IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

No. 88-7444

---

JOSE ROBERTO CANAS-SEGOVIA
and
OSCAR IBAN CANAS-SEGOVIA,
Petitioners,

v.

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE,
Respondent.

---

# BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES IN SUPPORT OF PETITIONERS

---

Guy S. Goodwin-Gill
Susan Timberlake
United Nations High Commissioner
for Refugees
1718 Connecticut Avenue,N.W., #200
Washington, D.C. 20009
(202)-387-8546

Ralph G. Steinhardt
George Washington University
National Law Center
720 20th Street, N.W.
Washington, D.C. 20052
(202)-944-5739

Attorney of Record for
*Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ........................................iii

INTEREST OF THE AMICUS ........................................1

SUMMARY OF ARGUMENT ........................................3

ARGUMENT ........................................7

I. CONTRARY TO THE APPARENT POSITION OF THE BOARD OF IMMIGRATION APPEALS, CONSCIENTIOUS OBJECTION TO MILITARY SERVICE CAN IN PRINCIPLE SUPPORT A CLAIM TO REFUGEE STATUS WITHIN THE MEANING OF THE 1951 CONVENTION AND THE 1967 PROTOCOL ........................................7

A. The Applicable International Standard, As Interpreted By The UNHCR, Neither Establishes Nor Permits A Per Se Rule Automatically Denying Refugee Status To All Self-Proclaimed Conscientious Objectors. To The Contrary, The UNHCR Handbook Makes It Clear That Conscientious Objection, When Combined With Other Individualized Facts, Can Ground A Claim For Refugee Status ..................8

1. The likelihood of punishment under a law of universal or general application does not rule out the possibility of persecution within the meaning of the Convention and the Protocol ........................................9

2. The Board of Immigration Appeals departed from the applicable standard by requiring petitioners to demonstrate that the government of El Salvador, in passing and enforcing its conscription law, was specifically motivated by a desire to persecute the petitioners on account of their religion. An "intent to persecute" on the part of a government or other State authority is not a necessary precondition for the existence of a well-founded fear of persecution .......17

B. The Petitioners' Claims For Refugee Status Should Be Assessed In Light of the Emerging Human Rights Norm Encouraging States to Recognize Conscientious Objection, But The Legitimacy Of Their Claims Is Not Dependent On The Recognition Of Such A Right ......................20

1. There is an emerging recognition that a state's legitimate right to self-defense must accommodate an individual's corresponding right to conscientious objection ........................................21

2. The Board of Immigration Appeals incorrectly assumed that the absence of uniform practice among states with respect to conscientious objection vitiated it as a basis for refugee status. The legitimacy of conscientious objection as a ground for asylum does not depend on its prior recognition as an individual human right ....................................................27

C. The Board of Immigration Appeals Incorrectly Regarded Religious Persecution As A Separate Category Of Asylum Claims And Was Therefore Insufficiently Sensitive To The Inherently Political Context In Which The Petitioners' Claims Arise ..........................................31

II. FOR PURPOSES OF REMAND, THIS COURT SHOULD ARTICULATE STANDARDS, CONSISTENT WITH THE INTENT OF CONGRESS AND INTERNATIONAL LAW, GOVERNING THE DISPOSITION OF CLAIMS TO REFUGEE STATUS BY CONSCIENTIOUS OBJECTORS ..................36

TABLE OF AUTHORITIES

UNITED STATES CASES

Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985)............8

Arteaga v. INS, 836 F.2d 1227, 1232 (9th Cir. 1988)..............12

Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985)........8,36

Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985), aff'd, 580 U.S. 421 (1987)....................................3,7,8,19

Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984)..............8

Cerrillo-Perez v. INS, 809 F.2d 1419 (9th Cir. 1987).............8

Del Valle v. INS, 776 F.2d 1407 (9th Cir. 1985)..................36

Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988)...................36

Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988).................8

Ellis v. Ferro, 549 F. Supp. 428 (W.D.N.Y. 1982).................8

Fernandez-Roque v. Smith, 539 F. Supp. 925 (N. D. Ga. 1982).......8

Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1987).8,32

Hotel and Restaurant Employees Union v. Smith, 594 F. Supp. 502 (D.D.C. 1984), aff'd, 804 F.2d 1256 (D.C. Cir. 1986), aff'd as amended, 846 F.2d 1499 (D.C. Cir. 1988) (en banc)...............................................8

Lauritzen v. Larsen, 345 U.S. 571, 578 (1953)....................20

Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987)................36

M.A. A26851062 v. INS, 858 F.2d 210 (4th Cir. 1988), reh'g en banc granted __ F.2d __ (January 11, 1989)........................8

McColloch v. Sociedad Nacional de Marieneros de Honduras, 372 U.S. 10 (1963)...................................................20

McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981)...................8

Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)........20

Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986)............8

Sherbert v. Verner, 374 U.S. 398 (1963)..........................32

Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982) rev'd on other grounds, 104 S. Ct. 2489 (1984)........................................8

Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801)....................20

Turcios v. INS, 821 F.2d 1396 (9th Cir. 1987)....................8

Weinberger v. Rossi, 456 U.S. 25 (1982).........................20

Wisconsin v. Yoder, 406 U.S. 205 (1972) ........................32

DECISIONS OF THE BOARD OF IMMIGRATION APPEALS

Matter of Acosta, Int. Dec. 2986 (BIA 1985)..................8,32

Matter of A.G., Int. Dec. 3040 (BIA 1987)....................8,13

In re Frentescu, 18 I&N Dec. 244 (BIA 1982)......................8

Matter of Maldonado, Int. Dec. 3041 (BIA 1988)...................8

Matter of Salim, 18 I&N Dec. 311 (BIA 1982).....................13

Matter of Vigil, Int. Dec. 3050 (BIA 1988).......................8

TREATIES, STATUTES, AND REGULATIONS

American Convention on Human Rights, signed November 22, 1969, O.A.S. Doc. OEA/Ser.L/V/II.65, Doc. 6 (1985), entered into force, 18 July 1978...............................................22

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, codified at 8 U.S.C. 1101(a)(42)(A), 1158(a)...........4,20

United Nations Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.....................2,8,13,35

United Nations Protocol Relating to the Status of Refugees, 31 January 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.....................................2,8,13

UNITED NATIONS MATERIALS

Commission on Human Rights, Resolution 1987/46 (10 March 1987).....24

Draft Report of the United Nations Commission on Human Rights, U.N. Doc. E/CN.4/1989/L.10/Add.15 (9 March 1989) .............25

International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 UN GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), entered into force,3 January 1976....21

Report of the 28th Session of the Executive Committee of the High Commissioner's Programme, U.N. Doc. A/AC.96/549 (1977).........7

Report of the Secretary-General, The Role of Youth in the Promotion and Protection of Human Rights, including the Question of Conscientious Objection to Military Service, U.N. Doc.E/CN.4/1989/30 (20 December 1988).......................15,17,24

Report of the Subcommission on the Prevention of Discrimination and the Protection of Minorities, Conscientious Objection to Military Service, U.N. Doc. No. E/CN.4Sub2/1983/30/Rev.1, Annex III....................................14,15,23,24,30,34

Statute of the Office of the United Nations High Commissioner for Refugees, U.N.G.A. Res. 428(V), Annex 11 (A)(ii) and 6(b) (14 December 1950)............................................1,2

Subcommission on the Prevention of Discrimination and the Protection of Minorities, Resolution 1982/30 (10 September 1982)...........................................23

U.N. General Assembly Res. 43/117 (8 December 1988)................1

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Geneva,1979).............2,5,8,9,10,11,12,14,15,16,20,34

Universal Declaration of Human Rights, UNGA Res. 217A (III), U.N. Doc. A/810 (1948), adopted 10 Dec. 1948..............21,22

MISCELLANEOUS AUTHORITIES

Council of Europe, Conscientious Objection to Military Service, CE Doc. 88.C55 (1988)..................................23,25,26

Crawford and Hyndman, "Three Heresies in the Application of the Refugee Convention," 1 International Journal of Refugee Law 152 (1989).....................................................16

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950), entered into force, 3 September 1953..........................................22,25

Fawcett, The Application of the European Convention on Human Rights, 64 (2nd. ed., 1987)....22

Fuller, The Morality of Law (rev. ed., 1969)....18

Goodwin-Gill, The Refugee in International Law (1983)....17,31,32

Grahl-Madsen, The Status of the Refugee in International Law (1966)....35

Kelsen, General Theory of Law and State (1945)....18

Kofner and Nicolaus, Grundlagen des Asylrechts in der Bundes republik Deutschland 552 (1986)....16,28

Marx, Asylrecht (4th ed. 1984)....16

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| JOSE AND OSCAR CANAS-SEGOVIA, Petitioners, | * | |
| v. | * | No. 88-7444 |
| UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, Respondent. | * | |

## INTEREST OF THE AMICUS CURIAE

The Office of the United Nations High Commissioner for Refugees ("UNHCR") has been charged by the United Nations General Assembly with the responsibility of providing international protection, under the auspices of the United Nations, to refugees within its mandate and of seeking permanent solutions to the problems of refugees.[1] The Statute of the Office of the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, *inter alia*:

---

[1] *Statute of the Office of the United Nations High Commissioner for Refugees*, U.N.G.A. Res. 428(V), Annex 11 (A)(ii) and 6(b) (December 14, 1950). In Resolution 43/117 on the Report of the UNHCR, adopted by consensus on December 8, 1988, the General Assembly announced that it

> *strongly reaffirms* the fundamental nature of the function of the United Nations High Commissioner for Refugees to provide international protection and the need for Governments to cooperate fully with his Office in order to facilitate the effective exercise of this function. . . .

*Id.*, at para. 1.

> Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto ...[2]

This supervisory responsibility of the UNHCR is formally recognized in Article II, paragraph 1, of the 1967 United Nations Protocol relating to the Status of Refugees ("1967 Protocol"), to which the United States became a party in 1968:

> The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

The present case concerns the interpretation of statutory provisions deriving directly from the 1951 United Nations Convention relating to the Status of Refugees ("1951 Convention"), through the 1967 Protocol, and thereby presents questions involving the essential interests of refugees within the mandate of the High Commissioner and the protection function of the Office. Indeed, in reaching its decision, the Board of Immigration Appeals interpreted specific provisions of the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status[3] and construed the Office's position with respect to conscientious objectors' claims to refugee status. These interpretations by the Board require some authoritative clarification.

---

[2] Id., para. 8.

[3] Geneva, 1979 (hereinafter cited as Handbook).

Conceived more broadly, the resolution of this case is likely to affect the interpretation by the United States of the 1967 Protocol with regard to the determination of refugee status and the grant of asylum to those who qualify for such status. The decision in this case can also be expected to influence the manner in which the authorities of other countries apply the refugee definition contained in the 1951 Convention and incorporated by reference in the 1967 Protocol.

For these reasons, the UNHCR respectfully submits this brief to assist the Court in its interpretation of dispositive provisions of conventional and customary international law. See Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 436-437 (1987).

## SUMMARY OF ARGUMENT

The material facts in this case are straightforward and, for the most part, undisputed. The applicants, both Jehovah's Witnesses, left El Salvador to escape conscription or empressment. They seek asylum in the United States and claim to be eligible under section 201(a) of the Immigration and Nationality Act, as amended, which incorporates the internationally-accepted refugee definition contained in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.

It is not disputed that Jehovah's Witnesses are forbidden by the tenets of their religion to perform military service. At the

initial hearing, the Immigration Judge found both applicants to be credible and their religious convictions to be bona fide. The Immigration Judge's decision, with which the Board of Immigration Appeals largely concurred, was that there was no evidence that the government of El Salvador persecutes Jehovah's Witnesses on account of their religion or for any other reason, and that the Government's policy of requiring military service without exception for conscientious objectors did not constitute persecution.

In the view of UNHCR, the reported reasoning reflects only a partial analysis of the key issues and suggests also that certain standards irrelevant and additional to that of well-founded fear of persecution have been imported into the determination process. In this brief, the UNHCR will argue, first, that conscientious objection to compulsory military service may in principle give rise a claim to refugee status within the meaning of Article 1(A)(2) of the 1951 Convention, as incorporated into the Refugee Act of 1980. [4] In particular, this brief will demonstrate that (1) under the general standard for refugee status -- namely whether the applicant has a well-founded fear of persecution --, the likelihood of punishment under a law of universal or general application does not, per se, rule out the possibility of persecution within the meaning of the Convention; (2) an "intent to persecute" on the part of a government or other state authority is not a necessary precondition for the existence of a well-founded fear of persecu-

[4] The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, codified at 8 U.S.C. 1101(a)(42)(A), 1158(a).

tion; indeed, to impose upon the applicant the duty of showing the government's intent to persecute imposes a burden unjustified by the words of the refugee definition; and (3) the UNHCR has consistently adopted these positions, both in relevant provisions of the Handbook, and in communications by the Office and its representatives to other United Nations agencies, and to governments and non-governmental organizations. This brief does not address major evidentiary issues of fact that may arise on remand: in particular, the actual practice in the applicants' country of origin with respect to those who refuse military service, including questions of treatment and practices of forced conscription that may be engaged in by both sides.

Second, the UNHCR respectfully urges the Court to assess the petitioner's claims in light of the emerging human rights norm obliging states to accommodate individuals' sincere objections to military service on the basis of conscience, including religious and political belief. The brief reviews the international legal standing of the right to conscientious objection, considered on its own merits in the human rights context, from the perspective of state practice and that of international and regional organizations. At the same time, however, it is clear that the legitimacy of the petitioners' claims does not presuppose or require the international recognition of a right to conscientious objection per se.

Third, the UNHCR submits that the grounds for persecution recognized at international law can in some circumstances overlap.

In this case, the Board seems to have interpreted the petitioners' claims as based solely on a well-founded fear of religious persecution. But, regardless of the precise characterization of the applicant's motives, the conscientious refusal to bear arms inevitably places the individual in political opposition to his or her government, in a situation of conflicting duties that should be resolved in accordance with international standards of reasonableness and proportionality.

Finally, on the foundation of the law as described, the UNHCR respectfully urges the Court to adopt a framework of standards within which the refugee status of conscientious objectors may appropriately be determined. This invites attention to the special value attributed in national and international law to the individual's right to freedom of conscience and its relationship to competing interests of state and community. It also reasserts the individualization of issues which is otherwise jeopardized by the excessive weight given to the element of prosecution and punishment under the general law and by the introduction of the extraneous and irrelevant criterion of "intent to persecute".

It should be stated clearly that the UNHCR's interpretation of the relevant law, expressed herein, coincides with its own practice for determining the refugee status of draft evaders and deserters under its mandate in accordance with its statute.

## ARGUMENT

I. CONTRARY TO THE APPARENT POSITION OF THE BOARD OF IMMIGRATION APPEALS, CONSCIENTIOUS OBJECTION TO MILITARY SERVICE CAN IN PRINCIPLE SUPPORT A CLAIM TO REFUGEE STATUS WITHIN THE MEANING OF THE 1951 CONVENTION AND THE 1967 PROTOCOL

Analysis of this case must begin with the axiom, articulated by the Supreme Court, that Congress, in enacting the Refugee Act of 1980, intended to conform U.S. domestic law with international norms. Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987). As a consequence, in determining the meaning of critical statutory terms, such as "refugee" and "well-founded fear of persecution," courts and administrators may consider the UNHCR Handbook as authoritative evidence of the international understandings incorporated by Congress in the Act. Id. This is especially appropriate because the Handbook was prepared at the request of States members of the Executive Committee of the High Commissioner's Programme, for the guidance of governments.[5] It is based on the UNHCR's experience, the practice of states in regard to the determination of refugee status, exchanges of views between the Office and the competent authorities of Contracting States, and relevant literature on the subject. It has been widely circulated and approved by governments; it is frequently cited by counsel in refugee status proceedings throughout the world, and has been cited with approval by a variety of courts, including, in addition to the

---

[5] See Report of the 28th Session of the Executive Committee of the High Commissioner's Programme, U.N. Doc. A/AC.96/549 (1977), para. 53.6(g).

United States Supreme Court, INS v. Cardoza-Fonseca, supra, circuit courts of appeal,[6] federal district courts,[7] and the Board of Immigration Appeals itself.[8]

### A. The Applicable International Standard, As Interpreted By The UNHCR, Neither Establishes Nor Permits A Per Se Rule Automatically Denying Refugee Status To All Self-Proclaimed Conscientious Objectors. To The Contrary, The UNHCR Handbook Makes It Clear That Conscientious Objection, When Combined With Other Individualized Facts, Can Ground A Claim For Refugee Status.

---

[6] See, e.g., Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985); Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982) rev'd on other grounds, 104 S. Ct. 2489 (1984); M.A. v. INS, 858 F.2d 210 (4th Cir. 1988), reh'g en banc granted __ F.2d __ (January 11, 1989); Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984).

The Ninth Circuit Court of Appeals has frequently consulted the Handbook to resolve a variety of interpretive questions arising under the Convention and Protocol. See, e.g., Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985), aff'd, 580 U.S. 421 (1987); Turcios v. INS, 821 F.2d 1396 (9th Cir. 1987); Cerrillo-Perez v. INS, 809 F.2d 1419 (9th Cir. 1987); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985); McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981).

[7] See, e.g., Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988); Hotel and Restaurant Employees Union v. Smith, 594 F. Supp. 502 (D.D.C. 1984), aff'd, 804 F.2d 1256 (D.C. Cir. 1986), aff'd as amended, 846 F.2d 1499 (D.C. Cir. 1988) (en banc); Ellis v. Ferro, 549 F. Supp. 428 (W.D.N.Y. 1982); Fernandez-Roque v. Smith, 539 F. Supp. 925 (N. D. Ga. 1982).

[8] The Board has relied on the Handbook both before and after the Supreme Court's decision in Cardoza-Fonseca, supra. See, e.g., Matter of Vigil, Int. Dec. 3050 (BIA 1988); Matter of Maldonado, Int. Dec. 3041 (BIA 1988); Matter of A.G., Int. Dec. 3040 (BIA 1987); Matter of Acosta, Int. Dec. 2986 (BIA 1985); In re Frentescu, 18 I&N Dec. 244 (BIA 1982).

1. The likelihood of punishment under a law of universal or general application does not rule out the possibility of persecution within the meaning of the Convention and the Protocol.

The UNHCR's position on the general circumstances in which persons avoiding military service fall within the refugee definition of the 1951 Convention is set forth in paragraphs 167-174 of the Handbook. Paragraph 167 of the Handbook notes that, while "... [f]ear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition ...," neither does it exclude a person from being a refugee. Paragraph 168 maintains the non-absolute character of the essential premises, by emphasizing that "[a] person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat."

But it is equally clear that there is and can be no per se rule precluding conscientious objectors from refugee status. Indeed, the Handbook catalogues a variety of circumstances which give rise to such status. In one such circumstance, outlined in paragraph 169, a draft evader or deserter "may . . . be a refugee", if he has reason to fear persecution within the sense of Article 1 of the 1951 Convention, apart from the possibility of prosecution and punishment of draft evasion or desertion. Refugee status is established under this heading, where it can be shown that the person concerned,

> would suffer disproportionately severe
> punishment for the military offence on

> account of his race, religion, nationality, membership of a particular group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

Handbook para.169. Applying these abstract principles to this case, evidence that Jehovah's Witnesses in a country are more exposed than other religious groups to prosecution -- or to persecution from groups whose actions are tolerated by, or beyond the control of the government -- may well support a claim for refugee status.

The recognition of refugee status can also follow where unwillingness to serve derives from a general dislike of the regime falling short of a specific and demonstrable conviction, provided that it is supported in a cumulative way by other elements, such as family background or political associations or activities. Similarly, if the objection is based on disagreement with the political justification for a particular military action, or on objection to the techniques or means by which the war is waged, or on other political objections.[9] Paragraphs 170 and 171 of the Handbook stress such circumstances of personal and

[9] In practice, an objection to military service on political grounds will take on a deeper significance, where the military action in question is condemned by the international community, where it is an aggressive war, or is contrary to international humanitarian law (for example, because the civilian population is frequently the target), or is intended to perpetuate an illegal situation (such as the acquisition of territory belonging to another State, or the preservation or enforcement of apartheid). Both the objectives of the action in question and the methods by which it is conducted will be relevant.

overall context:

> 170. There are ... cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.
>
> 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

A person whose refusal to perform military service is based on genuine religious, moral or political convictions can also be considered a refugee, provided that the genuineness of such convictions and the likelihood of prosecution and sanction, or other treatment amounting to persecution, are established. This is made clear in paragraph 172, which is perhaps most relevant to the case at bar:

> ... If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status.

In this regard, the UNHCR in its own practice and in its interpretation of the relevant law continues to adhere to the position articulated by Mr. Joachim Henkel, UNHCR Deputy Representative:

> ... [E]specially where no alternative to military service

exists, significant punishment for refusal to perform military service, based on strong religious or moral convictions, or on political opinion, may be considered persecution. Therefore, assuming that the religious, moral, or political conviction advanced is reasonably credible, and surrounding circumstances of the case do not argue otherwise, a draft evader or deserter of that description may be accorded refugee status even though the punishment he faces does not differ substantially from that meted out generally for this offense because of a simple disinclination to serve.[10]

In all such cases, an enquiry must be made into the credibility of the applicant's assertions, taking into account, where relevant, his personal, social, religious, and political background, whether he made his convictions known in the past, and whether he or others similarly situated suffered any harassment or discrimination in the past by the authorities (or by persons beyond the control of the authorities).[11] Both credibility and the likelihood of treatment amounting to persecution may be supported by evidence of the objective situation in the country of origin.

As an initial matter, therefore, it is error to assume

---

[10] Letter of 30 January 1986 from Mr. Joachim Henkel, Deputy Representative of the UNHCR, to Karen Musalo, Esq. A copy of the letter appears in the appellate record. A similar approach would seem to apply in this Circuit, Arteaga v. INS, 836 F.2d 1227, 1232 (9th Cir. 1988) ("This court has rejected persecution claims based on the threat of conscription into a national army (as distinct from punishment for conscientious objection to military service).")

[11] Handbook, para. 174. Account must also be taken of cases in which the country of origin views desertion or draft evasion as an objective "political act", regardless of actual motivation. The treatment in consequence may amount to persecution, and the practices, policies or declared intentions of that country will often suffice to confirm the imputation of a "political act" to the applicant.

that conscientious objectors cannot qualify for refugee status, as the Immigration and Naturalization Service would apparently concede.[12] The Board itself has also apparently recognized this in principle in prior cases, even where it was not satisfied that the factual predicates had been established by a particular applicant. See, e.g., Matter of A.G., Int. Dec. 3040 (BIA 1987); Matter of Salim, 18 I&N Dec. 311 (BIA 1982).[13]

Of course, as noted by the Board, the 1967 Protocol contains no provision declaring that conscientious objectors are per se refugees. But this is not surprising, since the Protocol offers only a general description of those within its scope. The only persons recognized per se as refugees are those who were considered as such under certain arrangements concluded in the inter-war years or under the Constitution of the International Refugee Organization.[14] Significantly, there is no provision in the Protocol that excludes conscientious objectors -- in contrast to war criminals for example -- from refugee status. Convention, Article 1(F). The Board opines that there was, at the moment of

---

[12] At oral argument, the INS apparently agreed that Jehovah's Witnesses in El Salvador who resisted military service on the basis of a sincere religious belief would qualify for refugee status. AR 34-37.

[13] The Board attempts to distinguish Salim from this case on the grounds that the applicant there resisted conscription in an army under foreign domination. Matter of Canas, at 14, n. 10. The Handbook admits no such distinction. In either case, it is persecution within the meaning of the 1951 Convention to impose significant sanctions for resisting military service on the basis inter alia of sincere religious beliefs.

[14] See 1951 Convention, at Article 1A(1); 1967 Protocol, at Article 1(2).

drafting, no consensus that persons like the applicants should qualify. This begs precisely the question that, in its specificity, the drafters left to be dealt with by a general definition sufficiently broad to cover persecution in its many forms, if not its infinite variety. It was error in short for the Board to assume that the silence of the Protocol with respect to conscientious objection somehow restricted it as a basis for refugee status.[15]

The Board of Immigration Appeals also found significance in the erroneous belief that the UNHCR's position on conscientious objection had changed over time. Matter of Canas, at 10. In particular, the Board suggests that the current position of the UNHCR is inconsistent with its submission to the U.N. Secretary-General, as reflected in his report on Conscientious Objection to Military Service.[16] The UNHCR's summary filing noted, unexceptionably, that conscientious objectors may be regarded as refugees, "if they fulfil the normal criteria of refugee status ...," but that fear of prosecution or punishment is not itself a reason for granting such status, "unless there are also elements indicating a well-founded fear of persecution under the refugee definition." The Board went on to conclude "... the record reflects in this case that the UNHCR no longer

---

[15] Paragraph 173 of the Handbook (cited by the Board at pp. 11-12) does not endorse state prerogative amounting to arbitrary power. Rather it recognizes the existence of grey areas in law and practice which States can fill in the application of developing international standards.

[16] U.N. Doc. No. E/CN.4Sub2/1983/30/Rev.1, Annex III.

subscribes to this view...." Matter of Canas, at 11, n. 5. But there is no discrepancy in these formulations. The UNHCR's position has been consistently stated, whether in the Handbook, in submissions to United Nations agencies,[17] in the cited letter of the UNHCR Deputy Representative, Mr. Joachim Henkel, supra, and, more recently, in its response to the UN Secretary-General's note verbale of 22 May 1987, seeking information at the request of the Commission on Human Rights.[18] On each of these occasions, the Office has presented an outline of the position explained herein.

In this connection, and perhaps most important, the UNHCR submits that the likelihood of punishment under a law of universal or general application does not rule out the possibility of persecution within the meaning of the Convention. The Board of Immigration Appeals identified the core issue as the applicants' argument that they are conscientious objectors who come from a nation with compulsory military service. Matter of Canas, at 11. The Board focuses its attention on "prosecution," Id., at 12, and concludes that the government has not " 'singled out' the respon-

---

[17] This includes the response by UNHCR in February 1982 to the request for information to be supplied to the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. Id.

[18] See Report of the Secretary-General, The Role of Youth in the Promotion and Protection of Human Rights, including the Question of Conscientious Objection to Military Service, U.N. Doc. E/CN.4/1989/30 (20 December 1988), at 17.

dents for persecution on account of their religious beliefs."[19]

The Board notes:

> ... a reasonable person in the position of the respondents might fear prosecution for a refusal to perform military service but would not believe that he had been punished on account of his religious beliefs where the same penalties are applied to all violators, regardless of the reasons for the refusal to serve.

Matter of Canas, at 14. The evidence adduced indicates that measures besides prosecution were also feared, but to dismiss a claim on the ground that the "reasonable person" would only fear prosecution along with all other violators supposes, against human experience, that the law cannot be used, and "reasonably" perceived, as persecution. To rely on the "fact" that the respondents face punishment just as any other Salvadoran who refused military service is to compare like with unlike. The respondents do not claim to be "like any other", but to be particular in the sense of motivated by conscience, and thereby moved into the arena of political conflict. In this sense, they may not be persecuted "on account of" their religion, but in spite of it.[20] In effect, they are persecuted because their religious conviction sets them in a political context, in which the extent of state authority and individual autonomy are at

---

[19] For criticism of the "singling out" requirement, see Crawford and Hyndman, "Three Heresies in the Application of the Refugee Convention," 1 International Journal of Refugee Law 152 (1989).

[20] Kofner and Nicolaus, Grundlagen des Asylrechts in der Bundesrepublik Deutschland 552 (1986); 1 Marx, Asylrecht (4th ed. 1984) at sec. 63.13.

issue.[21] A failure to accommodate such individuals in accordance with standards of reasonableness and proportionality, or otherwise to accord protection from risk of harm, amounts to persecution, and, assuming the applicants' sincerity of belief (and other individualized factors), brings them within the refugee definition.

2. The Board of Immigration Appeals departed from the applicable standard by requiring petitioners to demonstrate that the government of El Salvador, in passing and enforcing its conscription law, was specifically motivated by a desire to persecute the petitioners on account of their religion. An "intent to persecute" on the part of a government or other State authority is not a necessary precondition for the existence of a well-founded fear of persecution.

The Board of Immigration Appeals found that there was no evidence that the government of El Salvador had the inclination to persecute the applicants for any reason unrelated to their arguments concerning conscription. Matter of Canas, at 12. The Board explicitly relied on the absence of any evidence of "persecutory intent" or discriminatory application of the law. Id., at 13.

Quite apart from whether this articulation of the burden is consistent with prior Ninth Circuit jurisprudence,[22] in the view of the UNHCR, these references either import an additional criterion, beyond that allowed by section 201(a) of the Immigra-

---

[21] Goodwin-Gill, The Refugee in International Law (1983), 34f. See section I(C), infra.

[22] See Petitioner's Opening Brief in this appeal, at 28-30.

tion and Nationality Act, or give unlawful, dispositive weight to only part of the evidence submitted. In the case at bar, the applicants' claims to a well-founded fear of persecution are integral to, not separate from, the issue of conscription. The motivation of the government may be a relevant consideration, but only from an evidentiary perspective, to support the well-foundedness of fear; in these circumstances, it may be a sufficient but not a necessary condition of persecution. As deployed in the decision under appeal, "inclination" or "intent"[23] constitutes an additional, counter-textual, and often unsurpassable standard of proof.

Intention is also problematic in that it introduces a criterion derived from the limited and limiting field of the criminal law, namely the concept of <u>mens rea</u>, which closely links culpability with intent. To conclude that persecution can only be inferred in the presence of legislative or government intention to harm is unjustified in the refugee determination process. Decision-makers are not called upon to establish the guilt or liability of the persecutor, but the well-foundedness of the applicant's fear. The one should not depend upon the other, or the rights of the refugee (who deserves a lesser standard of

---

[23] The decision mentions both the "intent of the law" and the "government's motivation". At note 11, the Board attempts to relieve the applicant's additional burden, by allowing for appropriate inferences; but in this context neither intent nor motive are satisfactory bases for analysis. See generally, Fuller, <u>The Morality of Law</u> 84-8 (rev. ed., 1969); Kelsen, <u>General Theory of Law and State</u> 33-4 (1945).

proof),[24] will become contingent on the persecutor's guilt being established on the basis of the higher, criminal standard.[25] Needless to say, the intention of others other than individuals, such as corporations or governments, is not readily susceptible of proof.

In the refugee context also, particular weight must be attached to what happens in fact. Governments and laws can have a variety of aims: a law restraining and punishing the expression of political opinions may seek merely to preserve order and good government, enhance welfare and development. A law on segregation or forbidding inter-marriage may be "intended" to promote separate development, or racial harmony; and a law on conscription, to raise a defence force on the basis of treating equally all members of the community. In practice, however, in each case the law itself singles out and penalizes whoever exercises freedom of speech; or struggles for racial equality; or whose ties of affection know no racial barrier; or whose convictions compel them to refuse to be coerced into military service. Each

---

[24] INS v. Cardoza-Fonseca, supra.

[25] It does not follow as a matter of logic or reason that a finding in favor of the applicants in the present case entails the further finding, as the Board supposes, Decision, at 16, n. 12, that those who enacted or carried out the conscription laws thereby fall within the category of persons who "ordered, ... assisted, or otherwise participated in the persecution" of others. The latter requires an individualized finding of responsibility equivalent to criminal liability; the former requires merely that the applicant have a well-founded fear of persecution, according to the lesser standard endorsed by the international community and confirmed by the Supreme Court in INS v. Cardoza-Fonseca, supra.

has a fear of prosecution, shared in common with other violators of the same generic class; each is persecuted in application of the law, because the law itself, necessarily in its own terms, fails to accommodate, either wholly or in part, the fundamental rights of its subjects -- to freedom of expression, to equality, to freedom to marry, to freedom of conscience. To that extent, the claim to refugee status should be considered valid.

### B. The Petitioners' Claims For Refugee Status Should Be Assessed In Light of the Emerging Human Rights Norm Encouraging States to Recognize Conscientious Objection, But The Legitimacy Of Their Claims Is Not Dependent On The Recognition Of Such A Right.

Paragraph 173 of the Handbook stresses the need to consider conscientious objection in the light of recent developments in national laws, in international bodies, and in the practice of states.[26] Even a cursory review of these developments will show a trend toward accommodating the individual's right to conscience within the state's acknowledged right to require military service from its citizens. But it was error for the Board to link these two inquiries negatively, to deny the

---

[26] It is of course a standard canon of construction in the United States that statutes, like the Refugee Act of 1980, will be interpreted consistently with conventional and customary international law. Acts of Congress "ought never to be construed to violate the law of nations, if any other possible construction remains ...." Weinberger v. Rossi, 456 U.S. 25, 33 (1982), quoting Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). See also, Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); McColloch v. Sociedad Nacional de Marieneros de Honduras, 372 U.S. 10, 21 (1963).

possibility that a conscientious objector can be a refugee on the grounds that international law does not yet require states to recognize conscientious objection in their conscription laws. The UNHCR submits that an individual can be held to satisfy the criteria for refugee status without necessarily implying that all states are obliged internationally to provide an absolute exemption for conscientious objection to military service.

> 1. There is an emerging recognition that a state's legitimate right to self-defense must accommodate an individual's corresponding right to conscientious objection.

The right to conscientious objection does not yet figure in any international human rights instrument, but the right to freedom of conscience does and repeatedly so. Article 18 of the Universal Declaration of Human Rights [27] proclaims that

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

This right is reiterated in various treaties, including the Covenant on Civil and Political Rights, [28] the American Conven-

---

[27] Universal Declaration of Human Rights, UNGA Res. 217A (III), U.N. Doc. A/810 (1948), adopted 10 Dec. 1948.

[28] International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 UN GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), entered into force, 3 January 1976, at article 18. Paragraph 2 adds that "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." The United States has signed but not yet ratified the Covenant.

tion on Human Rights,[29] and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[30] In each case, the rights proclaimed are subject to certain limitations, such as those "prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others."[31] Inevitably, this gives rise to a conflict of competing duties. [32]

The international trend in resolving this conflict is to

---

[29] American Convention on Human Rights, signed November 22, 1969, O.A.S. Doc. OEA/Ser.L/V/II.65, Doc. 6 (1985), entered into force, 18 July 1978, at article 12.

[30] European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950), entered into force, 3 September 1953, at article 9.

[31] American Convention, Article 12(3); Covenant on Civil and Political Rights, Article 18(3); European Convention Rights, Article 9(2); Universal Declaration of Human Rights, Article 29.

[32] To a certain extent that becomes explicit in Article 4 of the European Convention on Human Rights, which prohibits slavery, servitude, forced or compulsory labor. Article 4(3)(b) provides that the term "forced or compulsory labor" shall not include "any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service." Article 4(3) also excludes work required to be done during detention, or service exacted in emergencies, or as part of normal civic obligations. One commentator has observed that this "implies that such conscientious objection is an exercise of freedom of conscience under Article 9, but that a State may restrict it by allowing no exemption from military service, if it is necessary for the public safety ...." Fawcett, The Application of the European Convention on Human Rights 64 (2nd. ed., 1987). Nonetheless, in Application 10401/83, the European Commission seems to have accepted that, even though the Convention accords no right not to be compelled to do military service contrary to conscience, such measures can yet give rise to issues under Article 9 or other provisions. A similar approach has already been adopted with respect to other rights not guaranteed by the Convention, such as to be admitted to a particular State, or not to be expelled, or not to be extradited.

recognize the rights of conscience. The United Nations, for example, has developed norms encouraging the accommodation of conscientious objection. In 1971, the United Nations Commission on Human Rights began its inquiry into conscientious objection, in connection with its Study of Discrimination in the Matter of Religious Rights and Practices. Responsibility passed to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and a preliminary report on conscientious objection to military service was prepared by Asbjorn Eide and Chama Mubanga-Chipoya. The Sub-Commission requested the authors to develop appropriate principles and to prepare a final report.[33] That report was published in 1983,[34] and has been widely circulated for comment to governments, United Nations agencies, intergovernmental and non-governmental organizations. In

---

[33] In resolution 1982/30, 10 September 1982, of the Sub-commission on the Prevention of Discrimination and the Protection of Minorities, the Subcommission proposed that the final report be prepared with a view to

> (a) Recognizing the right of all persons to refuse service in military or police forces which are used to enforce apartheid, to pursue wars of aggression, or to engage in any other illegal warfare; (b) Recognizing the possibility of the right of all persons to refuse service in military or police forces on the grounds of conscience or deeply held personal conviction, and their responsibility to offer instead of military service any other service in the social or economic field, including work for the economic progress and development of their country; (c) Urging Member States to grant asylum or safe transit to another State to persons compelled to leave their country of nationality solely because of conscientious refusal to serve in the military forces.

[34] Conscientious Objection to Military Service, U.N. Doc. E/CN.4/Sub.2/1983/30/Rev.1.

resolution 1987/46 (10 March 1987), the Commission on Human Rights appealed to states to recognize that conscientious objection be considered a legitimate exercise of the right to freedom of thought, conscience and religion.[35]

In 1987, the Commission on Human Rights requested the Secretary-General to report to its forty-fifth session on the question of conscientious objection, taking into account the comments of Governments and any further information received.[36] In March 1989, the Commission on Human Rights adopted a resolution formally and expressly recognizing the right to conscientious objection, considered as "a legitimate exercise of the right of freedom of thought, conscience and religion," as laid

---

[35] In their comprehensive report, the authors identified the conflict of values that is represented by conscientious objection to military service, but also saw that this is not specific to the issue:

> One of the main purposes of the concern with human rights is to ensure that divergent opinions can be accommodated, respected and acted upon in such a way that due attention is paid both to the common good and to the concerns of individuals. To achieve this, compromises have to be worked out in a democratic way; the question of conscientious objection and alternative service is one area in which many, but not all, societies have worked out such a compromise.

See, Conscientious Objection to Military Service, U.N. Doc E/CN.4/Sub.2./1983/30/Rev.1 paras. 33-5.

[36] C.H.R. Res. 1987/46 (10 Mar. 1987). See Report of the Secretary-General, The Role of Youth in the Promotion and Protection of Human Rights, including the Question of Conscientious Objection to Military Service: UN Doc. E/CN.4/1989/30 (20 December 1988). Thirteen states, (including five that have no standing army, or with military service on a voluntary basis), two UN agencies (UNHCR and UNESCO), one regional organization (the Council of Europe), and six non-governmental organizations submitted their views.

down in the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights. The resolution further appealed to states to provide for alternative service of a civilian and non-combatant nature.[37]

Conscientious objection has been similarly treated by the Council of Europe.[38] The most recent recommendation of the Committee of Ministers lays down the basic principle that:

> Anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service, on the conditions set out hereafter. Such persons may be liable to perform alternative service.[39]

The accompanying report stresses the essential element in support of an application for conscientious objector status: "compelling reasons of conscience." A list approach to acceptable reasons was rejected, because "(a) such a list could not be exhaustive

---

[37] Draft Report of the United Nations Commission on Human Rights, U.N. Doc. E/CN.4/1989/L.10/Add.15 (9 March 1989).

[38] On 9 April 1987, the Committee of Ministers adopted Recommendation No. R(87)8 on conscientious objection to military service. This recommendation is the latest in a series of regional initiatives that goes back to 1966, and to various resolutions of the Parliamentary Assembly. In 1977, the Assembly recommended that the Committee of Minsters urge the Governments of Member States to bring their legislation into line with principles set out in Resolution 337 (26 January 1967); and that they introduce the right of conscientious objection into the European Convention on Human Rights.

[39] Acceptance of this recommendation was qualified with three governments reserving their position and one government abstaining on the ground that the recommendation was deficient, falling short of the suggestions of the Assembly. See Council of Europe, Conscientious Objection to Military Service, CE Doc. 88.C55 (1988).

and (b) it might well obscure the fundamental idea, namely that the very notion of freedom of conscience implies that all compelling reasons dictated by conscience against being involved in any use of arms are to be considered as a basis for granting conscientious objector status."[40] The experience in Australia is similar.[41]

This necessarily summary survey of international action on the issue of conscientious objection shows both that the right to

---

[40] "Compelling" is equated with "impossible to resist", while the practice of requiring alternative service was seen to serve the interests of the community, "for reasons of equality of treatment and ... to ensure the applicant's good faith." Id., Explanatory Report, paras. 15-17.

[41] In its 1985 report on Conscientious Objection to Conscripted Military Service, the Australian Senate Standing Committee on Constitutional and Legal Affairs contrasted "the right of the community simply to exist, .. with political structures freely determined by its citizens. ... (T)he right to defend itself if such existence is threatened, and (the obligation of) the government ... to ensure that the right is secured for the common good", with "the right of the individual person to act in accordance with conscientiously held beliefs. This right requires that a person not be compelled by law to act contrary to a conscientiously held position such that, so to act would fundamentally impair his sense of integrity as a human being." The Committee also rejected a list approach to the bases for conscientious belief: "Not only would it be unfair to exclude grounds which could give rise to a genuine conscientious position; it could also lead to artificial and contorted attempts by applicants to get their submissions ... expressed in the 'correct' way. Ibid., paras. 2.2, 2.4. 2.29. In describing what was meant by conscientious belief, the Committee relied particularly on one witness's analysis: "... the only possible definition of a conscientious belief is a belief based on a seriously held moral conviction. That is, of course, very broad and it is perhaps best understood if we see what it leaves out. What it leaves out most clearly are beliefs based on selfish desires of one sort or another, personal interest, belief based on emotions like fear or ambition ... beliefs which are whimsical or based on impulse." Testimony of Prof. Peter Singer, Professor of Philosophy, Monash University: quoted ibid., para. 2.13.

refuse military service is extensively though not yet universally accepted as a fundamental human right in itself, and that an increasing number of states in a variety of forums is inclined to accept that some provision must be made for those who are unwilling to serve by reason of their compelling beliefs. States also widely recognize the principle of alternative service as offering a practical solution to the conflict of duties, while preserving a measure of equality among citizens otherwise liable to conscription. As shown in the next section, however, there are limits to the inferences that can be drawn from this analysis.

> 2. The Board of Immigration Appeals incorrectly assumed that the absence of uniform practice among states with respect to conscientious objection vitiated it as a basis for refugee status. The legitimacy of conscientious objection as a ground for asylum does not depend on its prior recognition as an individual human right.

Controversy over the "right" of conscientious objection provides no answer to the question whether, if it is not a human right as such, conscientious objection can still and of itself give rise to a refugee claim, in the sense of a well-founded fear of persecution as understood in the 1951 Convention. Analysis of the right and its standing in international law also leaves open the question of how conscientious objection as a relevant ground fits within the Convention criteria; and the related issue of how to distinguish conscientious objectors entitled to protection from others who, on perhaps similar grounds, may equally object to the exercise of state authority. Finally, the standing of the

right of conscientious objection cannot and does not, in and of itself, prescribe the weight to be accorded, in the refugee determination context, to the incidence of prosecution and punishment, of related extra-legal treatment, or any available alternative service. The Board erred in supposing that it could only find the existence of a well-founded fear of persecution within the meaning of the Convention, if it also found conclusive evidence of the existence of a universally recognized human right.

As noted above, a claim to refugee status properly depends upon the applicant's demonstration that he has a well-founded fear of persecution on the grounds set forth in Article 1A(2) of the 1951 Convention, and incorporated in United States law by the 1980 Refugee Act. In some jurisdictions, the application of this standard has been wrongly subordinated to another standard, namely, whether the applicant would be recognized as a conscientious objector under local law.[42] This is anomalous because local procedures frequently incorporate idiosyncratic distinctions (for example, between partial and absolute objectors), or are inherently incapable of addressing the international legality of state action; moreover, this approach ignores entirely the central issues of motivation and the treatment feared.

---

[42] See, e.g., the account of the influence on asylum practice of such an erroneous interpretation of article 4.3 of the Grundgestz of the Federal Republic of Germany, which provides the constitutional guarantee of conscientious objection, in Kofner and Nicolaus, supra at 527-554, 550 (n.92 and 93), and 551 (n. 94).

Similarly, as in this case, where conscientious objection is not recognized in the country of origin, some objectors have been thought "merely" to fear prosecution and punishment under a law of universal application. Again, this approach disregards the individuation of issues inherent in application of the refugee definition, to favor an indiscriminate and arbitrary exclusion.

If conscientious objection were accepted as a basic human right, then the degree of punishment would be irrelevant. The absence of choice, of exemption, of alternative service, the constraint to act and the threat of imprisonment in default, are themselves the incidents of persecution. On the other hand, if conscientious objection is a more relative claim, then the precise nature of its consequences count in the assessment of a claim to refugee status. The state and community have a recognized interest in defence, but the measures taken to that end should at least be "reasonably necessary in a democratic society";[43] specifically, there ought to exist a relationship of proportionality between the end and the means. At this juncture, alternative service is a potential means for reconciling competing duties in a manner which best promotes community interests in

---

[43] Cf. Akar v. Attorney-General of Sierra Leone [1970] AC 853, in which the Privy Council declined to accept that a law dealing with citizenship was by that fact alone "reasonably necessary in a democratic society" so as to avoid constitutional limitations, including provisions on discrimination. State practice and recognition of alternatives to military service support the proposition that the duty to bear arms likewise has no overriding quality.

defence and equality of treatment, and the individual's interest in his or her own conscience. Whether, in the circumstances, alternative service meets international standards is a question of fact to be determined in each case, and with due regard to conditions, nature and duration.[44]

Similarly, in the absence of alternative service, or where eligibility turns on legal niceties or criteria less general than a sincerely held belief going to conscience, the likelihood of prosecution and punishment must be assessed, to determine whether such measures, on their particular facts, amount to persecution within the meaning of the 1951 Convention. As suggested above, this would be the case where punishment was significant, for example, as being disproportionate, or consisting of excessive or repeated detention.[45] Retributive measures from non-governmental quarters would also support a claim to a well-founded fear of persecution.

A state's failure to take adequate steps to protect freedom of conscience, and those who by reason of conscience are

---

[44] The UNHCR fully endorses the position on alternative service articulated by the Subcommission on the Prevention of Discrimination and the Protection of Minorities, Conscientious Objection to Military Service, supra, n. 34, at paragraphs 104-115, 150-153.

[45] In Dounetas v. Secretary of State, approved and applied in Atibo v. Immigration Officer, London (Heathrow) Airport [1978] ImmAR 93, the United Kingdom Immigration Appeal Tribunal found that the practice in Greece of sentencing conscientious objectors to repeated terms of four and one half years imprisonment throughout the period of military age amounted to persecution. The Tribunal's reasoning that this was not persecution within the Convention has been criticized, however. See Goodwin-Gill, The Refugee in International Law (1983), 34f.

compelled to certain acts or omissions, may give rise to a well-founded fear. The state benefits from the choice of means, and enjoys a margin of deference with respect to the exercise of its rights and the modalities of their implementation. In the refugee context, however, once the relevant ground or connection has been established, what counts is what in fact is likely to result.

In the view of UNHCR, then, conscientious objection to military service is a relevant ground for refugee status, in so far as it relates to the freedoms of conscience and religion, which are clearly internationally-protected interests.

### C. The Board of Immigration Appeals Incorrectly Regarded Religious Persecution As A Separate Category Of Asylum Claims And Was Therefore Insufficiently Sensitive To The Inherently Political Context In Which The Petitioners' Claims Arise.

Application of the Convention standard requires close attention to the motives of the applicant and to the treatment which he or she is likely to face under the "general" law and otherwise. Military service and objection thereto, seen from the point of view of the state, are issues that go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority; in this objective sense, independently of the individual's particular motivation, it is a

political act.[46] The conscientious objector who is in need of international protection, must still be distinguished from other opponents of state authority who are not; for example, the individual who refuses to pay such proportion of income tax as is destined for military expenditures; or the shopkeeper who wishes to trade on Sundays; or the parents who, on grounds of religious conviction, refuse to send their children to public schools.

To a degree, the conflict between these individuals and the state is attributable to the "choice" of the individual, who elects to place matters of principle or belief over obligations in law. But precedents have recognized that it is unconscionable to require the individual to change, or to exercise his or her choice differently. This is a familiar theme in American constitutional jurisprudence, even with respect to statutorily-based privileges: seemingly neutral laws can improperly burden the freedom of conscience.[47] In the refugee context, the Board of Immigration Appeals has itself explicated the essentially humanitarian rationale for uncoupling governmental benefits from ideological conformity. In Matter of Acosta,[48] the Board defined

---

[46] Cf. Goodwin-Gill, The Refugee in International Law (1983), p.34.

[47] See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.") See also, Sherbert v. Verner, 374 U.S. 398, 404 (1963); Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1987).

[48] Int. Dec. 2986 (BIA 1985).

social group members as sharing a "common immutable characteristic," either innate or experiential. Such a characteristic was of a nature

> that the members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. By construing in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions or as a matter of conscience should not be required to avoid persecution.

The same element of coercion can be present in conscientious objectors' claims for refugee status. The unrecognized conscientious objector is constrained, in a direct physical sense, to either act in a way contrary to conscience or to face punishment. They are put to the choice of either participating in the violence they oppose or suffering sanctions. The reluctant taxpayer, by contrast, must only tolerate the use of funds for military purposes,[49] and the would-be Sunday trader is simply

---

[49] In a recent Canadian case, the court considered the claim of the taxpayer who, on grounds of conscience, objected to contributing to the government's military expenditures. Prior v. Canada, [1988] F.C.J. No. 107. In striking out the statement of claim as disclosing no reasonable cause of action, the court found no "offence to conscience", no being "forced to act in a way contrary to ... beliefs." The Constitution does not guarantee that the State will not act inimically to a citizen's standards of proper conduct: it merely guarantees that a citizen will not be required to do something contrary to those standards, subject to the reasonable limitations recognized by section 1 of the Canadian Charter of Rights and Freedoms. Ibid, citing Twaddle, J.A., in McKay et al v. Government of Manitoba 23 C.R.R. 8, at 12. The court also cited with approval two U.S. cases: Autenrieth et al v. Cullen, 418 F.2d 586 (1969); and Barton v. Commissioner of Inland Revenue, 737 F.2d 822 (1984).

restrained from transacting business at will.[50] Again, the conscientious objector is distinguishable because the state requires his or her active complicity in military service, not just tolerance or restraint or restrictions on certain conduct. Quite apart from cumulative factors supporting refugee status (such as personal, social, religious or political background), the conscientious objector is also distinguishable from the "mere" draft evader or deserter by the sincerely-held opinion, as noted above.[51] This locates the conflict of individual and state within the realm of competing (but legitimate) rights or inter-

---

[50] In two recent cases, the Supreme Court of Canada examined the constitutionality of restrictions on Sunday trading. In The Queen v. Big M Drug Mart, [1985] 1 S.C.R. 295, the Court found that the object and purpose of the Lord's Day Act, considered historically, was the compulsion of religious observance. It offended freedom of religion, and worked a form of coercion inimical to the spirit of the Charter; it was found unconstitutional. In Edwards Books and Art Limited v. The Queen et al, [1986] 2 S.C.R 713, on the other hand, the Retail Business Holidays Act of the Province of Ontario was upheld. Although it significantly infringed the freedom of Saturday-observers to manifest or practice their beliefs, it also had other reasonable objectives and provided for exemptions. The abridgement of the freedom of religion could be justified under section 1 of the Charter; it satisfied the dual tests of legitimate objectives and proportionality.

Similarly, in Jones v. The Queen, [1986] 2 S.C.R. 284, the issue of compulsory school attendance was examined, in a context which comes closer to the experience of the conscientious objector. The legislation in question was held to be a reasonable limitation on a parent's religious convictions regarding the education of children. The authorities did not purport to exercise absolute control, and there was no absolute obligation to attend public schools. Instruction could be given elsewhere, including at home, provided it was certified as efficient; the appellant objected, again on religious grounds, to seeking such certification, but the Court found this to be demonstrably justifiable under Canadian law.

[51] See section I(A), supra, and Handbook, paras. 170-1.

ests, and separates out others whose motivations may be purely self-regarding and devoid of any recognized human rights interest, such as conscience or religion. In respect of the conscientious objector, what may lead directly to refugee status is the existence of reasonable fear of prosecution and punishment or other treatment amounting to persecution.

The individual conscientious objector may appear liable, if returned, merely to prosecution for breach of a law of general application. From another perspective, however, the fact of conscientious objection can be seen as a political act, either because it reflects an actual political opinion held by the individual, in which case the necessary subjective element is present; or because dissident political opinions are attributed to the individual by the authorities of the state of origin; or because the nature of the act is inherently political, regardless of the precise motivation of conscience, or the actual perceptions of government. Evidently, a reasonable fear of persecution may exist in the absence of any actual or inferred persecutory intent on the part of the government, for it may originate in the community itself, or in the acts of others, uncontrolled and uncontrollable.[52]

In summary, the refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority; this is not a political opinion

---

[52] 1 Grahl-Madsen, The Status of the Refugee in International Law (1966), at 190-2; Handbook, para. 65; Goodwin-Gill, The Refugee In International Law, supra, at 42.

that needs to be inferred, let alone imputed to the individual.[53] It is the objective reality that results from the act of faith; and it is that element of conviction (hence the importance of credibility and sincerity of belief) which serves to separate out others whose motivations may be purely self-regarding. From recognition of the protected interest, it is but a short step to examination of the critical issue, addressed in the next section, namely the circumstances under which the punishment or treatment, legal or extra-legal, feared by the claimant amounts to persecution.

## II. FOR PURPOSES OF REMAND, THIS COURT SHOULD ARTICULATE STANDARDS, CONSISTENT WITH THE INTENT OF CONGRESS AND INTERNATIONAL LAW, GOVERNING THE DISPOSITION OF CLAIMS TO REFUGEE STATUS BY CONSCIENTIOUS OBJECTORS.

States are free to recognize conscientious objection in itself as a sufficient ground upon which to base recognition of refugee status. In this sense, they are free to attribute such value to the fundamental right to freedom of conscience that any measures having as their object to compel the individual to act contrary to sincerely held religious belief, or any punishment, such as deprivation of liberty, imposed to that end, amounts to persecution within the meaning of the 1951 Convention, regardless

---

[53] Imputation of political opinion may be appropriate, of course, where evidence does exist of the government's or the persecutor's intentions; see Desir v. Ilchert 840 F.2d 723 (9th Cir. 1988); Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985); Del Valle v. INS, 776 F.2d 1407 (9th Cir. 1985).

of its duration.

Alternatively, and short of such position of principle, international law requires that, in the context of the determination of claims to refugee status, an accommodation be found between the competing state and individual interests, based on standards of reasonableness and proportionality. This approach is unexceptionally applicable with respect to a variety of claims to a well-founded fear of persecution. It calls for an assessment of the circumstances of each individual case. Where application for refugee status is based upon conscientious objection to military service, these include:

> 1. the genuineness of the applicant's beliefs, as a manifestation of freedom of conscience. Once the genuineness or sincerity of belief has been established in the individual case, the subjective threshold has been crossed. Thereafter the decision-maker must determine whether, objectively, the applicant reasonably fears treatment amounting to persecution. This entails examination of additional elements, of which the following are illustrative, not exhaustive:
>
> 2. the scope and manner of implementation of military service laws;
>
> 3. the selective conscription of particular groups within society, and the bases of such distinctions;
>
> 4. the extent to which the right of conscientious objection is recognized, if at all;
>
> 5. the type of alternative service available, if any, its length and conditions by comparison with military service, and the treatment of conscientious objectors performing such service;
>
> 6. the manner of prosecution and the proportionality and likelihood of punishment of conscientious objectors in the absence of alternative service;

7. the treatment of conscientious objectors subject to such punishment, including the extra-legal activities of paramilitary groups or sections of the populace; and

8. the extent to which penalties for conscientious objection may be employed selectively, against specific racial, religious, social, or political groups.

9. the nature of the objection, insofar as it is relevant, for example, to the nature of the military conflict at issue (if any) or the way in which war is being waged;

10. the legality of the military action (if any) for which conscription is employed.

CONCLUSION

The essential position of the UNHCR may be simply stated: especially where there is no provision for alternative service, the imposition of significant sanctions for refusing to perform military service based on conscience, including sincere religious or moral objections, may be considered persecution within the meaning of the 1951 Convention and the 1967 Protocol. The Board's decision should be reversed and remanded for disposition under the proper standards.

Respectfully submitted,

Guy S. Goodwin-Gill
Susan Timberlake
United Nations High Commissioner
for Refugees
1718 Connecticut Ave. N.W.
Washington, D.C. 20009
(202)-387-8546


3 April 1989


Ralph G. Steinhardt
George Washington University
National Law Center
720 20th Street, N.W.
Washington, D.C. 20052
(202)-994-5739

Attorney of Record for
the Amicus Curiae

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| JOSE AND OSCAR CANAS-SEGOVIA,<br>Petitioners,<br><br>v.<br><br>UNTIED STATES IMMIGRATION AND<br>NATURALIZATION SERVICE,<br>Respondent | No. 88-7444 |

CERTIFICATE OF SERVICE

I hereby certify that this thirty-first day of March 1989, I served two copies of the foregoing Brief *Amicus Curiae* upon each of the following persons:

Karen Fletcher
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 879, Ben Franklin Station
Washington, D.C. 20044

Karen Musalo
231 Franklin St., Suite 2
San Francisco, CA. 94102

David Ilchert
District Director
United States Immigration and Naturalization Service
Appraiser's Building
630 Sansome Street
San Francisco, CA. 94111

Fernando Chang-Muy
Legal Counselor
31 March 1989