No. 85-782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner

v.

LUZ MARINA CARDOZA-FONSECA,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS

This brief is submitted *amicus curiae* by the Office of the United Nations High Commissioner for Refugees, with the consent of the parties.

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*:

> 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 United Nations Protocol of 1967 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.

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[1] U.N. General Assembly Res. 428(V) 1950; Annex: *Statute of the Office of the United Nations High Commissioner for Refugees*, para. 1.

[2] *Id.*, para 8.

The present case, concerning as it does the interpretation of statutory provisions deriving from the 1951 United Nations Convention relating to the Status of Refugees (1951 Convention), through the 1967 Protocol, presents questions involving the essential interests of refugees within the mandate of the High Commissioner. Its resolution 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, moreover, can 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.

Much of the present submission reproduces the UNHCR's *amicus curiae* brief in *INS* v. *Stevic*, 467 U.S. 407 (1984). In that brief, the UNHCR addressed an issue ultimately reserved by the Court, 467 U.S. at 430, and squarely presented by the present case, namely the meaning of the phrase "well-founded fear of being persecuted" as used in the 1951 Convention, the 1967 Protocol, and domestic law.

For these reasons, the UNHCR respectfully submits this brief in support of the interpretation of the relevant provisions of the 1967 Protocol, which was adopted by the Court of Appeals for the Ninth Circuit in the decision below.

SUMMARY OF ARGUMENT

In this brief, the UNHCR will demonstrate, first, that Congress plainly intended to conform U.S. statutory law to U.S. treaties. It accomplished this through the language of sections 101 and 208 of the Immigration and Nationality Act (8 U.S.C. §§ 1101(a)(42)(A), 1158(a)), which make asylum available as a matter of domestic law to any refugee as defined in the 1951 Convention, 189 U.N.T.S. 150, and

the 1967 Protocol, 19 U.S.T. 6223, 606 U.N.T.S. 268. The legislative histories of the United States' accession to the 1967 Protocol, and of the Refugee Act of 1980, Pub.L.No.96-212, 94 Stat. 102, *et seq.*, show that the refugee definition in these international instruments has been incorporated without qualification into United States law. Congress also intended to ensure that United States statutes and regulations would be construed in a manner consistent with the relevant international norms.

Second, this brief will show that the refugee definition in Article 1 of the 1951 Convention must be interpreted to mean that a person should be recognized as a refugee if he or she has "good reason" to fear persecution for the stated reasons; that is, if his or her subjective fear of being persecuted is based upon an objective situation which makes that fear plausible and reasonable under the circumstances. A person may have good reason to fear persecution even though it cannot be established that it is more likely than not that he or she would in fact be persecuted. The UNHCR's interpretation of the term "well-founded fear of being persecuted" is based on the legislative history of the 1951 Convention, the interpretation given to a similar term in the Constitution of the International Refugee Organization (IRO), from which the 1951 Convention definition derives, the stated objectives of the international community in adopting this Convention, and the plain meaning of the words themselves. The standard of "likelihood" or "clear probability" of persecution, which has been interpreted to mean that an applicant must prove that he or she would more likely than not be subjected to persecution, is inconsistent with the requirements of the 1967 Protocol in three distinct but related ways: (1) the standard suggests that fear cannot be "well-founded" unless it is based upon a more than even chance that the feared event will actually happen, which contradicts the intent of the drafters and the plain meaning of the chosen phrase; (2) the "clear probability" standard focuses on the

objective likelihood of persecution and therefore effectively devalues the subjective term "fear", which is a fundamental element of the refugee definition; and (3) the "clear probability" standard ignores the difficulties which genuine refugees face in producing particularized evidence. Thus, such a standard increases the possibility of erroneous decisions resulting in the denial of asylum to those who have a well-founded fear of persecution.

ARGUMENT

I. IT IS NOT DISPUTED THAT CONGRESS HAS CONSISTENTLY INTENDED TO CONFORM UNITED STATES LAW WITH THE 1967 PROTOCOL AND THE 1951 CONVENTION BY INCORPORATING THE INTERNATIONAL DEFINITION OF "REFUGEE" INTO DOMESTIC LAW WITHOUT QUALIFICATION.

A. In Passing The 1980 Refugee Act, Congress Plainly Adopted The Definition Of "Refugee" Contained In The 1951 Convention And The 1967 Protocol And Directed That It Should Be Interpreted Consistently With Those International Instruments. The Quantum Of Proof Required To Satisfy That Standard, Which Is The Fundamental Issue In This Case, Was Not Addressed.

At the threshhold, it is clear that the plain language of a statute is ordinarily conclusive on issues of statutory interpretation. *Russello* v. *United States*, 104 S.Ct. 296, 299 (1983). In this case, the starting point must be section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a), which specifically contemplates the discretionary grant of asylum to any alien who "is a refugee within the meaning of section [101(a)(42)(A)] 1101(a)(42)(A) of this title." In turn section 101(a)(42)(A) provides in pertinent part:

> The term "refugee" means (A) *any person* who is outside any 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. . . .*

8 U.S.C. § 1101(a)(42)(A) (emphasis supplied). The language chosen in 1980 by Congress to define "refugee" tracks virtually verbatim the corresponding provisions of the 1967 Protocol, which defines a "refugee" as an individual who

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

1967 Protocol, article 1(2) (emphasis supplied).

Even without the gloss of legislative intent, Congress plainly used the international term of art—"well-founded fear of persecution"—to define the appropriate asylum standard. By contrast, as noted by this Court in *Immigration and Naturalization Service* v. *Stevic*, 467 U.S. 407 (1984), Congress chose not to use the phrases "well-founded fear" or "refugee" in promulgating section 243(h) of the Act. The disparity is significant. "When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United*

States, supra, at 300 (*quoting United States* v. *Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972)). Here the conclusion is inescapable (and to date undisputed) that the language of the statutory asylum provisions incorporates without qualification the international definition of "refugee".

Moreover, all parties apparently agree that Congress, in adopting the Refugee Act of 1980,[3] *intended* to conform United States domestic law with its international obligations under the 1967 Protocol. Brief for the Petitioner herein, Immigration and Naturalization Service (hereinafter cited as INS Brief) at 26, 27. It first replaced the existing refugee definition, which would "finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the 1951 United Nations Refugee Convention and Protocol. . . ."[4] Congress, responding to developing international standards and refugee needs, including the provisions of the 1967 United Nations Declaration on Territorial Asylum,[5] also incorporated an asylum provision in the legislation for refugees who meet this international definition.[6]

[3] Pub. L. No. 96-212, 94 Stat. 102, *et seq.*

[4] H.R. Rep. No. 96-608, 96th Cong., 1st Sess. (1979) at 9; S. Rep. No. 96-590, 96th Cong., 2nd Sess. (1980) at 19. For similar contemporary statements, see *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 96-781, 96th Cong., 2nd Sess. (1980) at 19; S. Rep. No.96-256, 96th Cong., 1st Sess. (1979) at 4. *See also* 126 Cong. Rec. H1521 (daily ed. March 4, 1980), remarks of Rep. Holtzman: "House definition of the term 'refugee' . . . essentially conforms to that used under the United Nations Convention and Protocol relating to the status of refugees." *Accord* 125 Cong. Rec. H11967 (daily ed. December 13, 1979); *Id.* at H11969 (remarks of Rep. Rodino); *Id.* at H11973 (remarks of Rep. Chisholm); *Id.* at H11979 (remarks of Rep. Esblocki); 126 Cong. Rec. S1753-S1754 (daily ed., February 26, 1980)(statement of Sen. Kennedy). Administration witnesses were equally emphatic. See *The Refugee Act of 1979, Hearings on H.R. 2816, Before the Subcommittee on International Operations of the House Committee on Foreign Affairs,* 96th Cong., 1st Sess. (1979) at 71 (remarks of Ms. Doris Meissner, Deputy Associate Attorney General: "What we have done in the Administration bill is simply incorporated the United Nations' definition for 'refugee'. . . .")

In the discussions concerning the new refugee definition no reference was made to the standard of proof. They simply reflect the intent of Congress to bring United States statutory law into conformity with the 1967 Protocol and to incorporate its refugee definition without any qualification into domestic law.

The legislative history of asylum similarly provides no support for the Petitioner's claim that Congress understood the phrase "well-founded fear of persecution" to be equivalent to such a standard of proof as would require an alien claiming asylum to show a likelihood or clear probability of persecution. INS Brief at 12. The Petitioner relies upon the statement in the Senate Report that,

> The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol. . . .[7]

The Petitioner also relies on the remarks of Mr. David Martin, Office of the Legal Advisor, Department of State,

[5] U.N. General Assembly Res. 2312 (XXII) of 14 December 1967. In its 1977 Conclusions, the Executive Committee of the High Commissioner's Programme, which advises the High Commissioner in the exercise of his statutory functions and which comprises 41 States members (including the U.S.), expressly appealed to governments to follow liberal practices in granting asylum: Report of the 28th Session, UN Doc. A/AC.96/549, para. 53.3(d), an appeal repeated the following year: Report of the 29th Session, UN Doc. A/AC.96/559, para. 68.1(d). *See also* Report of the 30th Session: UN Doc. A/AC.96/572, para. 72(2)(a)(1979) ("States should use their best endeavours to grant asylum to bona fide asylum-seekers".)

[6] H.R. Rep. No. 96-608, *supra,* at 17-18.

[7] S. Rep. No. 96-256, 96th Cong., 1st Sess. (1979) at 9, quoted in INS Brief at 26.

that "[f]or purposes of asylum, the provisions in this bill do not really change the standards." INS Brief at 26.

The reference to no change in the "substantive standard", however, merely emphasized that asylum would be granted as before only to persons fulfilling certain criteria in the United Nations definition—the 'standard' in this sense being that of refugee. The report does not allude to the standard of proof, *i.e.* to the manner in which eligibility or entitlement is to be established, questions of which Congress may not even have been aware. Indeed, as Mr. David Martin later testified in connection with the burden of proof question in asylum proceedings:

> The Refugee Act . . . never became the occasion for a thorough-going reconsideration of the problems in the asylum process, largely because these problems really did not become fully apparent until after the Act was in place.[8]

In the legislative history of the Refugee Act of 1980, there is thus no indication that Congress intended the new refugee definition to be applied in the manner in which the Board of Immigration Appeals had previously applied the withholding of deportation provision of the Immigration and Nationality Act. The Refugee Act of 1980 incorporates the United Nations 'standard', insofar as that standard is equated with the definition of a refugee, but does not address the standard of proof required to be met by those who claim the benefit of that definition. On the contrary, both the House and Senate reports unequivocally reflect Congress' intention that the new refugee definition conform with the definition in the 1967 Protocol and should

[8] *Asylum Adjudication: Hearings Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess.* (1981) at 132. Note also Petitioner's concession that asylum was introduced almost as an afterthought. INS Brief at 20.

"be construed consistent with the Protocol".[9] This would be required even if the legislative history of the Act were ambiguous. It is established that an act of Congress "ought never to be construed to violate the law of nations if any other possible construction remains". *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *Accord*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1962).

B. Nothing In The Legislative History Of The United States' Accession To The 1967 Protocol Implies That Congress Intended To Endorse Any Prior Standard Of Proof Which Might Be Inconsistent With The Protocol.

Since 1968, the United States has been a party to the 1967 Protocol, which incorporates Articles 2 through 34 of the 1951 Convention. Both instruments provide for the fair and humane treatment by States Parties of any person who, owing to a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion, is unable or unwilling to return to his or her country of nationality or of former habitual residence if stateless.

The history of accession shows that the Senate focused its attention first on the *admission* of refugees (i.e. after selection overseas), and secondly on areas where possible amendments to United States legislation might be called for. In a prepared statement, Mr. Lawrence A. Dawson commented that accession to the 1967 Protocol "does not in any sense commit the Contracting State to enlarge its immigration measures for refugees".[10] This view was reiterated by Mr. Dawson during the hearing before the Senate Foreign Relations Committee when he stated "that there is nothing in this Protocol which implies or puts any

[9] H.R. Rep. No. 96-608, 96th Cong., 1st Sess. (1979) at 9. S. Rep. No. 96-590, 96th Cong., 2nd Sess. (1980) at 19, 20.

[10] S. Exec. Doc. K, 90th Cong., 2nd Sess. (1968) at 7.

pressure on any Contracting State to accept additional refugees as immigrants".[11]

These statements relate exclusively to refugee admissions, a matter not addressed in the 1951 Convention and the 1967 Protocol, and they have no bearing on the application of the refugee definition in asylum proceedings.

In referring to the obligations under Articles 32 and 33 of the 1951 Convention, Mr. Dawson declared:

> . . . the asylum concept is set forth in the prohibition under Article 33 of the Convention against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act *with limited exceptions*, are consistent with this concept. *The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment to the Act.*[12]

The report of the Secretary of State was to the same effect.[13]

As Mr. Dawson stressed during the hearings, the Attorney General could implement the changes required by accession to the 1967 Protocol "without the enactment of any further *legislation*" and "without amendment to the Act".[14]

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[11] S. Exec. Rep. No. 14, 90th Cong., 2nd Sess. (1968) at 10.

[12] *Id.* (emphasis supplied).

[13] S. Exec. Doc. K, 90th Cong., 2nd Sess. (1968) III at VIII.

[14] S. Exec. Rep. No. 14, 90th Cong., 2nd Sess. (1968) at 8 (emphasis supplied).

The legislative history of accession to the 1967 Protocol thus shows that the Senate did not touch upon the question of the interpretation and application of the refugee definition but focused on areas where accession might possibly require changes in United States laws. In particular, the Senate did not address the question of the standard of proof to be applied in asylum cases. There is no indication that the Senate intended to endorse the "clear probability" standard previously applied by certain lower courts and the Board of Immigration Appeals (BIA). It suggests, on the contrary, that this practice would need to be modified in so far as it could be inconsistent with the 1967 Protocol, and that it could be so modified through the exercise of administrative discretion, without any legislation.

II. THE TERM "WELL-FOUNDED FEAR OF BEING PERSECUTED" IN THE 1951 CONVENTION MEANS THAT A PERSON SEEKING REFUGEE STATUS MUST SHOW THAT HIS OR HER SUBJECTIVE FEAR OF PERSECUTION IS BASED UPON OBJECTIVE FACTS WHICH MAKE THE FEAR REASONABLE UNDER THE CIRCUMSTANCES, BUT NOT NECESSARILY THAT HE OR SHE WOULD MORE LIKELY THAN NOT BECOME THE VICTIM OF PERSECUTION.

A. The Drafters Of The 1951 Convention Agreed That Fear Should Be Considered Well-Founded When A Person Can Show "Good Reason" Why He Or She Fears Persecution.

The term "well-founded fear of being persecuted for reasons of race, religion, nationality . . . or political opinion" originated with the Ad Hoc Committee on Statelessness and Related Problems, which had been appointed in August 1949 by the United Nations Economic and Social Council (ECOSOC) to consider whether it was desirable to prepare a "revised and consolidated convention relating to the international status of refugees" and stateless persons,

and if so to draft such a convention.[15] At its first session in January 1950, draft proposals for Article 1 of the Convention—the refugee definition—were submitted by the United Kingdom, France and the United States.[16] The drafts contained differences concerning the categories of persons to be covered by the convention,[17] but each included persecution or the fear of persecution as the basic element of the refugee definition.

The United Kingdom's proposal referred to "good reasons" for being unwilling to return to one's country of origin "such as, for example, serious apprehension based on reasonable grounds of . . . persecution."[18] The original French draft proposal for Article 1 recognized the refugee status of any person ". . . who has left his country of origin and refuses to return thereto owing to a justifiable fear of persecution. . . ."[19] The United States proposal applied the term "refugee" to persons defined as such in the various pre-war arrangements and conventions, and also to "any person who is and remains outside his country of nationality or former habitual residence because of persecution or fear of persecution on account of race, nationality, religion or political belief", provided such person also belonged to one of certain specified categories.[20] The

[15] ECOSOC Res. No. 248 B (IX) of 8 August 1949. *See generally* Report of the Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618 and Corr. 1 of 17 February 1950 (hereinafter cited as *Report*).

[16] U.N. Docs. E/AC.32/L.2, E/AC.32/L.3, E/AC.32/L.4 and Add.1 (17 January 1950).

[17] Briefly, the United Kingdom and France perferred to rely upon a broad general definition, while the United States proposal, although including a general definition, listed specific categories of refugees to be covered by the Convention.

[18] U.N. Doc. E/AC.32/L.2 (17 January 1950).

[19] U.N. Doc. E/AC.32/L.3 (17 January 1950) at 1 and 2.

[20] U.N. Doc. E/AC.32/L.4 and Add.1.

representative of the United States explained that the point of departure for the U.S. draft proposal, subject to certain modifications, had been the definition in the Constitution of the International Refugee Organization.[21]

On January 19, 1950, the United Kingdom submitted a revised draft proposal for Article 1 in which the term "well-founded fear of persecution" appears for the first time:

> In this Convention, the expression "refugee" means, except where otherwise provided, a person who, having left the country of his ordinary residence on account of persecution or well-founded fear of persecution, either does not wish to return to that country for good and sufficient reason or is not allowed by the authorities of that country to return there and who is not a national of any other country.[22]

On the same day, the Ad Hoc Committee appointed a working group composed of the representatives of four countries—France, Israel, the United Kingdom, and the United States—to draft a refugee definition that would obtain general approval, using the United States proposal as the basic working document.[23] On January 23, the working group presented a provisional draft which employed, for persons who became refugees as a result of events in Europe after September 3, 1939, and before January 1, 1951, the term "owing to persecution, or a well-founded fear of persecution, for reasons of race, religion, nationality or political opinion".[24] With certain stylistic modifi-

[21] U.N. Doc. E/AC.32/SR.5, para 9. *See* II(B), *infra*.

[22] U.N. Doc. E/AC.32/L.2/Rev.1 (19 January 1950).

[23] U.N. Doc. E/AC.32/SR.6 at 6-8. The representatives of the International Refugee Organization also participated in the deliberations of the working group.

[24] U.N. Doc. E/AC.32/L.6.

cations, but with no disagreement as to the substance, this was accepted as the central element of the definition applicable to post-war refugees in the Draft Convention adopted by the Ad Hoc Committee and transmitted to the Economic and Social Council.[25]

The Secretary-General invited governments to comment on the Draft Convention. None of the comments received suggested any disagreement as to the use of the specific term "well-founded fear of persecution" in the refugee definition.[26]

This refugee definition was extensively discussed in the Economic and Social Council at its 11th Session (August 1950),[27] in the Fifth Session of the United Nations General Assembly,[28] and in the Conference of Plenipotentiaries which met in Geneva in July 1951 to consider and adopt the 1951 Convention in its definitive form. These discussions, however, focused almost exclusively on questions such as date-lines, categories of persons to be included, criteria for exclusion, and the geographical limitation. The basic refugee definition adopted by the Ad Hoc Committee was not questioned; after stylistic changes it emerged substantially unaltered in the 1951 Convention.[29]

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[25] U.N. Doc. E/1618 and Corr. 1, Annex I (17 February 1950).

[26] *See*, U.N. Doc. E/AC.32/L.40, Memorandum by the Secretary-General of 10 August 1950.

[27] *See* ECOSOC Res. 319 B (XI) of 16 August 1950, and U.N. Doc. A/1396, *Draft Convention relating to the Status of Refugees: Note by the Secretary-General* (26 September 1950).

[28] *See* U.N. G.A. Res. 429(V) of 14 December 1950 and U.N. Doc. A/1682, *Report of the Third Committee* (12 December 1950).

[29] The same basic definition figures in the Statute of the Office of the UNHCR, U.N. G.A. Res. 428(V) of 14 December 1950, Annex, paras. 6(A)(ii) and 6(B).

In its final report to ECOSOC, the Ad Hoc Committee provided extensive comments on the provisions of the Draft Convention, including the following:[30]

> The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either been actually a victim of persecution or can show *good reason* why he fears persecution. . . .[31]

The formulation adopted by the Committee was generally approved and was thereafter included without debate in virtually all subsequent draft definitions.[32] The *travaux preparatoires* to the 1951 Convention contain no further discussion of its meaning, and the comment of the Ad Hoc Committee remains the final statement by the framers of the 1951 Convention interpreting the term "well-founded fear of being persecuted."

The Petitioner asserts that the drafters "rejected formulations of the well-founded fear standard that would have required only that the alien's fear be 'plausible', 'justifiable', or 'reasonable'." INS Brief at 30, fn. 22. The Petitioner reaches this conclusion, however, through the apparent accident of misquotation or misinterpretation of

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[30] *Report*, U.N. Doc. E/1618, Annex II, at 39. The report of the Ad Hoc Committee, including the Draft Convention and the explanatory comments, together with the comments of Governments, was transmitted by ECOSOC to the U.N. General Assembly. *See* ECOSOC Res. 319 (B)(XI), footnote 27, *supra*.

[31] *Report*, U.N. Doc. E/1618 at 39.

[32] *See*, e.g., U.N. Doc. E/L.82(ECOSOC)(France: amendment to the draft convention relating to the status of refugees)(29 July 1950) and U.N. G.A. Docs A/C.3/L.114, A/C.3/L.115, A/C.3/L.125, A/C.3/L.130 and A/C.3-L.131 Rev.1 (2 November—1 December 1950). (Various countries proposed definitions of "refugee")(reprinted in 5 UNGAOR), Annex (Agenda Item 32) 16-20 (1950).

a draft of the Ad Hoc Committee's final report. The passage involved actually provides in full:

> The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either been actually a victim of persecution *or can give a plausible account why he fears persecution.*[33]

Thus, between its draft and final reports, the Committee replaced "plausible account" with "good reason" as its gloss on the "well-founded fear" criterion. But there is no suggestion under either formulation that persecution must be more likely than not; indeed, even assuming *arguendo* that there is any meaningful difference between "good reason" and "plausible account", it would be wholly inconsistent with the history and intent of the Convention to interpret the substitution of one for the other as even a remote endorsement of the stricter "clear probability" standard. Moreover, as shown in the next section, when the Convention was drafted, "good reason" and "plausible account" were thought to be generally equivalent formulations of the accepted standard. The interpretation urged by the Petitioner has no basis in the history of the Convention.

B. The Term "Well-Founded Fear Of Being Persecuted" In The 1951 Convention Was Based On The Constitution And Practice Of The International Refugee Organization (IRO), Which Required No More Than That An Applicant Show Plausible Reason For Fearing Persecution.

The Ad Hoc Committee on the Draft Convention included the following "general observation":

> In drafting this convention the Committee gave careful consideration to the provisions of previous international agreements. It sought to retain as many of them as possible in order to assure that the new consolidated convention should afford *at least as much protection* to refugees as had been provided by previous agreements. . . .[34]

As noted, the Constitution of the International Refugee Organization had served as the point of departure for the refugee definition in the U.S. draft proposal.[35] Under the IRO Constitution, the determination of whether a refugee or displaced person was of concern to the Organization involved an evaluation of the validity of their objections to returning to their country of origin. The term "well-founded fear of persecution" in the first drafts of the 1951 Convention derives from one of the three "valid objections" listed in the IRO Constitution:

> The following shall be considered as valid objections: (1) Persecution, or fear, based on *reasonable grounds* of persecution because of race, religion, nationality or political opinion, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations. . . .[36]

The parallel between this language and that used in the U.S. and other draft proposals[37] is obvious. The term used in the official French version of the IRO Constitution as the equivalent of "fear, based on reasonable grounds of persecution" is "*crainte fondee de persecution*". This precise phrase was used in the draft proposal submitted by

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[33] See U.N. Doc. E/AC.32/L.38 at 33-34 (emphasis supplied).

[34] *Report*, U.N. Doc. E/1618 at 37.

[35] See text accompanying footnote 23, *supra*.

[36] Constitution of the International Refugee Organization, 18 U.N.T.S. 283, at 3, Annex I, Part I, Section C(l)(a)(i) (emphasis added).

[37] See U.N. Doc. E/AC.32/L.4, *supra*, at 5; U.N. Doc. E/AC.32/SR.5 at para.9; U.N. Doc. E/AC.32/L.3 (17 January 1950).

the representative of France to the Ad Hoc Committee, and was translated from the original French on that occasion as "justifiable fear of persecution". The original United Kingdom proposal to the Ad Hoc Committee had also used a term, "serious apprehension based on reasonable grounds . . . of persecution", very close to the IRO terminology. Finally, the term used in the revised United Kingdom proposal (and eventually adopted by the Committee), "well-founded fear", is so close to the French "*crainte fondee*" as to appear to be a retranslation. Thus it is evident that the members of the Ad Hoc Committee were willing to adopt, for the basic refugee definition in the Draft Convention, an expression which was in effect a rephrasing of the term used in the IRO Constitution.

The close connection between the terms "fear, based on reasonable grounds of persecution" in the IRO Constitution and "well-founded fear of being persecuted" in the 1951 Convention is significant for an understanding of the latter term inasmuch as the meaning of the earlier phrase had been clearly established through the eligibility decisions made by the IRO.

The *Manual for Eligibility Officers* published by the IRO includes the following comments on the meaning of the term "persecution or fear based on reasonable grounds of persecution":

> Fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to political convictions or to his race, he is afraid of discrimination, or persecution, on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution. Since fear is a subjective feeling the Eligibility Officer cannot refuse to consider the objection as valid when it is plausible. . . .[38]

Although the IRO Eligibility Manual was prepared for use by the organization's eligibility officers rather than by government officials, it was based on eligibility decisions of which governments were well aware.[39] The representatives of the United Kingdom on the Ad Hoc Committee referred explicitly to the IRO eligibility practice as having built up "a body of interpretive [*sic*] decisions" and considered that "the U.S. draft proposal was intended to be interpreted in the light of these precedents".[40] The U.S. delegate for his part referred to the established meaning of the IRO terminology used in the U.S. proposal and stated that the definition of "neo-refugees" (i.e., those included in the general post-war definition) had "already appeared in the IRO Constitution where its meaning was quite clear. It would have to have an identical meaning in the Convention".[41]

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[38] IRO *Manual for Eligibility Officers* at 24.

[39] The IRO Review Board submitted reports of its activities to the IRO General Council, on which the member Governments sat. *See e.g.* IRO Document GC/103, *Report of the Chairman of the Eligibility Review Board* (21 September 1949), which refers to the "more liberal view" taken by the Board concerning applicants' failure to provide documentary proof, and the practice of according "the benefit of the doubt" to applicants. The IRO *Eligibility Manual* itself was circulated to governments in February 1950 and was discussed by government representatives at the IRO General Council Fifth Session in March 1950 (IRO General Council, Fifth Session, Summary Records (GC/SR/64, 69, Annex 70).

[40] U.N. Doc. E/AC.32/SR.6 at 3.

[41] U.N. Doc. E/AC.32/SR.5 at 2-5. The U.S. delegate similarly defended the use of the IRO terminology in the Draft Convention:

> But there is no question about what was meant. It was clearly understood that those who had fled as a result of persecution or fear therefor, or entertaining fears thereof, in their countries of

The deliberations of the Ad Hoc Committee thus demonstrate that the drafters of the refugee definition in the 1951 Convention were fully aware of the close connection between that definition and the one used in the IRO Constitution.[42] The obvious links between the two definitions and the explicit references during the Ad Hoc Committee's discussions to the interpretative precedents created under the IRO show the context in which the 1951 Convention definition was written and in which it must be read.

The *travaux preparatoires* thus contain no suggestion or hint of an intention that the standard of eligibility under the 1951 Convention definition was to be narrower than that which prevailed under the IRO. On the contrary, the expressed intention of the Ad Hoc Committee "to provide at least as much protection to refugees" as previous international instruments[43] shows that the definition in the 1951 Convention is to be interpreted in a manner similar to that adopted for the IRO Constitution, *i.e.*, as requiring no more than that the applicant give a plausible and coherent account of why he or she fears persecution.[44]

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origin, had valid reasons for rejecting repatriation.

IRO General Council, Fifth Session, Summary Record GC/SR/70, Annex at 9.

[42] The representatives of France and Italy even expressed the view that the Draft Convention definition was too similar to the provisions of the IRO Constitution and in following the IRO definition too closely it was *unduly restrictive*. Consequently, both countries pleaded for a broader definition (see U.N. Doc. E/1703(Corr. 1), E/1703/Add.2-7, and U.N. Doc. E/AC.32/L.40 (Memorandum by the Secretary-General) of 10 August 1950).

[43] *Report*, U.N. Doc. E/1618 at 37.

[44] For a description of the application of the IRO definition during this period, *see* L.W. Holborn, *The International Refugee Organization, Its History and Work—1946 to 1952* (1956) at 210.

C. UNHCR Guidelines, Prepared For And At The Request Of States, Provide The International Standard For Applying The Term "Well-Founded Fear."

The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, September 1979) was prepared at the request of States members of the Executive Committee of the High Commissioner's Programme, for the guidance of governments.[45] The *Handbook* is based on UNHCR's experience, including 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 the literature devoted to the subject over the last quarter of a century.[46] It has since been widely circulated and approved both by governments[47] and in many judicial decisions.[48]

The phrase "well-founded fear of being persecuted" has been explicated in the *Handbook* in the following way:

> The phrase "well-founded fear of being persecuted" is the key phrase of the definition. . . . Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evalu-

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

[46] *Handbook*, at 1.

[47] Report of the 30th Session, UN Doc. A/AC.96/572 (1979) at paras. 68, 72(1)(h); Report of the 31st Session UN Doc. A/AC.96/588 (1980) at para. 36.

[48] Both U.S. courts and the BIA have turned to the *Handbook* for guidance in the interpretation of the 1967 Protocol. *McMullen v. INS*, 658 F. 2d 1312 (9th Cir. 1981); *Carvajal-Munoz v. INS*, 743 F. 2d 562 (7th Cir. 1984); *Ananeh-Firempong v. INS*, 766 F. 2d 621 (1st Cir. 1985). *Matter of Rodriguez-Palma*, 17 I. & N. Dec. 465 (BIA 1980); *In re Frentescu*, 18 I. & N. Dec. 244 (BIA 1982).

ation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin. (para. 37)

To the element of fear—a state of mind and a subjective condition—is added the qualification "well-founded." This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration. (para. 38)

Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences—in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified. (para. 41)

As regards the objective element, it is necessary to evaluate the statements made by the applicant. . . . A knowledge of conditions in the applicant's country of origin—while not a primary objective—is an important element in assessing the applicant's credibility. In general, the applicant's

> fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there. (para. 42)

Consistently with the *travaux preparatoires*, the *Handbook* emphasizes that the fear of the applicant and not the hypothetical likelihood of future events is the central element of the refugee definition. *See also* paras. 40, 43.

The *Handbook* goes on to address the process of determining refugee status. It recognizes the general legal principle that the burden of proof lies on the person submitting a claim, but recalls that an applicant for refugee status is normally in a particularly vulnerable situation which may expose him or her to serious difficulties in submitting his or her case to the authorities (para. 190).

> . . . In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. (para. 196)

In view of the difficulty of proof inherent in the special situation in which applicants for refugee status find them-

selves, evidentiary requirements ought not be applied too strictly (see paragraphs 197, 203 and 204).

The rationale for this humanitarian standard is obvious. The harm done to one erroneously excluded from refugee status is analogous to that caused to the wrongfully convicted;[49] the likelihood of its eventuating is increased by unrealistic standards of proof. The objective of protection is better served by an approach which recognizes the gravity of the harm consequent on erroneous decisions, and of the special situation of the applicant. This conforms to tradition in United States law and practice where the standard of proof in legal proceedings has been adjusted to balance the interests of the state and the consequences to the individual of factual error. *Re Winship*, 397 U.S. 358, 379 (1970).

Thus, in procedures for determining refugee status, the standard of proof should adequately reflect the potentially disastrous consequences for the applicant of an erroneous determination, as well as the difficulties he or she may have in proving them. The need to facilitate the task of applicants for refugee status in presenting their cases is recognized in the practice and in court decisions of States Parties to the 1951 Convention and/or the 1967 Protocol.[50, 51, 52]

[19] Cf. Bayles, 'Principles for Legal Procedure', 5 *Law and Philosophy* (1986) at 33-57.

[50] The law and practice in Canada is described in the brief submitted by the UNHCR in *INS v. Stevic, supra,* at 23-34. The general approach described therein is further illustrated by *Re Naredo and Minister of Employment and Immigration,* (1981) 130 D.L.R. (3d) 752, 753, where the Canadian Federal Court of Appeal held that the Board had erred in requiring applicants to show that they *would* be subject to persecution. Heald, J., observed that ". . .the statutory definition required only that [the applicants] establish a 'well-founded fear of persecution'.

D. Any Interpretation Of The Term "Well-Founded Fear Of Persecution" Which Requires A Showing That The Applicant Is More Likely Than Not To Become The Victim Of Persecution Is Inconsistent With The International Standard Adopted By Congress.

To require asylum applicants to show a "clear probability of persecution" could lead to results which would not be in conformity with the 1951 Convention and the 1967 Protocol. The term "clear probability" is generally

The test imposed by the Board is a higher and more stringent test than that imposed by the statute. . . ."

[51] The reasoning adopted by the United Kingdom House of Lords in the case of *Fernandez v. Government of Singapore,* an extradition case, is itself striking and compelling authority for the rejection of the balance of probabilities test in asylum cases. ([1971] 1 W.L.R. 987; Goodwin-Gill, *The Refugee in International Law* (1983), at 22-24):

> [T]he phrase ["balance of probabilities"] is inappropriate when applied not to ascertaining what has happened, but to prophesying what, if it happens at all, can only happen in the future. There is no general rule of English law that when a court is required, either by statute or at common law to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens. . . . The degree of confidence that the events specified will occur which the court should have to justify refusal to return the fugitive . . . should, as a matter of common sense and common humanity, depend upon the gravity of the consequences contemplated by the section on the one hand of permitting and on the other hand of refusing, the return of the fugitive if the court's expectation should be wrong.

Ibid. at 993-4, (emphasis supplied.) Practice in asylum cases before adjudicators and the Immigration Appeal Tribunal in the United Kingdom now reflects this standard. *See Enninful* v. *Secretary of State,* Immigration Appeal Tribunal, (United Kingdom, October 22, 1984); *R.* v. *Secretary of State, ex parte Jeyakumaran,* High Court, CO/290/84 (United Kingdom, June 28, 1985).

[52] The law and practice in the Federal Republic of Germany is described in the brief submitted by the UNHCR in *INS v. Stevic, supra* at 24.

taken to mean that the fact in question must be more than probably true, *i.e.*, more likely than not. *INS* v. *Stevic*, 467 U.S. 407 (1984). However, to require of an applicant for asylum to prove that a future possibility of persecution is "more likely than not" results in a standard more stringent than the term "well-founded fear" as that phrase is used in the 1951 Convention.

First, such a standard misconstrues the intent of the drafters of article 1 of the 1951 Convention. According to their explanation, as shown above, the term "well-founded fear of being persecuted" means that an applicant for refugee status need only be able to show good reason why he or she fears persecution.[53] Under this definition, the objective circumstances must be evaluated with reference to an applicant's subjective fear of persecution in order to determine whether there is good reason for that fear. The clear probability standard as interpreted in *Stevic*, if applied to asylum, suggests that fear is not well-founded unless it is based upon a more than even chance that the event feared would actually happen. But this is inconsistent with the ordinary meaning of the words and contrary to human experience, as illustrated by an acknowledged authority on refugee law, Professor A. Grahl-Madsen, who has written:

> . . . Let us for example presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote "labour camp" or that people are arrested and detained for an indefinite period on a slightest suspicion of political non-conformity. In such a case it would only be too apparent that anyone who has managed to escape from the country in question will have a "well-founded fear of being persecuted" upon his eventual return. It cannot—and should not—be required that an applicant shall prove that the police have already knocked on his door.[54]

[53] See *Report*, U.N. Doc. E/1618, *supra*, Annex II at 39.

Second, the "clear probability" standard would deprive the subjective term "fear," which is a fundamental element of the refugee definition in the 1951 Convention and the 1967 Protocol, of its meaning. The term "fear" was introduced by the drafters of the 1951 Convention precisely in order to ensure that the subjective apprehensions of the applicant for refugee status in relation to the objective conditions in his or her country of origin are taken fully into account. This possibility would obviously be excluded if regard were had only to whether or not certain events forming the basis of the applicant's justified fear are *in fact* likely to occur. "Good reason" for fear, rather than proof of a particular degree of probability of being persecuted, is all that is required by international law.

Third, the "clear probability" standard could result in the denial of asylum to persons who qualify for it by ignoring the difficulties which genuine refugees often face in producing particularized evidence. It demands too much of the asylum-seeker and pays too little attention either to the gravity of the harm likely to be done to the refugee who is denied asylum, or to the essentially future-oriented

[54] Grahl-Madsen, 1 *The Status of Refugees in International Law*, 180 (1966). The Petitioner similarly relies on this treatise in its opening Brief. INS Brief at 30. But the paragraphs cited by the Petitioner simply establish what no one disputes, *viz.*, that a showing of likely persecution is *sufficient* to establish a well-founded fear of persecution. The issue in this case is whether such a showing is also *necessary*. Grahl-Madsen, in the passage quoted herein, plainly implies that it is not. In addition, the principal German case referred to by Grahl-Madsen in the Petitioner's citation only states that an applicant has "good reasons to fear persecution within the meaning of the Geneva Refugee Convention, if in a reasonable evaluation of his case, he cannot be expected to remain in his home country" (translation from the German by UNHCR). The other cases cited in the treatise are consistent with this approach.

nature of the essay in hypothesis which lies at the heart of a well-founded fear of persecution. In using the term "well-founded fear of being persecuted", the framers of the 1951 Convention adopted a definition which corresponds to the practical realities of the refugee situation and reflects the state of uncertainty and anxiety that often precipitates a refugee's decision to flee.

The Petitioner argues that the "clear probability" standard can be applied with some flexibility, and that it is indistinguishable from a "well-founded fear of persecution". INS Brief at 28, 31. But Petitioner's Brief in both this case and *Stevic*, and the decisions of the Board of Immigration Appeals and of some courts, show that the differences between the two standards are by no means negligible. Indeed, the "clear probability" standard has a tendency to escalate into a requirement of near certainty. For example, one of the forms of evidence that would, according to the Petitioner's Brief in *Stevic*, substantiate a "clear probability" of persecution, is "evidence of persecution of all or virtually all members of a group or class to which the alien belonged. . . ."[55] Clearly, an applicant might have a well-founded fear of being persecuted long before "all or virtually all" of the members of his group had actually become the victims of persecution. See also INS Brief herein at 12 (asylum available to those who "face persecution"). The standard, if interpreted as suggested by the Petitioner, approaches a requirement of near certainty and *a fortiori* would be inconsistent with the 1967 Protocol. *See also*, *Marroquin-Manriquez* v. *INS*, 699 F.2d 129 (3rd. Cir. 1983) (requiring "compelling reasons" and "conclusive proof"); *In re Dunar*, 14 I. & N. Dec. 310 (1973).

Petitioner places substantial weight upon the decision in *re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985),

[55] Petitioner's Brief in *INS* v. *Stevic* at 9, 23 and fn. 25 and 32.

in which the Board of Immigration Appeals remarked that "as a practical matter the showing contemplated by the phrase 'a well-founded fear' of persecution converges with the showing described by the phrase 'a clear probability' of persecution". The Board reiterated its view that the standards for asylum and withholding of deportation converged; a likelihood of persecution, a clear probability of persecution, or that persecution was more likely than not, were not meaningful distinctions in practice. But most courts addressing the issue have had little difficulty in distinguishing the two standards and in giving meaningful content to the more generous term as suggested herein. *Carvajal-Munoz v. INS*, 743 F. 2d 562 (7th Cir. 1984); *Youkhanna v. INS*, 749 F. 2d 360 (6th Cir. 1984); *Guevara-Flores v. INS*, 786 F. 2d 1242 (5th Cir. 1986); *Bolanos-Hernandez* v. *INS*, 749 F.2d 1316 (9th Cir. 1984). *Contra*, *Sotto v. INS*, 748 F. 2d 832 (3rd Cir. 1984).

The Petitioner complains that the well-founded fear standard as articulated by the court below does not correspond to any defined numerical level of probability. INS Brief at 31. No statistical definition is, however, appropriate to determine the reasonableness of an applicant's fear, given the inherently speculative nature of the exercise. The requisite degree of probability must take into account the intensity of the fear, the nature of the projected harm (death, imprisonment, torture, detention, serious discrimination, etc.), the general history of persecution in the home country, the applicant's personal experience and that of his or her family, and all other surrounding circumstances.[56] Thus, the court below was

[56] *Bolanos-Hernandez v. INS, supra.* This approach is illustrated by a recent decision of the Higher Administrative Court, Hamburg, decision of 11 April 1983—OVG Bf. V 30182, *InfAuslR* 1983, p. 187, *also published in* Marx, 1 *Asylrecht* (1984) at 237-8: "In case of serious sanctions such as death penalty or long-term imprisonment or severe torture, it can be sufficient that the possibility of these sanctions being

correct to conclude that the well-founded fear standard involves less than a clear probability, focusing not on likelihood of an event but reasonableness of fear:

> The term "clear probability" requires a showing that there is a greater than fifty percent chance of persecution. In contrast, the term "well-founded fear" requires that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded. While in the latter case there must be some objective basis for the fear, contrary to the requirement of the "clear probability" test the likelihood of persecution need not be greater than fifty percent.

Pet. App., 9a. The UNHCR respectfully urges this Court to affirm this articulation of the appropriate standard.

CONCLUSION

For the foregoing reasons, the Office of the United Nations High Commissioner for Refugees would respectfully urge the Court to affirm the holding of the Court of Appeals in the decision below.

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applied is *not remote.*" (Translation by UNHCR) (emphasis supplied). *See also, Benipal* v. *Ministers of Foreign Affairs and Immigration*, Action No. 878/83, 993/83, 1016/83 (High Court of New Zealand, Nov. 29, 1985):

"Clearly there are subjective and objective considerations in the application of the definition to the facts. While as a matter of convenience it is useful to distinguish between the two ingredients, it can lead to error to regard them as separate and independent elements which can be considered in isolation. If fear exists, the issue whether that fear is well-founded cannot be divorced from the fear itself: it is *in relation to the fear* that the issue of "well-founded" must be decided, not in relation to anything else. . . ." (at 228)

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