Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men who Refuse to Bear Arms for Reasons of Conscience

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I. INTRODUCTION


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¹ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 [hereinafter 1980 Act or Refugee Act] (amending Immigration and Nationality Act §§ 101(a)(42), 207-09, 243(h), 411-14) (codified at 8 U.S.C. §§ 1101(a)(42), 1157-59, 1253(h), 1521-24 (1982) [hereinafter INA]). The Refugee Act provides for two forms of relief, political asylum pursuant to section 101(a)(42), and withholding of deportation pursuant to section 243(h). Political asylum relief is within the discretionary authority of the attorney general for individuals who meet the refugee definition; withholding of deportation is a mandatory form of relief available to individuals who establish that their "life or freedom would be threatened...on account of race, religion, nationality, membership in a particular social group or political opinion" upon return to their home country. INA § 243(h), 8 U.S.C. § 1253(h).


³ 189 U.N.T.S. 137 (1951) [hereinafter Convention].

⁴ See INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987). ("If one thing is clear from the legislative history of the new definition of 'refugee' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol...."); H.R. REP. No. 781,
of refugee contained in the Protocol:

any person who is outside 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 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. 5

Since the Refugee Act’s passage, the courts have been called upon to resolve controversies over almost every aspect of the refugee definition. The Immigration and Naturalization Service consistently has argued for interpretations of the Act which increase the asylum applicants’ burden of proof, or which limit those categories of individuals which can come within its protection. The Board of Immigration Appeals (Board) 6 has generally upheld the INS, but the federal courts have frequently reversed Board decisions. 7

One such category of individuals which the Board deems to be outside the protection of the Refugee Act is the “conscientious objector,” 8 the young man 9 who flees his home country rather than be

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6. See, e.g., Cardoza-Fonseca, 480 U.S. at 452 (rejecting the Immigration and Naturalization Service’s contention that applicants for political asylum must show a clear probability of persecution, which is the standard for withholding of deportation, rather than the more generous well-founded fear standard). In his concurrence to this decision, Justice Blackmun rebuked the Immigration and Naturalization Service for their “seemingly purposeful blindness” in developing the standards for relief under the 1980 Refugee Act. Id.
7. The Board of Immigration Appeals has nationwide jurisdiction over appeals of decisions of immigration judges in deportation and exclusion proceedings. 8 C.F.R. § 3.1(b)(1), (2) (1988).
8. See, e.g., Blanco-Lopez v. INS, 858 F.2d 531 (9th Cir. 1988) (reversing Board of Immigration Appeals’ holding that beatings and death threats against a Salvadoran accused of gun-running did not constitute persecution); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985) (reversing Board of Immigration Appeals’ holding that an alien who suffered a direct credible threat against his life on account of his desire to remain neutral was not eligible for relief); Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988) (reversing Board of Immigration Appeals’ holding that a coup participant in Ghana who had been tortured and imprisoned was not eligible for relief).
9. The definition of conscientious objector in the context of this article is somewhat broader than the definition under United States law. Under the laws of the United States, conscientious objection may be based on religious, moral, or ethical beliefs, and the objection must extend to participation in all wars; selective conscientious objection is not recognized as a basis for exemption from military service. Military Selective Service Act § 6(j), 50 U.S.C.A. app. § 456(j) (West 1981); 32 C.F.R. §§ 1636.3-1636.6 (1980); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). The definition of conscientious objection in this article is derived from the United Nations High Commissioner on Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1979) [hereinafter Handbook] and other international sources. An objection may be based on political convictions, as well as religious, moral, or ethical beliefs. The objection need not extend to all wars, but may be based upon particular wars or military actions.
forced to join the military and participate in activities in violation of his religious, moral, or political convictions. In *In re Canas*, decided in September of 1988, the Board held that relief under the 1980 Refugee Act is not available to such individuals.

The Board’s position on the issue of conscientious objection as a valid basis for refugee status runs counter to the guidance of the United Nations High Commissioner on Refugees in the *Handbook on Procedures and Criteria for Determining Refugee Status*, which recommends refugee status for such individuals. Although the *Handbook* is not binding, it is recognized by United States courts as an internationally respected instrument for interpreting the Protocol. According to the *Handbook*, punishment of an individual who, for reasons of conscience, refuses to perform military service constitutes persecution within the meaning of the Protocol.

The position of the Board also diverges from developing asylum jurisprudence. Federal courts have recognized an expanded concept of the term “persecution.” Recent decisions demonstrate a willingness to reject a narrow analysis of the required “on account of race, religion, nationality, membership in a particular social group, or political opinion” in favor of an interpretation which looks at the totality of circumstances.

This article will address the issue of the conscientious objector as refugee from the perspective of the advocate. It will argue that fulfillment of the letter and spirit of the Refugee Act requires the pro-

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10. To date all of the cases under the Refugee Act have involved young men; the descriptive use of this term is not meant to exclude persons of any age or gender who may be subject to obligatory mandatory service.


12. *In re Canas* is currently on appeal to the Ninth Circuit Court of Appeals. The author is attorney of record for the respondents in *In re Canas*.


14. *Id.* ¶¶ 167-74.


16. *See Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452 (9th Cir. 1985), *aff’d, INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (“the statutory term ‘persecution’ includes more than just restrictions on life and liberty”); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 n.13 (9th Cir. 1985) (“[i]n turn, the term ‘persecution’ in section 101 may not be limited to ‘a threat to life or freedom’”).

17. *See, e.g.*, *Desir v. Iechert*, 840 F.2d 723 (9th Cir. 1988) (beatings, imprisonment, and assaults for refusing to pay bribes to Haitian paramilitary forces constitutes persecution on account of political opinion); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (repeated rape and beating of a female Salvadoran civilian by an Air Force sergeant constitutes persecution on account of political opinion).
tection of young men of conscience. The article will first briefly review those sections of the *Handbook* that deal with conscientious objectors and will examine federal and Board precedent. It will then look at the Board of Immigration Appeals' rationale in denying relief to such persons. The article will then respond to the Board's reasoning, drawing upon the Protocol, the *Handbook*, the 1980 Refugee Act, and relevant domestic precedent. It will consider the significance of the developing international trend toward recognition of conscientious objection as a fundamental human right. Finally, the article will address itself to the practical concerns of the practitioner advocating on behalf of Salvadoran and Guatemalan clients through a discussion of the factual requirements for raising a claim based on objection to military service for reasons of conscience.

II. THE UNITED NATIONS HANDBOOK

The *Handbook* recommends refugee status for individuals who flee their home countries to avoid serving in the military against their "genuine political, religious or moral convictions, or...valid reasons of conscience." Although the *Handbook* is not binding, it "provides significant guidance in construing the Protocol, to which Congress sought to conform." The Office of the United Nations High Commissioner for Refugees (UNHCR) was established by the United Nations General Assembly and charged with the "duty of supervising the application of the provisions" of the Protocol. The UNHCR prepared the *Handbook* at the request of member states for their guidance in applying the Protocol. The criteria articulated in the *Handbook* for determining refugee status are the product of knowledge accumulated by the UNHCR over a twenty-five year period. It has been widely circulated and approved by governments.

18. *Handbook*, *supra* note 9, ¶ 170; *see also* ¶¶ 171-74.
19. *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also* authorities cited *supra* note 4.
The State Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

Id.

By acceding to the Protocol, the United States agreed to cooperate with the UNHCR in its supervision of the Protocol’s application.24 The federal courts25 and the Board of Immigration Appeals26 have deferred consistently to the *Handbook’s* guidance in interpreting the 1980 Refugee Act.

The *Handbook’s* recommendation of refugee status for conscientious objectors constitutes an exception to the well-established princi-

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AC.96/588 at 36 (1980).

24. See Protocol, supra note 2, art. II.

25. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (applying *Handbook’s* interpretation of “well-founded” fear of persecution); Tureios v. INS, 821 F.2d 1396 (9th Cir. 1987) (applying *Handbook* to evaluate petitioner’s credibility); Ramirez-Ramos v. INS, 814 F.2d 1394 (9th Cir. 1987) (applying *Handbook* to find that provision regarding crimes committed outside the United States does not apply to crimes committed within the United States); Cervillo-Perez v. INS, 809 F.2d 1419 (9th Cir. 1987) (under the *Handbook*, preservation of family unity is a critical factor in admitting refugees); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575 (9th Cir. 1986) (citing *Handbook* provision regarding membership in a “social group”); Hernandez-Ortiz v. INS, 777 F.2d 509, 513, 516 n.6, 517 (9th Cir. 1985) (applying *Handbook* provisions regarding relevant facts to consider in determining: reasonable possibility of persecution; group determination of refugee status; and imputed political opinion); Ananath-Firemont v. INS, 766 F.2d 621 (1st Cir. 1985) (applying *Handbook* provisions on the definition of “social group,” the significance of threats to members of a social group, and the weight of an applicant’s personal testimony); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985) (significance of credible testimony); Young v. INS, 759 F.2d 450 (5th Cir. 1985) (dissenting opinion), cert. denied, 474 U.S. 996 (1985) (citing *Handbook* for significance of credible testimony); Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984) (citing *Handbook* provisions on the evidentiary burden for proving a “well-founded fear”); Zavala-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984) (significance of credible testimony); Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), rev’d on other grounds, 467 U.S. 407 (1984) (applying *Handbook* definition of “well-founded fear” of persecution); McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981) (refugees fleeing persecution are often limited in the evidence they can present); Dwohoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988) (applying the *Handbook* provisions on convictions for serious nonpolitical crimes); Singh v. Nelson, 623 F. Supp. 545 (S.D.N.Y. 1984) (petitioners fleeing persecution are limited in the evidence that they can present); Hotel & 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) (the UNHCR *Handbook* is the “basic guide” in analyzing the term “well-founded fear”); Ellis v. Ferro, 549 F. Supp. 428 (W.D.N.Y. 1982) (development of the proper legal standards for consideration of asylum claims is to be informed by the traditional indices of legislative intent, and by the *Handbook*).

ple that sovereign nations have the right to raise and maintain armies, and therefore prosecution and punishment for the criminal offense of draft evasion or desertion does not constitute persecution within the meaning of the 1980 Refugee Act.

The Handbook position is consistent with this general principle,

27. Arteaga v. INS, 836 F.2d 1227, 1232 (9th Cir. 1988) (referring to the "legitimate authority to raise armies" possessed by national sovereigns); In re Vigil, Interim Dec. No. 3050, at 9 (BIA 1988) (referring to the "long established principle of international law that a sovereign government has the right to draft its citizens and maintain an army for the purpose of self-defense"); see also Conscientious Objection to Military Service, U.N. Doc. E/CN.4/Sub.2, at 14, U.N. Sales No. E.85.XIV.1 (1985) ("[u]nder international law and practice every nation may be said to have the right to organize its defence forces").

28. Rodriguez-Rivera v. INS, 848 F.2d 998, 1005 (9th Cir. 1988) ("requiring military service does not constitute persecution"); Arteaga v. INS, 836 F.2d 1227, 1232 (9th Cir. 1988) ("[t]his court has rejected persecution claims based on the threat of conscription into a national army"); Kaveh-Haghigy v. INS, 783 F.2d 1321 (9th Cir. 1986); Saballo-Cortez v. INS, 761 F.2d 1259 (9th Cir. 1985); Espinoza-Martinez v. INS, 754 F.2d 1536 (9th Cir. 1985); Rejaie v. INS, 691 F.2d 139 (3rd Cir. 1982); Batistic v. Pilliod, 286 F.2d 1961 (7th Cir. 1961) (refusal to serve in Yugoslavian military insufficient to qualify applicant for withholding of deportation); Chao-Ling Wang v. Pilliod, 285 F.2d 517, 520 (7th Cir. 1960) ("prosecution before a military tribunal convened pursuant to laws of a foreign state to try offenses committed by a member of the military forces of the country, cannot be construed to be physical persecution under the statute"); Villegas v. O'Neill, 626 F. Supp. 1241 (S.D. Tex. 1986); Glavic v. Beechie, 225 F. Supp. 24, 27 (S.D. Tex. 1963), aff'd, 340 F.2d 91 (5th Cir. 1964) (refusal to serve in the Yugoslavian Army not "the sort of persecution which has been held to justify parole"); In re Vigil, Interim Dec. No. 3050, at 10 (BIA 1988) ("We have consistently taken the position that a government's drafting a person for military service does not constitute 'persecution,' and that a person who fears returning to a given country only because of a prior unwillingness to perform military service there has not demonstrated eligibility for asylum."); In re A-G, Interim Dec. No. 3040, at 6 (BIA 1987) ("We hold to the long-accepted position that it is not persecution for a country to require military service of its citizens."); In re Lee, 13 I. & N. Dec. 236 (BIA 1969); In re Lia, 11 I. & N. Dec. 113 (BIA 1965).

The foregoing is consistent with the axiom that prosecution for a crime is generally not considered to be persecution: "Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim—or a potential victim—of injustice, not a fugitive from justice." Handbook, supra note 9, ¶ 57; see also MacCaud v. INS, 500 F.2d 355 (2nd Cir. 1974) (Canadian petitioner who feared prosecution and punishment for the crime of escape from prison while serving a sentence for the possession of counterfeit banknotes not eligible for withholding of deportation).


167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft evasion, does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.

168. 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. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country,

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but carves out two basic exceptions. The first applies when the draft evader or deserter suffers disproportionately severe punishment for the offense on account of race, religion, nationality, political opinion, or membership in a particular social group. 30 The second exception applies when the individual's refusal to serve in the military is based on "genuine political, religious or moral convictions, or . . . valid reasons of conscience." 31

or if he otherwise has reasons, within the meaning of the definition, to fear persecution.

Id. (emphasis added).

30. HANDBOOK, supra note 9, ¶ 169:

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social 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.

Id. (emphasis added).

31. HANDBOOK, supra note 9, ¶ 170-73:

170. There are, however, also 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 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 light of all other requirements of the definition, in itself be regarded as persecution.

172. Refusal to perform military service may also be based on religious convictions. 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. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies. In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

Id.

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In the first exception, involving disproportionate punishment, the
government's otherwise permissible motive of punishing an individ-
ual for the criminal offense of draft evasion or desertion is called into
question by its discriminatory application of the punishment. The
government's more severe punishment of an individual because of his
race, religion, nationality, social group membership, or political opin-
ion may transform the punishment into persecution. The second ex-
ception, which addresses conscientious objectors and is the focus of
this article, is based upon the rationale that to punish an individual
for adhering to his religious or political convictions is to persecute
the individual.

The Handbook's recommendation is based upon a distinction be-
tween the individual who refuses military service for reasons of con-
science and the individual who refuses for reasons of self-interest or
expediency. The state's right to obligate its citizens to perform mili-
tary service must be balanced against the rights of the individual.
The right to refuse military service for reasons of conscience is enti-
tled to deference. Thus, when the individual's refusal is not based on
reasons of conscience, the state's interest in maintaining its defense
generally prevails. However, the balance is quite different when the
state's right is weighed against the competing interest that both the
individual and society have in the cultivation and preservation of the
individual conscience. In such a case, the state's interest cannot be

32. The Handbook and federal precedent recognize that the line between prosecu-
tion and persecution is not clear. Handbook, supra note 9, ¶ 57 ("The . . . distinction
between prosecution and persecution] may, however, occasionally be obscured."). Prosecu-
tion may constitute persecution when the punishment is imposed against an individual
for an action or status which is protected within the refugee definition, or when the pun-
ishment is excessive. Id. Prosecution may also constitute persecution when the crime or
the punishment is politically motivated, Coriolan v. INS, 559 F.2d 993 (9th Cir. 1977);
In re Janus & Janek, 12 I.& N. Dec. 866 (BIA 1968), or when there is no indication of
legitimate judicial process, Blanco-Lopez v. INS, 858 F.2d 531 (9th Cir. 1988).
33. See supra note 27.
34. Justice Harlan F. Stone declared:
All our history gives confirmation to the view that liberty of conscience has a
moral and social value which makes it worthy of preservation at the hands of
the state. So deep in its significance and vital, indeed, is it to the integrity of
man's moral and spiritual nature that nothing short of the self-preservation of
the state should warrant its violation; and it may well be questioned whether
the state which preserves its life by a settled policy of violation of the con-
science of the individual will not in fact ultimately lose it by the process.

A similar sentiment was expressed in a United Nations report addressing the issue of
conscientious objection:
The conscience of the individual is a precious asset for every society. It is part of
the socialization process to nurture and encourage the moral conscience of
the individual, without which civilization would be meaningless. At the centre
of this process is the effort to instill in the individual the conviction that it is
immoral in most circumstances to take the life of other persons.
Rev.1, at 3 (1985).

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presumed to take precedence; policy then dictates an accommoda-
tion of the two opposing interests.

The increasing trend toward recognition of conscientious objection
as a fundamental human right (which is discussed in Section V)
leisure further moral justification to the individual asserting this right.
It bolsters the Handbook's position that protection should be ex-
tended to the individual who is not accorded the right to conscien-
tious objection from military service in his home country.35

Individuals who base their claim for asylum on their refusal to
perform military service must demonstrate that their convictions are
genuine, and that these convictions "are not taken into account by
the authorities of...[their home] country." For instance, where
conscientious objectors are not released or exempted from service be-
cause of their convictions, and are instead punished, such punish-
ment constitutes persecution. The UNHCR has indicated that a
claim to asylum based on conscientious objector status may be estab-
lished especially where the punishment is "significant,"36 although
that term has not been fully defined. The individual whose refusal to
serve is based on political convictions must establish one additional
criteria: namely that the military action with which he does not
want to associate himself is "condemned by the international com-
unity as contrary to basic rules of human conduct."37 Proof that
the military action contravenes human rights norms transforms the
objection from one based on mere political disagreement to one
based on international standards, which require abstention from par-
ticipation in acts of genocide and other gross violations of human
rights.38

In recommending refugee status for conscientious objectors, the

35. Handbook, supra note 9, ¶ 170-73.
36. "UNHCR takes the view...that, especially 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 perse-
cuion." Letter from Joachim Henkel, former Deputy Representative of the Office of the
37. See Handbook, supra note 9, ¶ 171. A United Nations General Assembly
resolution addressing the question of obligatory military service in South Africa is a use-
ful example of implementation of the principle contained in the Handbook. The resolu-
tion, which predated publication of the Handbook, recognizes the right of South African
citizens to refuse to serve in the armed forces of that country which enforce apartheid,
and calls upon member states to grant safe transit and asylum to those fleeing South
Africa for this reason. G.A. Res. 33/165, 33 U.N. GAOR Supp. (No. 45) at 154, U.N.
38. Trial of the Major War Criminals Before the International Mili-
tary Tribunal 173-74 (1947).
*Handbook* characterizes the judicially sanctioned punishment which the individual faces as persecution. In countries where human rights are routinely violated, the individual who refuses military service is often subject to extrajudicial sanctions, such as torture, disappearance, or assassination. The refusal to serve is commonly interpreted as a sign of disloyalty or opposition to the government.\(^\text{30}\) The imposition of such extrajudicial sanctions for draft evasion or desertion constitutes persecution\(^\text{40}\) on account of political opinion\(^\text{41}\) for both conscientious objectors, and nonconscientious objectors. If the likelihood of such harm could be established, it would provide a basis for the relief of withholding of deportation as well as political asylum. The problem lies in establishing the requisite probability that extrajudicial sanctions will be imposed. Military and paramilitary forces that carry out such abuses are not likely to admit having such a policy.\(^\text{42}\) The Board has consistently ruled inadequate the evidence submitted by draft resisters or draft evaders to establish extrajudicial sanctions.\(^\text{43}\) This article, however, will focus on the recommendation contained in *Handbook* paragraphs 170 through 173. Under these provisions, a showing of extrajudicial sanctions is not necessary; judicially imposed sanctions alone may constitute persecution and form the basis for relief.

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\(^{39}\) *See*, e.g., Aviles-Torres v. INS, 790 F.2d 1433, 1436 (9th Cir. 1986) (Salvadoran petitioner eligible for relief because “[i]dentification as a subversive, combined with refusal to join in the armed forces would place [him] in a group of prime targets for government retribution”).

\(^{40}\) It is generally accepted that torture, disappearance, or assassination which implicate the loss of life or freedom, constitute persecution. *See*, e.g., *Handbook*, *supra* note 9, ¶ 51 (“it may be inferred that a threat to life or freedom . . . is always persecution”).

\(^{41}\) The concept of imputed political opinion has been recognized in the Ninth Circuit and refers to persecution inflicted on an individual due to the government’s perception of that individual’s political opinions. Such persecution is on account of political opinion even though the individual may be neutral or hold no political opinions whatsoever. *See* Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985); Argueta v. INS, 759 F.2d 1395 (9th Cir. 1985). *But see* In re Maldonado-Cruz, Interim Dec. No. 3041 (BIA 1988) (characterizing the harm of assassination that an individual who deserted from the guerrillas faces as military discipline rather than persecution on account of imputed political opinion), rev’d, 883 F.2d 788 (9th Cir. 1989).

\(^{42}\) *See* Bolanos-Hernandez, 767 F.2d at 1285 (“Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.”).  

\(^{43}\) *In re* A-G-, Interim Dec. No. 3040 (BIA 1987) stated: The respondent further asserts that the penalty for failure to serve in the military is not imprisonment after trial but is likely to be torture and death at the hands of the death squads. Although he has presented evidence to show that many have been murdered by so-called death squads for suspected anti-government sympathies, he has not supported the contention that mere failure to serve in the military is the kind of activity which draws the attention of the persons who carry out these killings.

*Id.* at 7.

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III. Draft Evaders, Deserters, and "Conscientious Objectors": Analysis of Administrative and Federal Court Decisions

The only federal court decision which directly addressed the applicability of the Handbook in the cases of draft evaders and resisters was vacated upon the granting of a petition for rehearing en banc. Thus, there are no existing federal court decisions which discuss the applicability of Handbook paragraphs 167 through 174 in the case of young men who base their claim for asylum on the refusal to perform military service. However, several cases tend to affirm the Handbook's recommendation of asylum for such individuals. No federal court has rejected the principles expressed therein. Decisions of the Board of Immigration Appeals have been more numerous, and extremely inconsistent. In several cases the Board granted political asylum and withholding of deportation to draft evaders or deserters without referring to the Handbook, or providing a clear rationale for its decision. On other occasions, the Board expressly deferred to the Handbook, or specifically applied the relevant provisions. In other instances, the Board declared that it would not utilize the Handbook in making eligibility determinations in the cases of draft evaders and deserters. The following section reviews these federal and administrative decisions.

A. Federal Precedent

Sarkis v. Nelson and Sarkis v. Sava are the first federal court cases apparently utilizing the Handbook's criteria on draft evaders.

44. See M.A. A.26851062 v. INS, 858 F.2d 210 (4th Cir. 1988), reheg en banc granted, 866 F.2d 660 (4th Cir. 1989). The rehearing en banc was granted to review two separate and distinct issues: the proper legal standard to apply to draft resisters who seek refugee status, and the degree of deference owed by the federal courts to the Board in cases involving motions to reopen, pursuant to 8 C.F.R. § 209.11 (1988).


and deserters in adjudicating claims for relief arising out of the 1980 Refugee Act. These related cases involved the asylum claims of two Armenian Christians who feared returning to Iraq due, in part, to their refusal to join the military. The federal court remanded the case, instructing the Board to determine whether “performance of military service would be contrary to [the petitioners’] genuine political, religious, or moral convictions, or contrary to valid reasons of conscience.”51 The individuals subsequently failed to “demonstrate, or even to allege that military service would be contrary to their political, religious, or moral convictions” and relief was denied.52 The court in the two Sarkis cases did not make specific reference to the Handbook, nor did it explicitly discuss conscientious objection as a basis for relief. However, from the court’s verbatim use of the Handbook criteria, one can infer the incorporation of the criteria into the adjudication of the claim.53

Although it deals primarily with forcible conscription at the hands of the guerrillas, and not by the government, Arteaga v. INS54 contains an explicit reference to the concept of conscientious objection as a basis of asylum. The Salvadoran petitioner, Manuel Diaz Arteaga, feared forcible conscription by the guerrillas. The Ninth Circuit held that a nongovernmental group such as the guerrillas does not have the right to raise armies and that such forcible conscription by the guerrillas constitutes a deprivation of liberty which would amount to persecution under the statute.55 Governmental groups, the court held, have the “legitimate authority to raise armies by conscription” and therefore “this court has rejected persecution claims based on the threat of conscription into a national army (as

52. Sava, 599 F. Supp. at 726-27.
53. A recent unpublished opinion from the Fifth Circuit Court of Appeals similarly remanded a case to the BIA for consideration of the Handbook criteria. Sanchez-Perdomo v. INS, No. 88-4765 (5th Cir. 1989). The petitioner claimed that forced military service in El Salvador would be in violation of his political and moral beliefs. Both the immigration judge and the Board had treated the claim as based on mere fear of conscription, rather than an unwillingness to serve based on personal convictions. The court declared:

Petitioner's testimony indicated his personal opposition to the actions of the Salvadoran military. He expressed his desire to avoid participation in the killings and other human rights abuses. Petitioner testified that if he returned to El Salvador, he would probably be conscripted into the army and commanded to do things he opposed. His theory of eligibility for asylum, then, was not merely that he would be drafted into the military, but that he would be ordered to commit acts violating his political and moral beliefs.

Id. at 3-4.
54. 836 F.2d 1227 (9th Cir. 1988).
55. Id. at 1231-32 (“Because Arteaga’s neutral political opinion precluded his voluntarily joining the guerrillas, the guerrillas would have had to kidnap him to get him into their ranks. Such a deprivation of liberty on account of political opinion would amount to persecution.”).
distinct from punishment for conscientious objection from military service.\textsuperscript{56} Without referring expressly to the Handbook, Arteaga appears to follow its principles in separating claims based on conscientious objection from claims based merely on a refusal to serve in the military.

B. The Board of Immigration Appeals

\textit{In re Salim,\textsuperscript{57}} which involved a national of Afghanistan who fled after refusing to join the Afghan Army, was the first case subsequent to the passage of the 1980 Refugee Act in which the Board of Immigration Appeals considered a claim for asylum and withholding of deportation based on refusal to serve in the military. The Board held that because of the high level of desertion from the Afghan Army, and the brutal method of recruitment used to replenish the ranks, Salim’s claim was “clearly differ[ent] from persecution claims by aliens who merely seek to avoid military service in their country.”\textsuperscript{58} There is no mention of the Handbook, or any discussion of whether the military action in Afghanistan is “condemned by the international community as contrary to basic rules of human conduct” as required under Handbook paragraph 171. The Board did not more fully elucidate its rationale when it granted relief twice more to nationals of Afghanistan who fled to avoid military service.\textsuperscript{59} Subsequently, in \textit{In re A-G,\textsuperscript{60}} the Board held that the determinative factor in \textit{In re Salim} was that the army in which Salim did not want to

\begin{itemize}
  \item 56. Id. at 1232 (emphasis added).
  \item 57. 18 I. & N. Dec. 311 (BIA 1982).
  \item 58. Id. at 313.
  \item 59. Id. at 313.
  \item 60. Interim Dec. No. 3040 (BIA 1987).
\end{itemize}
serve was Soviet controlled. The basis for the Board’s reliance upon the ideological identity of the military is suspect, since the 1980 Refugee Act was intended to eliminate geographical considerations, and to effectuate a country-neutral standard.

After In re Salim, the Board directly addressed the applicability of the Handbook provisions on draft evaders and deserters on at least five occasions in cases involving Salvadoran and Guatemalan applicants. The Board appeared to take to heart the counsel of Ralph Waldo Emerson that “consistency is the hobgoblin of little minds.” The Board was consistent in only one respect—its denial of relief in all cases.

The first of these cases decided by the Board was In re Lainez-Lainez, involving a Salvadoran national. Audelino Lainez-Lainez fled El Salvador at the age of eighteen, after being advised by a family friend in the military that he was soon to be recruited. He was informed after his departure that the military had come looking for him. Lainez-Lainez testified that performance of military service was against his political and moral convictions, because the Army killed innocent and defenseless people. He feared that he too would be killed for his refusal to participate in these activities. The Immigration Judge denied relief, holding inter alia that “the obligation to perform military service or the consequences from the refusal to per-

61. Id. at 7 (“The case of the claimant in Matter of Salim...is distinguishable from that of the respondent because the former was refusing to serve, not in an army controlled by his own government, but in one which was 'under Soviet command.'”)

62. Prior to the passage of the Refugee Act, recognition as a refugee was conditioned on geographical and ideological factors. The first permanent statutory basis for the admission of refugees was established by the Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-239, 79 Stat. 911. Section 203(a)(7) allowed for the conditional entry of refugees who “because of persecution or fear of persecution on account of race, religion, or political opinion...have fled (1) from any Communist or Communist-dominated country or area, or (2) from any country within the general area of the Middle East.” Passage of the 1980 Refugee Act, which incorporated the international definition of refugee, eliminated this geographical and ideological preference. See Anker & Posner, The Forty Year Crisis: A Legislative History of the Refugee Act of 1980, 19 SAN DIEGO L. REV. 9, 11, 17-18 (1981).


64. R. W. Emerson, Self-Reliance, in Essays 27, 33 (1895).


66. The petitioner testified from his personal knowledge of atrocities; he was deeply disturbed upon seeing that innocent and defenseless people were often the victims of the military: “I’m not afraid [to fight]. But I don’t want to kill people that are defenseless. . . . [The armed forces] don’t sometimes kill the people they are going for. They kill other innocent people. . . .” Lainez-Lainez, transcript of hearing, at 31-33.
form such duties do not constitute persecution within the meaning of the Act." In denying the claim, the Board affirmed the immigration judge's holding, and expressly declined to follow the Handbook's recommendation in this matter: "We do not agree that the Handbook is authority for the determination of refugee status." An appeal of the Board's decision is currently pending at the Ninth Circuit Court of Appeals.

The Board next considered In re A-G-, which raised issues substantially similar to those raised in In re Lainez-Lainez. The applicant in In re A-G-, a Salvadoran national, asserted that participation in the military violated his political and moral convictions. Like Lainez-Lainez, A-G- had personal knowledge of atrocities committed by the military; his cousin had been killed after participating in an antigovernment demonstration, and his brother-in-law's brother was killed for providing food to the guerrillas. A-G- himself had been beaten twice by the National Guard. In addition, he submitted extensive evidence documenting the military's pattern of human rights abuses against civilians.

Instead of dismissing the Handbook, as it had done in Lainez-Lainez, the Board embraced it, citing to pages thirty-nine through forty-one (the section on deserters and persons avoiding military service) and quoting from paragraph 171. The Board noted that the Handbook sets forth exceptions to the "long-accepted position that it is not persecution for a country to require military service of its citi-

68. The Board stated:
The respondent also submits that the Handbook is authority for determining refugee status and proceeds to indicate how he established entitlement to the relief under its guidelines. We do not agree that the Handbook is authority for the determination of refugee status. The Handbook is the product of the Office of the United Nations High Commission for Refugees. The preface to the Handbook indicates that it was designed for the guidance of government officials—it does not purport to be mandatory authority. . . . Eligibility for asylum and withholding of deportation is determined under the applicable provisions of the Immigration and Nationality Act by this Board and the courts of the United States. Although the Handbook may be referred to for guidance in particular instances, it is not mandatory authority.
Id. at 5.
70. Id. at 2-3.
71. Id. at 3. The evidence submitted by the respondent included reports by Amnesty International and Americas Watch, affidavits of expert witnesses, and national newspaper articles. M.A. A26851062 v. INS, 858 F.2d 210, 217 (4th Cir. 1988), reh'g en banc granted, 866 F.2d 660 (4th Cir. 1989).
The two exceptions which the Board deemed relevant to A-G's claim were "where a disproportionately severe punishment would result on account of one of the five grounds enumerated in section 101(a)(42)(A) of the Act," or where the alien would necessarily be required to engage in inhuman conduct as a result of military service required by the government." The Board held that the applicant had failed to establish that he would suffer disproportionate punishment. Then, in addressing the claim of the objection based on political convictions, the Board declared that to show "condemnation by the international community," an individual must present a United Nations Resolution to that effect, analogous to the United Nations Resolution addressing South Africa.

In re A-G- is important for its recognition of the Handbook's authority in cases involving draft resisters. However, the Board's interpretation of the controlling Handbook language to require a United Nations Resolution to demonstrate "condemnation by the international community" may be critiqued for imposing an inappropriately high standard.

The applicant in In re Navas-Rivera, a Guatemalan national, based his claim for relief on a combination of factors, including his fear of military recruitment. Navas-Rivera was a member of the Seventh Day Adventist faith, and had been in seminary in preparation for the ministry. His religious beliefs as a Seventh Day Adventist did not permit him to perform combatant military service.

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73. As discussed supra at text accompanying notes 30-32, a showing of disproportionate punishment may result in refugee status for both conscientious objectors and non-conscientious objectors.
74. As discussed supra, at text accompanying notes 37-38, this is the requirement for the person basing his objection on political convictions.
75. See supra note 37.
76. The status of the Board's decision in In re A-G- is uncertain. As discussed infra in Section IV, the Fourth Circuit Court of Appeals reversed the Board in M.A. A26851062 v. INS, 858 F.2d 210 (4th Cir. 1988). Subsequently, the Fourth Circuit decision was vacated after granting of the government's motion for rehearing en banc. M.A. A26851062 v. INS, 866 F.2d 660 (4th Cir. 1989).
78. In addition to the conscientious objection aspect of his claim, the applicant feared persecution because his father, formerly a prominent member of a far-right wing party, was accused of participating in a kidnapping for ransom. The father had been beaten and, at the time of the applicant's deportation hearing, was still imprisoned as a political prisoner. Navas-Rivera allegedly was fired from a government job because of his relationship with his father, and the family farm was taken away. In addition, Navas-Rivera alleged that his family received anonymous telephone threats, and was constantly being watched. Id. at 2-3.
79. The following represents the official position of the Seventh Day Adventists regarding military service:
Throughout their history Seventh-day Adventists have been noncombatants.
They declared this position during the Civil War. They have reaffirmed it repeatedly through succeeding years. Government recognition of the Seventh-day
Navas-Rivera testified that in 1975, at the age of seventeen, he was given a deferment from combat position by the Guatemalan Army in accommodation of his religious beliefs. He testified that he subsequently learned from friends that "the military no longer honors special arrangements for religious beliefs and that he would be obligated to carry arms." 80 In 1983, he received a notice to report for military service, and, believing that he would be assigned to combatant service, he did not report. He feared both judicial and extrajudicial sanctions for his failure to report. Although it denied relief to Navas-Rivera, the Board’s majority opinion accepted the premise that punishment for refusal to serve in the military could form the basis for a claim to refugee status. 81 However, the Board held that the applicant had failed to establish that he would not again be permitted to serve in a noncombatant position. 82

In *In re Vigil*, 83 the Board again deferred to the authority of the *Handbook* in adjudicating a claim based on a refusal to perform military service. The applicant in *In re Vigil* had not alleged that his

Adventist Church as a noncombatant religious organization also dates back to Civil War days. This status has been granted them in the armed conflicts in which our nation has been involved since that time.

**National Service Organization of the General Conference of Seventh-Day Adventists, Why Seventh-Day Adventists Are Noncombatants, Washington, D.C., Oct. 11, 1943.**


81. In its majority opinion the Board stated: With regard to the respondent’s claim that he will be persecuted because of his failure to show up at his military interview, we initially note that the failure of a government to honor conscientious objectors and punishment for any subsequent refusal to serve in the military, is not persecution in and of itself. Punishment for failing to serve in the military is not persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, so long as the punishment is not greater than what the country imposes on anyone who fails to serve. However, if the punishment arises only because of refusal to serve based on one of the statutorily designated grounds, or if punishment is enhanced for such a reason, a claim of persecution may arise; such facts are not alleged in this case. The respondent failed to present any evidence to prove that the military will force him to carry arms against his religious beliefs. The respondent was allowed to serve as a medical cadet previously and he has failed to demonstrate that the military will no longer accept such an arrangement.

*Id.* at 4 (emphasis added).

82. In an unpublished decision, the Ninth Circuit Court of Appeals upheld the Board’s factual finding, and thus did not reach the issue of conscientious objection as a basis for relief. Navas-Rivera v. INS, No. 88-7266, slip. op. at 4 (9th Cir. July 6, 1989) ("The BIA’s conclusion that petitioner ‘failed to present any evidence to prove that the military will force him to carry arms against his religious beliefs’ . . . is supported by substantial evidence.").

service in the Salvadoran Army offended his conscience or convictions; he had stated only that he feared the possibility of being conscripted by the army, and he wished to remain neutral. Under these circumstances, Handbook paragraph 169 recommends relief only if the punishment of disproportionate. The Board applied this criterion and denied relief, finding that the record did not demonstrate the application of disproportionate punishment.

In In re Canas, the Board retreated from the position articulated in In re A-G., In re Navas-Rivera, and In re Vigil. In those cases the Board expressly recognized that the Handbook informed its adjudication of draft resistance claims and applied the Handbook’s relevant provisions. In In re Canas the Board rejected the Handbook and declined to apply its recommendations.

The two petitioners in In re Canas refused to serve in the Salvadoran military because their religious beliefs as Jehovah’s Witnesses precluded both combatant and noncombatant participation. The Immigration Judge and the Board found the two men to be sincere adherents to the Jehovah’s Witness faith, and held that their religious convictions were genuine. The evidence submitted established that military service is obligatory for all men from ages eighteen to thirty and that there are no exemptions for reasons of conscience. Those who resist or evade service are treated as deserters, and during wartime may be imprisoned from five to fifteen years, depending

84. Id. at 4.
85. Id. at 6.
86. Id. at 10.
88. The official position of the Jehovah’s Witnesses regarding military service is as follows:

   Jehovah’s Witnesses are conscientiously opposed to war and to their participation in such in any form whatsoever. For this reason they inform officials of the government that they conscientiously object to serving in the military, in any substitute service therefor or in any civilian capacity which fosters or supports the military. . . .

89. Interim Dec. No. 3074 at 3, 9.
90. “Military service is mandatory for all Salvadorans between eighteen and thirty years of age. In case of need, all Salvadorans suitable for performance of military tasks shall be soldiers. A special law shall regulate this matter.” Constitucion de la Republica de El Salvador 1983 y Reglamento de la Asamblea Legislativa art. 215 (El Sal.).
91. Interim Dec. No. 3074, at 9; see Letter from Gisela von Muhlenbrock, Senior Specialist, Library of Congress Law Library, to Leonard Rosenberg, Assistant District Counsel, Immigration and Naturalization Service (Jan. 29, 1986) (“Salvadoran laws on conscription do not include conscientious objection as an exemption for military service nor do they include procedures to obtain such status or alternative service as a noncombatant or civilian.”); see also Conscientious Objection to Military Service, U.N. Doc. E/CN.4/SUB.2, at 23, 26, 28 (1983).
on the circumstances. Arguably, a consistent application of Handbook paragraph 172 would have resulted in recognition of the applicants as refugees. The Board, however, refused to defer to the Handbook's terms and assessed the claim separately under the 1980 Refugee Act. Therein, the Board found no basis for relief and held that the harm feared by the Canas brothers for refusal to perform military service does not constitute persecution on account of religion under the 1980 Refugee Act.

In re Canas and In re A-G. are both published opinions, binding immigration judges nationwide, and severely limiting the circumstances under which young men who refuse military service for reasons of conscience may qualify for refugee status. They are particularly troublesome because they indicate a lack of consistency on the part of the Board of Immigration Appeals, and demonstrate a narrow mechanistic analysis which does not comport with fundamental principles embodied in the 1980 Refugee Act. The following section reviews in detail these two decisions and attempts to formulate a reasoned response to the Board's position.

IV. RESPONDING TO THE BOARD OF IMMIGRATION APPEALS: IN RE A-G, IN RE CANAS

A. In re A-G-

In In re A-G-, the Board accepted the applicability of the Handbook but denied relief. Although the Board agreed that refusal to serve in the military may form the basis for relief if the military action has been condemned by the international community, the

95. For a discussion of the weight accorded to published decisions, see Comment, A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases, 75 VA. L. REV. 681 (1989).

The vast majority of Board decisions are not published and are given no precedential weight—that is, they are not binding on the INS or the immigration judges beyond the immediate controversy—and the Board does not cite previous unpublished decisions as authority in its opinions. The Board selects a small number of opinions (an average of thirty per year during the last six years) to be published as "precedent decisions," which are binding on both the INS and the immigration judges and are frequently cited by the Board and even the federal courts.

Id. at 685 (footnotes omitted).
Board interpreted the relevant section of the *Handbook* to impose three additional requirements: a United Nations Resolution condemning the military action; a showing that the human rights abuses are the policy of the Salvadoran government; and a showing that the respondent would personally be required to carry out these abuses.

The Board's decision was appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit reversed the Board and found that the petitioner had established a prima facie case for relief. Subsequently the government brought a motion for rehearing en banc; this motion was granted, vacating the panel's decision. Although *M.A. v. INS* is no longer of precedential value, its analysis is instructive. The Fourth Circuit Court of Appeals affirmed the basic premise that punishment for refusal to serve with a military that engages in internationally condemned acts can form the basis for a successful request for political asylum. The court went on to reprimand the Board for imposing the three additional requirements.

First, the court rejected the requisite of a United Nations Resolution condemning the military action of the Salvadoran government. The court reasoned that the Geneva Conventions of 1949 constitute an invaluable set of standards for assessing the actions of a military during war, and that the evidence submitted by the petitioner showed consistent contravention of these rules by the government of El Salvador.

Relying on established asylum jurisprudence, which recognizes that a claim for relief may be based upon fear of persecution by

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97. *M.A. A26851062*, 858 F.2d at 215-16.
99. The court stated:

The Geneva Conventions of August 12, 1949 represent the international consensus regarding minimum standards of conduct during wartime. They include the following, as to all of which M.A. has presented evidence to show their contravention by the Salvadoran military: the obligation to treat humanely persons taking no active part in hostilities, and the prohibition of certain acts, including violence to life and person, specifically murder of all kinds, mutilation, cruel treatment, and torture; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.

*M.A. A26851062*, 858 F.2d at 219.
groups a government cannot or will not control, the court set aside the BIA’s requirement that the commission of human rights violations be the result of government policy.\textsuperscript{100}

Finally, the court held that the petitioner need not show that he would personally be forced to commit these acts since the focus of the \textit{Handbook} is on “association” with such activities, and not commission. The court noted that when the violations are pervasive, as they are in El Salvador, there is a greater likelihood that the individual will be personally forced to participate in their commission.

The Fourth Circuit’s position is appropriate, and consistent with the language of the \textit{Handbook} and with concepts generally applicable to asylum jurisprudence. The \textit{Handbook} itself contains no requirement of proof of personal participation in the commission of human rights abuses. To the contrary, the objector need only show that he sincerely “does not wish to be associated”\textsuperscript{101} with this type of activity. Similarly, there is no mention of the requirement of a United Nations Resolution; in fact, in a letter predating the decision in \textit{In re A-G}, the former deputy counsel for the UNHCR specifically stated that “it is not an absolute prerequisite—even though it is clearly most useful—that there exist specific condemnation of that military action by the international community,” and that it is sufficient that “the military action under consideration violates international humanitarian law (the laws of war), or that the military forces in which he is resisting service are violating internationally recognized human rights.”\textsuperscript{102}

\textsuperscript{100} The court declared:

\textit{We also decline to adopt the Board’s requirement that there be proof that the acts of atrocity with which M.A. does not want to be associated are the policies of the Salvadoran government. It is sufficient that M.A. show that the Salvadoran government is unwilling or unable to control the offending group, here, the armed forces. See Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9 Cir.1987 [sic]) (persecution found by a single member of the armed forces, which the Duarte government cannot control “despite the staunchest efforts. . .” provided basis for well-founded fear); Bolanos-Hernandez v. INS, 767 F.2d at 1284 (applicant for asylum must show “persecution by the government or by a group which the government is unable to control.”); see also McMullen v. INS, 658 F.2d 1312, 1315 n.2 (9 Cir.1981 [sic]) (in § 243(h) proceeding persecution includes persecution by nongovernmental groups which the government is unable or unwilling to control). Id. at 218. The Fourth Circuit’s position is supported by the \textit{Handbook} (it provides that nongovernmental acts “can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”). \textit{Handbook}, supra note 9, ¶ 65.}

\textsuperscript{101} \textit{Handbook, supra note 9, ¶ 171.}

\textsuperscript{102} Letter from Joachim Henkel, former Deputy Representative of the UNHCR,
The requirements imposed by the Board in *In re A-G* thwart the intent implicit in *Handbook* paragraph 171: an intent to provide international protection to individuals of conscience who would refrain from the commission of acts by their government which contravene human rights norms. Paragraph 171 must certainly be read as an expression of the wisdom acquired through the tragic experience of World War II. It articulates the principle, now accepted by civilized nations, that individuals are obligated to abstain from participation in acts of genocide and other gross violations of human rights. Such nations cannot decry war crimes and acts of genocide on the one hand, and yet deny protection to those individuals who make a choice of conscience to refuse association with the commission of such acts.

United States courts have held that individuals are personally responsible for taking part in actions contrary to international law, that is, human rights abuses which constitute violations of international instruments. These concepts have been incorporated into our 1980 Refugee Act; it excludes from the refugee definition “any individual who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” Such individuals are also barred from the relief of withholding of deportation. Direct, personal participation in the persecutory acts is not necessary for a finding that an individual assisted in the persecution of others. Furthermore, the fact that an individual was co-

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103. *Trial of the Major War Criminals Before the International Military Tribunal* 173-74 (1947); see also *Conscientious Objection to Military Service*, U.N. Doc. E/CN.4/Sub.2/1983/30/Rev.1, U.N. Sales No. E.85.XIV.1, at 6 (1983) (“The Nurnberg principles, contained in the Charter of Nurnberg Tribunal, and reaffirmed in General Assembly resolution 95(I) of 11 December 1946, make the individual personally responsible for certain actions contrary to international law, whether or not he has taken part in the decision-making process.”).


The exclusion language of INA § 101(a)(42) and INA § 243(h)(2) is derived from, and is almost identical to, the language contained in INA § 241(a)(19), 8 U.S.C.A. § 1251(a)(19). This statute mandates deportation of any alien who:

(a) the Nazi government of Germany

(b) any government in any area occupied by the military forces of the Nazi government of Germany

(c) any government established with the assistance or cooperation of the Nazi government of Germany

(d) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

*Id.* (emphasis added).

ered to commit such an act is most likely not exculpatory. The Board's position could bring about the anomalous result that an individual who feared he would be peripherally involved in human rights abuses committed by the military would be unable to establish eligibility for relief under paragraph 171 as a conscientious objector, but subsequently would be excludable from relief as a persecutor.

B. In re Canas

1. Rejection of the Handbook

In In re Canas the Board chose not to follow the Handbook's recommendations; in so doing, it abruptly departed from its own precedent, including In re A-G- (in which it had applied the Handbook provisions), and from federal precedent. The explanations given for this break were that the Protocol is silent on this issue, that the Handbook is not binding, and that its position in the case of the conscientious objector is ambiguous.

First, the Board's reliance on the nonbinding nature of the Handbook as a justification for refraining from its application appears disingenuous. The nonbinding nature of the Handbook has long been recognized, and at the same time did not preclude the treatise from serving as an interpretive aid in an unbroken line of cases, including those involving issues of draft evasion and desertion from the military.

1. War criminals, quislings and traitors;
2. Any other person who can be shown:
   (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
   (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.


110. See supra note 26.


112. See supra note 25.


114. See supra notes 25-26, 47.
Second, the Board’s reliance on the silence of the Protocol is misplaced. The Protocol defines refugee as any person with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”116 The Protocol does not provide a substantive interpretation of the essential terms implicated in the refugee definition. It was for this very reason that the Handbook was published—to give meaning to terms not expressly defined within the Protocol.116 The Handbook is of most value in those cases where the Protocol’s treatment of an issue is limited. The inference drawn by the Board, that the silence of the Protocol on an issue diminishes the weight to be accorded the Handbook, is without authority, and is contrary to the opinion of the UNHCR itself.117

The Board’s observation that it need not follow the Handbook because its guidance in this area is ambiguous is equally problematic. The ambiguity found by the Board consisted of the fact that Handbook paragraph 173118 counsels states to consider the increasing international trend toward granting the right of conscientious objection to citizens in determining whether objection to military service for reasons of conscience should be a basis for granting refugee status. The Board seized upon the language in the last sentence of the paragraph, which after discussing this trend, states: “In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for

115. See Protocol, supra note 2, art. 1.

116. For example, Handbook, supra note 9, ¶¶ 51-53, gives meaning to the term “persecution.” This is of great utility since “[p]ersecution” is not defined in the 1951 Convention or in any other international instrument. G. Goodwin-Gill, The Refugee in International Law 38 (1983). The Handbook outlines circumstances under which discrimination may rise to the level of persecution, Handbook, supra note 9, ¶¶ 54, 55, or when punishment for a crime may constitute persecution. Id. ¶¶ 56-60.

117. See Amicus Curiae Brief of the Office of the United Nations High Commissioner for Refugees, Canas v. INS, No. 88-7444 (9th Cir. 1989) (authored by Guy S. Goodwin-Gill, Susan Timberlake, Ralph G. Steinhardt) [hereinafter Amicus Curiae Brief of The UNHCR]. The UNHCR argued:

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. . . . Significantly, there is no provision in the Protocol that excludes conscientious objectors—in contrast to war criminals for example—from refugee status. Convention, Article a(1). The Board opines that there was, at the moment of drafting, no consensus that persons like the applicants [conscientious objectors on account of religious convictions] 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.

Id. at 13-14 (emphasis added).

118. See supra note 31.
genuine reasons of conscience.” The Board interpreted the phrase “would be open to Contracting States” as constituting a retreat from the position set forth in the preceding paragraphs recommending refugee status for such persons. To the contrary, paragraph 173 strengthens the recommendations of paragraphs 170 through 172 by emphasizing the growing acceptance of a right to conscientious objection. Once again the Board’s interpretation was contrary to the UNHCR analysis.119

In choosing not to recognize the relevancy of the Handbook, the Board in In re Canas was in the unusual position of disagreeing with the Immigration and Naturalization Service. The INS Appellate Counsel agreed with the respondents on the fundamental legal issue that religious conscientious objectors may be recognized as refugees.120 The Board’s posture also contradicts the position taken by the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the State Department. Pursuant to statute, the BHRHA issues advisory opinions on applications for political asylum.121 Notably, in

119. 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. 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 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. . . .

Amicus Curiae Brief of the UNHCR, supra note 117, at 21.

120. The appellate counsel stated the following at oral argument:

The basic issue as I would state it, and this is somewhat in the language of the U.N. Handbook and of the decision, is whether where no alternative to military service exists, as is the case in El Salvador, and assuming the religious conviction of the respondent is reasonably credible. . . . a draft evader or a deserter may be accorded a grant of asylum. . . . I would think that the Board could hold that membership in such a sect, a truly devout membership, would entitle someone to asylum. . . .

Transcript of oral argument before the Board of Immigration Appeals at 10-13 (Mar. 4, 1988).

121. 8 C.F.R. § 208.8(d) (1988) (State Department opinion letters are to be incorporated into the record). Favorable State Department letters are rare when dealing with countries that maintain friendly diplomatic ties with the United States. See Smith, A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals’ Actions in Asylum Cases, 75 Va. L. Rev. 681, 719 (1989) (“Although these opinions are prepared by the Bureau of Human Rights and Humanitarian Affairs (BHRHA), the BHRHA frequently consults the desk officers for the applicant’s native country. The desk officers are not neutral sources of information on political conditions in the countries to which they are assigned.”). Kasravi v. INS, 400 F.2d 675, 677 n.1 (9th Cir. 1968) (“[a] frank, but official discussion of the political shortcomings of a friendly nation is not al-
two cases involving Jehovah’s Witnesses from El Salvador who fled to avoid military service, the BHRHA has recommended grants of asylum. In at least two other cases where the applicants’ alleged objection to military service was based on religious objections, the BHRHA affirmed the position of the Handbook, but issued negative opinions based on its finding that the applicants had not met the relevant criteria. On other occasions the State Department has addressed the issue of Salvadoran conscientious objectors by stating that although the right to an exemption or to noncombatant service does not exist in law, it does exist in practice. There is no evidence to support this position, but what is valuable about even these letters is the State Department’s tacit acceptance of the premise set forth in the Handbook.

ways compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world.

122. A24 343 675, positive advisory opinion (Dec. 12, 1988); A28 960 334, positive advisory opinion (May 2, 1989). Interestingly, the State Department’s advisory opinion in Canas, which was issued August 8, 1985, was negative and conformed to boiler-plate language; it did not address the conscientious objector basis of the claim.

123. The letters declared:
The applicant believes that he faces persecution because he refuses to serve in his country’s military forces. In countries, such as El Salvador, where military service is compulsory, failure to perform such service, whether through draft evasion or desertion, is usually punishable by law. The penalties vary from country to country but, if legally imposed, are not normally regarded as persecution. Fear of persecution and punishment for draft evasion or desertion does not in itself constitute the basis for a well-founded fear of persecution within the meaning of the Convention and the Protocol. On the other hand, an applicant who is a draft evader or deserter may be considered a refugee, provided it can be shown that he would suffer disproportionately severe punishment for his evasion or desertion on account of his race, religion, nationality, membership in a particular social group or political opinion, or it can be demonstrated that 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.

A27 527 104, advisory letter (May 29, 1986); A26 769 967, advisory letter (Aug. 11, 1986) (emphasis added).

124. The applicant alleges persecution for refusing to serve in military forces on religious grounds. The laws of El Salvador do not include conscientious objection as grounds for exemption from military service nor do such laws include procedures to obtain alternate service as a non-combatant serviceman or civilian. However, in actual practice, the army attempts to use conscientious objectors in such non-combatant positions as clerks, medics, or cooks, wherever possible.


125. In January 1987 then President of El Salvador Jose Napolean Duarte proposed a law that would have assigned recruits who, “for religious reasons,” could not carry arms to “special units” designated by the High Command. The proposed law also would have exempted only sons, school teachers, and pastors, among others, from military service, and would be applied to all Salvadorans “without regard to sex, class or condition.” This law was never passed. See Lindsay-Poland, Youth Under Fire: Military Conscription in El Salvador (publication forthcoming as a special report by the Center on War and the Child).
The Board’s decision not to defer to the Handbook in *In re Canas* is unsupported by precedent. In addition, it contradicts the position held by the Department of State and the INS Appellate Counsel.

2. *The Board’s Analysis of Persecution On Account of Religion*

After ruling that it was not bound to follow the Handbook recommendations, the Board in *In re Canas* analyzed the respondents’ claim under the 1980 Refugee Act. It did not address whether the type of harm the respondents feared was persecution, but moved directly to the question of causal relationship: is the harm imposed on account of one of the five enumerated grounds?

The respondents had alleged two distinct types of harms—prosecution and punishment for their refusal to perform military service contrary to their religious beliefs, and extrajudicial sanctions for the political opinion imputed to them as a result of their refusal to serve. The Board ruled that the respondents had not established a likelihood of extrajudicial sanctions; it thus limited its analysis to whether prosecution and punishment of Jehovah’s Witnesses for refusal to serve in the military constitutes persecution on account of religion.

The Board held that prosecution and punishment under these circumstances does not constitute persecution on account of religion. It reached this conclusion by applying a constricted analysis of the “on account of religion” requirement. The Board focused solely on the motivations of the government, and ignored the effect of the government’s sanctions on the individual’s religious practices. The Board conceded that the respondents were being punished for adhering to their religious beliefs. However, the Board reasoned, the government’s motivation was not to punish them for holding these beliefs, but for the offense of refusing to comply with the conscription law. Therefore, the Board concluded that such punishment does not constitute persecution on account of religion.126

The analytical framework thus conceived by the Board calls into question the promise of protection from religious persecution contained within the Protocol and the 1980 Refugee Act. The exclusive

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126. The opposite conclusion has been reached by the State Department, which found religious persecution to exist in Hungary because of the imprisonment of conscientious objectors. *Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs, U.S. Department of State, Religious Persecution in Hungary* (1988).
focus on the purported motivations of the government in enforcing conscription is overly restrictive. In this case, enforcement of the conscription law denies the individual the power to make the most fundamental decision—whether to participate in a war and engage in killing another human being. The locus of the Board’s inquiry is misplaced; it errs in considering as irrelevant the effect of the law and looking only at the motivations of the government.

Case law on persecution on account of religion arising under the 1980 Refugee Act is scant, and does not address the issue raised by the Board’s analysis.127 Thus, it is instructive to consult other sources and authorities to develop the meaning of persecution on account of religion. The Universal Declaration of Human Rights declares: “Everyone has the right to freedom of thought, conscience and religion” and this right includes the “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.”128 This broad statement provides a more appropriate basis for discussion and assessment of the parameters of persecution on account of religion. A finding of persecution must look both at the protected religious interest at stake, as well as the government’s motivation; a more limited analysis transforms the right to practice one’s religion into a mere formality.129

127. The motivation of the persecutor was not an issue in a sampling of cases alleging, inter alia, persecution on account of religion. Gumbol v. INS, 815 F.2d 406 (6th Cir. 1987); Yousif v. INS, 794 F.2d 236 (6th Cir. 1986); Dawood-Haio v. INS, 800 F.2d 90 (6th Cir. 1986); Shamon v. INS, 735 F.2d 1015 (6th Cir. 1984); Nasser v. INS, 744 F.2d 542 (6th Cir. 1984); Dally v. INS, 744 F.2d 1191 (6th Cir. 1984); Youkhanna v. INS, 749 F.2d 360 (6th Cir. 1984); In re Salama, 11 I. & N. Dec. 536 (BIA 1966); In re Liadakis, 10 I. & N. Dec. 252 (BIA 1963).


129. The Ninth Circuit has held that it could analyze the “on account of” requirement from either the victim or the persecutor’s perspective. Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987) (persecution on account of political opinion found in case in which Salvadoran Army sergeant Zuniga repeatedly raped and beat civilian woman, Olimpia, because Zuniga had the political opinion “that a man has the right to dominate” a woman, and Olimpia had the political opinion that “no political control exists to restrain a brutal sergeant”); Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) (“in determining whether threats of violence constitute political persecution . . . we may look to the political views and actions of the [persecutor] as well as to the victim’s and we may examine the relationship between the two”).

This analytical flexibility was also demonstrated in a policy guideline issued by former Attorney General Edwin Meese regarding asylum for nationals of the People’s Republic of China. Meese stated that a refusal to follow the family planning policy of “one-child per couple” based on reasons of conscience should be viewed as an act of political defiance sufficient to establish refugee status. Office of the Attorney General, Memorandum to INS Commissioner Alan Nelson, Aug. 1988, reprinted in the Am. IMMIGN. LAW. Ass’n NewsL., (Nov. 1988). The Board rejected the Meese guidelines in In re Jin Han Chang, A27 202 715, Interim Dec. No. 3107 (May 12, 1989). “We cannot find that implementation of the ‘one couple, one child’ policy in and of itself, even to the extent that involuntary sterilizations may occur, is persecution or creates a well-founded fear of
Finally, in ruling that the punishment of the Canas brothers does not constitute persecution, the Board also relied heavily on the fact that the Salvadoran conscription law applies to all individuals equally, regardless of their religious affiliation. An analogy to domestic first amendment law illustrates the problematic nature of such an analysis; it has long been recognized that application of a neutral statute may improperly burden the religious freedoms of some individuals. 130 Under these circumstances, to argue that equal treatment defeats a claim of persecution is illogical; it is comparing “like with unlike.” 131 Where, on the one hand, the state may be justified in punishing a “mere” draft evader or deserter, different values must be balanced in justifying the punishment of a resister of conscience.

V. THE DEVELOPING TREND TOWARD RECOGNITION OF CONSCIENTIOUS OBJECTION AS A FUNDAMENTAL HUMAN RIGHT

The decision to confer refugee status on conscientious objectors should be informed by domestic and international norms. Decisions such as *In re Canas* and *In re A-G* must be considered in light of the standards of civilized nations. The right to conscientious objec-

persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.”” 130 United States domestic law arising under the first amendment free exercise clause is useful by analogy for its recognition that neutral statutes can have a differential impact on individuals depending on their religious affiliations and beliefs. The fact that no discriminatory impact was intended is insufficient to defeat a claim of interference with the free exercise of religion. *Hobbs v. Unemployment Appeals Comm'n*, 408 U.S. 136 (1987) (reaffirming *Sherbert*); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (Jehovah's Witness who, for religious reasons, quit his job in a weapons plant, was entitled to unemployment benefits); *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”); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh Day Adventist who, for religious reasons, refused to work on Saturdays, was entitled to unemployment benefits).

131.

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. 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 issue. 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.

tion has long been recognized in the United States,\textsuperscript{132} and there is an emerging trend toward its recognition as a fundamental human right.\textsuperscript{133}

The international trend may be seen as a natural outgrowth of the right to freedom of thought, conscience, and religion which is contained in numerous treaties, including the Universal Declaration of Human Rights,\textsuperscript{134} the International Covenant on Civil and Political Rights,\textsuperscript{135} the American Convention on Human Rights,\textsuperscript{136} and the

\begin{footnotesize}
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\item The tradition of conscientious objection is rooted in the early colonial period in the United States. In 1661 Massachusetts enacted the first legal provision allowing conscientious objection. To a great degree, this was the result of the influence of Quaker and Mennonite settlers. Universal conscription laws enacted in the twentieth century have all contained provisions for conscientious objection to military service. The earliest conscription law of the 1900s limited exemption to members of “peace churches,” those religions which required abstention from all military service. Act of May 18, 1917, ch. 154, 40 Stat. 78 (repealed 1919). The current statute, as interpreted by the United States Supreme Court, provides exemption for those individuals who object to participation in all wars as a result of religious, moral, or ethical beliefs, and is thus significantly broader than the earlier enactment. See Military Selective Service Act § 6(j), 50 U.S.C.A. app. 456 (j) (West 1981); 32 C.F.R. 1636.3-1636.6 (1989); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). For an historical and philosophical discussion of conscientious objection in the United States, see S. Kohn, Jailed for Peace: The History of American Draft Law Violators 1658-1985 (1986).
\item Discussion of the international trend toward recognition of conscientious objection as a fundamental human right is drawn primarily from the excellent discussion of the same contained in Amicus Curiae Brief of the UNHCR, supra note 117.
\item Article 18 of the Universal Declaration of Human Rights declares: “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.” G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).
\item Article 18 of the International Covenant on Civil and Political Rights declares:
\begin{enumerate}
\item Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
\item No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
\item Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, health, or morals or the fundamental rights and freedoms of others.
\item The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
\end{enumerate}

\item Article 12 of the American Convention on Human Rights declares:
\begin{enumerate}
\item Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private.
\item No one shall be subject to restrictions that might impair his freedom to
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European Convention for the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{137}

In March 1989, after more than a decade of consideration and study,\textsuperscript{138} the Commission on Human Rights of the United Nations adopted a resolution recognizing the right to conscientious objection as "a legitimate exercise of the right of freedom of thought, conscience and religion." The resolution appeals to states to provide for alternative service.

The Council of Europe has dealt with the question of conscientious objection in a manner similar to the United Nations. In April 1987 the Committee of Ministers of the Council of Europe made the recommendation that "[a]nyone . . . 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. . . .

\footnotesize{\begin{verbatim}
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.


\textsuperscript{137} Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms declares:
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and the freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.


\end{verbatim}}
Such persons may be liable to perform alternative service.\textsuperscript{139}

Although the recognition of the right to conscientious objection as a fundamental human right is by no means a requisite for acceptance of the \textit{Handbook} provisions, it is significant for its expression of an enlightened trend, a trend which should inform the implementation of the 1980 Refugee Act.

VI. THE SALVADORAN AND GUATEMALAN CONSCIENTIOUS OBJECTOR: HOW TO MEET THE \textit{HANDBOOK} CRITERIA

The Board of Immigration Appeals has declined to grant asylum to young men from El Salvador and Guatemala who refuse to participate in the military for reasons of conscience. Nonetheless, until the federal courts speak on this issue, it is premature to abandon this theory on behalf of asylum seekers. Attorneys representing young men who express an aversion to military service should inquire into the underlying reasons. In cases where the applicant refused military service due to genuine religious, political, or moral convictions, or valid reasons of conscience, a claim may lie. The record should set forth the essential elements of the claim—the genuineness of the respondent’s convictions, and the form of military participation required—to preserve the issue for appeal.

\textit{A. The Form of Military Participation}

A claim for asylum arising under the \textit{Handbook} must establish: (1) mandatory conscription; (2) no exemption for reasons of conscience; (3) judicial sanctions; and (4) condemnation of the military action by the international community (in the case of the individual whose objection is based on political convictions). Both El Salvador and Guatemala meet these criteria.

\textit{1. El Salvador}

As previously noted, Article 15 of the Salvadoran Constitution states that military service is obligatory for all men between the ages of eighteen and thirty.\textsuperscript{140} The Salvadoran Constitution further states that a secondary law will be passed to regulate military service, but to this date no such secondary law has been enacted. Although there are written procedures requiring young men to report for military duty,\textsuperscript{141} the actual practice is one of forcible recruitment affecting

\textsuperscript{139} \textit{Recommendation of the Comm. of Ministers}, Doc. No. R(87)8 (Apr. 9, 1987).

\textsuperscript{140} \textit{Constitución} art. 215 (El Sal.).

\textsuperscript{141} \textit{Reglamento Para la Organización de las SITUACIONES ACTIVA, RESERVA Y RESERVA TERRITORIAL DEL EJÉRCITO} (Regulation for the Organization of Active, Reserve and Territorial Reserve Status of the Army) (Oct. 6, 1933). According

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primarily the sons of the poor.\footnote{142} The roundups of young men on the streets often result in the recruitment of teen-age boys well below the legal age of recruitment.\footnote{143} Salvadoran law does not recognize conscientious objection as a valid ground for refusing military service, and draft resisters are punished as deserters.\footnote{144} Because El Salvador is currently at war, the crime of desertion is aggravated and carries a penalty of five to fifteen years.\footnote{145} There have been repeated statements of severe censure regarding the conduct of the war, which may be cited to establish condemnation by the international community.\footnote{146}

to the Regulation, young men are to report to the military unit nearest their home during the first five days of January each year. Local boards, along with the assistance of town mayors, are to prepare listings of those to be inducted.

\footnote{142} Salvador Army Fills Ranks by Force, N.Y. Times, Apr. 21, 1989, at A3, col. 2 ("But while the poor fight, bleed and die for a system dominated by the economic elite, most wealthy young Salvadorans avoid military service. The Army allows well-to-do youths to buy their way out of the service, and the military almost never forcibly recruits soldiers in wealthy neighborhoods."); After Parades and Promises, Duarte Flounders in El Salvador, N.Y. Times, Feb. 16, 1987, § 1, at 7, col. 2 ("The sons of the rich are safe because there is no draft and the army press gangs do not pick up young men in affluent neighborhoods. . . .")

\footnote{143} Salvador Army Fills Ranks by Force, N.Y. Times, Apr. 21, 1989, at A3, col. 1 ("The 57,000-man Salvadoran military forcibly enlists 12,000 a year, often snatching teen-agers as young as 14 from poor and rural families.").


Although a government may have the right to conscript its citizens, the recruitment of underage children in violation of international instruments as well as internal regulations, as in the case of El Salvador, is without legitimacy, and may form the basis of a claim for asylum independent of any claim of refusal based on reasons of conscience. See In re Roberto Antonio Campos, A29 560 623 (San Francisco Immigration Court) (asylum granted on May 9, 1989 to a Salvadoran boy who was forcibly recruited at age 15; IJ held that forced recruitment of underage individual constituted kidnapping).


\footnote{145} Código de JUSTICE MILITAR, supra note 92, arts. 137-39.

Two forms of mandatory service exist in Guatemala—regular military units and civil patrol units. The civil patrols were formed as part of the Guatemalan government’s response to the armed opposition movement. Service in the military is obligatory for all men over the age of eighteen. The law requires voluntary enlistment; in reality, forced recruitment similar to recruitment in El Salvador is the norm. There is no exemption for conscientious objectors, who may be imprisoned. Service in the civil patrol is mandatory for all Guatemalan males between the ages of eighteen and fifty. In contrast to military service, which has juridical legitimacy, there is no statutory basis, executive order, or edict for the civil patrol and obligatory service, in fact, violates the Guatemalan Constitution. There is substantial evidence of the imposition of extrajudicial sanctions against individuals refusing to participate in the civil patrols and a new human rights organization, Runujel Junam Council of Ethnic Communities, has been established in Guatemala to support those

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147. CONSTITUCION art. 135 (Guat.) (it is the duty of every Guatemalan citizen “to give the military and social service in accordance with the law”); see also LEY CONSTITUTIVA DEL EJERCITO DE GUATEMALA (Constitutive Law of the Guatemalan Army), ch. 9, art. 65 (“All Guatemalan males, on reaching 18 years of age, have the obligation to sign themselves up as soldiers in order to obtain their record of enrollment in the military. . . .”); Letter from Rubens Medina, Chief of the Library of Congress, Hispanic Law Division, to the Honorable Ronald V. Dellums (with a Report by Gisela von Muhlenbrock, Senior Legal Specialist, with Appendices) (Apr. 7, 1986) (“all male Guatemalans 18 years of age must register for mandatory military service”) [hereinafter Medina Letter].

148. J. SIMON, GUATEMALA: ETERNAL SPRING, ETERNAL TYRANNY 45-46 (1988). Military service is obligatory for all Guatemalan males, yet poor Indian males are the primary targets of forced recruitment. The army conducts forced recruitment drives wherever it finds large gatherings of young males.

149. Conscientious Objection to Military Service, supra note 144, at 20, 24, 27, 28; Medina Letter, supra note 147 (“[M]ilitary service is mandatory in Guatemala and those who do not register or who dodge the draft are penalized. The law does not include conscientious objection as an exemption from serving in the armed forces.”).

150. The official age and gender limitations are ignored, and it is common for minors, as well as females to be forced to patrol. AMERICAS WATCH, CIVIL PATROLS IN GUATEMALA 38-40 (1986).

151. Medina Letter, supra note 147 (“The civil defense patrols do not have a specific statutory basis and are the product of internal warfare in that country.”).

152. CONSTITUCION art. 5 (Guat.) (Guatemalan citizens are not required to obey orders “not” based on the law or issued according to it); id. art. 34 (no one is mandated to become associated or to become a member of self-defense or similar groups or associations).


154. Consejo de Comunidades Etnicas Runujel Junam (CERJ) was founded by school teacher Amilcar Mendez Urizar on July 31, 1988. The purpose of the organization is to document threats and violence against individuals who have withdrawn from the civil patrol. CERJ presented a petition to the Guatemalan Human Rights Commis-
individuals who assert their constitutional right to refuse service in the patrols. Many human rights organizations have gone on record condemning the ongoing pattern of human rights abuses committed by the military and the civil patrol in Guatemala.  

B. "Genuine Convictions"

The genuineness of an individual's convictions is a question of credibility. It can be established by detailed, consistent, and articulate testimony by the applicant. Credibility can be adversely affected by factors peculiar to the asylum process; attorneys who represent refugees have increasingly become aware of ways in which cultural differences and psychological trauma can result in disbelief of the client's testimony.

Developing client testimony in this area requires sensitivity to the sophistication level of the asylum applicant. The genuineness of beliefs of a Salvadoran peasant or Guatemalan Indian with little or no education may be established notwithstanding the client's inability to discuss their ideas as formal theological, philosophical, or ethical positions. A Catholic client who believes with all his heart in the biblical commandant "thou shalt not kill" and bases the refusal to serve on this alone, is just as credible as an individual who can explain the official Catholic theology supporting the position of conscientious objection. Details about the development and deepening of belief of the less sophisticated client will contribute to credibility. Many clients will be able to recall their earliest church attendance, their training

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156. See McGrath, Credibility Determinations: Avoiding Adverse Findings in Asylum Hearings and Defeating them on Appeal, 16 IMMIGR. NEWSL. (July-Aug. 1987).


in scriptural commandments, their communion (if Catholic), and the
effect that particular priests, ministers, or catechists had on the for-
mination of their thinking in this area. Testimony should also address
their current beliefs and religious affiliation.

It is equally important for the attorney to understand the precepts
of the client’s religion, when the claim is so based. An individual
may belong to a religion which prohibits military service under all
circumstances. For example, religions such as the Jehovah’s Wit-
nesses, the Quakers, and the Church of the Brethren (Amish) re-
quire abstention from military service as a central tenet of their reli-
gion. In contrast, other religions accept the concept of “selective
conscientious objection,” wherein an individual may object to partic-
ular wars on moral grounds, but may participate in other military
actions, depending on the circumstances. Within Catholic theology,
there is an explicit theological basis for selective conscientious ob-
jection: under the “just war” tradition, a Catholic should abstain from
military service when the ends being pursued or the means being
used are not morally justifiable.159 There also exists within Catholic
theology a pacifist tradition of opposition to all war, which is well
supported by both historical and contemporary church documents.160

An individual’s assertion that his religion will not allow him to
participate in military action must be assessed in the light of the
tenets of his religion,161 and in light of his own personal interpreta-
tion of his religion. A Jehovah’s Witness and a Catholic might each
testify that their religion absolutely prohibits participation in war;
the Jehovah’s Witness would be basing his position on an express
tenet of the religion, while the Catholic would be basing it upon his
interpretation of the biblical commandment “thou shalt not kill.”
Furthermore, there may be distinctions between the types of war-
related activities to which an individual objects. Some men may state
they would be willing to take a noncombatant role because this
would not violate the prohibition against killing, while others may
find that any assisting role is complicit and makes them morally cul-

159. The “just war” theory originated in the theology of St. Augustine and St.
Thomas Aquinas. Two sets of criteria must be satisfied for a conflict to be considered
under the just war theory. The first is referred to as jus ad bellum, which determines when
recourse to war is legitimate; the second is jus in bello, which addresses the means by
which a war may be morally pursued. See NATIONAL CONFERENCE OF CATHOLIC BISH-
OPS, THE CHALLENGE OF PEACE: GOD’S PROMISE AND OUR RESPONSE, A PASTORAL LET-

160. The Catholic pacifist tradition is rooted in the life of Jesus and the early
Christian communities; it places an absolute value on human life, and embraces nonvi-
olece. Id. at 34-35.

161. See NATIONAL INTERRELIGIOUS SERVICE BOARD FOR CONSCIENTIOUS OBJEC-
TORS, WORDS OF CONSCIENCE: RELIGIOUS STATEMENTS ON CONSCIENTIOUS OBJEC-
tion (10th ed. 1983) for a compilation of the official position on conscientious objection of
major world faiths.
pable for the war dead. Further distinctions flowing from personal interpretations may emerge. For example, a Jehovah’s Witness, although objecting to all military participation, might not object to the use of force for self-defense, while a Catholic, who defines himself as a pacifist, may abstain from the use of force under all circumstances.

Effective representation requires that the attorney understand the basis and parameters of the client’s beliefs so that he or she can prepare the client for adversarial hypotheticals during cross-examination which challenge the theological consistency and sincerity of the religious convictions. It may be helpful for a minister or priest to discuss the precepts of the religion with the client and subsequently submit an affidavit evaluating the sincerity of the conviction.

VII. CONCLUSION

The enactment of the 1980 Refugee Act was widely applauded as a step toward fulfillment of the United States obligations undertaken pursuant to the Protocol. The question of asylum for the conscientious objector presents a challenge to the United States commitment to humanitarian ideals expressed by the 1980 Refugee Act. Recognition of conscientious objectors as refugees does not require abandonment of domestic precedent. To the contrary, the developing precedent supports a definition of refugee which includes individuals who would be imprisoned for adhering to their religious, political, or moral convictions.

The issue has far-reaching implications; the United States is perceived as a leader, and its decisions broadly influence the refugee policy of other nations. The recognition of conscientious objectors

162. This sentiment is articulated in the legislative history of the Refugee Act: “The Refugee Act . . . reflects one of the oldest themes in America’s history—welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns. . . .” S. REP. NO. 256, 96th Cong., 2d Sess. 4, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 141.

163. A 1986 issue paper of the U.S. Committee for Refugees recognized the leadership role of the United States in refugee issues:

In a 1982 draft internal report on asylum adjudications, INS recognized the pivotal role of the United States: “As with other issues, the United States is called upon to play a leadership role, for not only will our policies and decisions impact on the people of our own nation but they will serve as the international standard by which many other Western nations will evaluate their own actions.” It is not only Western nations who will note the conduct of the United States toward asylum seekers. In Southeast Asia, in Africa, in Pakistan, where millions have found refuge, U.S. standards will not be ignored.

as refugees would demonstrate the United States continuing commitment to the international refugee definition. In addition, it would signal to the international community that the United States values the individual conscience, is committed to the protection of religious freedom, and is in step with the trend toward recognition of conscientious objection as a fundamental human right.