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A Country With a Conscience? The Ninth Circuit Develops a Global Perspective of Refugee Law

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COMMENT

A COUNTRY WITH A CONSCIENCE? THE NINTH CIRCUIT DEVELOPS A GLOBAL PERSPECTIVE OF REFUGEE LAW

GIVE ME YOUR TIRED, YOUR POOR, YOUR HUDDLED MASSES YEARNING TO BREATHE FREE; THE WRETCHED REFUSE OF YOUR TEEMING SHORE. SEND THESE, THE HOMELESS, TEMPEST-TOST TO ME, I LIFT MY LAMP BESIDE THE GOLDEN DOOR.

-Emma Lazarus, The New Colossus 1, 1888.

I. INTRODUCTION

Worldwide, over 16 million people are fleeing from their homelands to escape oppression, torture and death.[1] For many, the prospect of admission to their destination country may be the only ray of hope in their dark journey to freedom. To illustrate, imagine John M., a citizen of Honduras, unwillingly drafted into the military at the age of fourteen. One day, after serving for several years, the military ordered him to kill his friend for desertion. He refused to execute the order, fully knowing the consequences of his decision. He subsequently fled his homeland, and illegally entered the United States. The appropriate authorities detected his presence, and brought him before an immigration judge, where he applied for political asylum.[2] A critical question must be resolved by

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1. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION 24 (1993). It is estimated that eighty to one-hundred million people have sought to reside outside their country of origin. And each year, 150,000 to 300,000 of those individuals are granted resettlement into other countries, two million of which seek asylum from their homeland. *Id.* And each day, 10,000 individuals become refugees. *Id.* at 1.

2. An individual who arrives in the United States may apply for political asylum if he or she qualifies as a refugee. 8 U.S.C.A. § 1158 (1996). A refugee is defined as "any person who is outside any country of such person's nationality or . . . any country in

the immigration court: Was John M.'s desertion of the military an expression of political opinion?

The above scenario describes the facts of the Ninth Circuit case, *Ramos-Vasquez v. Immigration and Naturalization Service*.[3] In *Ramos-Vasquez*, the Court of Appeals for the Ninth Circuit held that desertion of the military is an expression of political opinion which satisfies the statutory requirement of refugee status.[4] In reaching this conclusion, the court relied heavily upon international law, and concluded that refusing to participate in acts condemned by the international community may be grounds for asylum based upon political opinion.[5] The court has opened a proverbial Pandora's Box, causing other federal courts to take notice of the international repercussions of sending a refugee like John M. back to hands of his persecutors.

This note will discuss the Ninth Circuit's treatment of the "political opinion" standard and its strict interpretation of international and United States refugee law. Section I will examine the *Ramos-Vasquez* decision, which addresses, but does not completely resolve, whether refusal to participate in an act that violates human rights practices is an expression of a political opinion. Next follows a discussion of the status of international law, which examines the history, regulations, and international treaties concerning refugees. Section III examines United States refugee law, including the Refugee Act of 1980 and applicable legal precedent. Finally, section IV provides a legal analysis of the *Ramos-Vasquez* decision in light of international and United States law, and concludes that the *Ramos-Vasquez* decision marks a significant change in immigration law relating to the status of political refugees.

II. THE CASE

Jacobo Ramos-Vasquez was born in Honduras in 1954.[6] The Honduran Army drafted him at the age of fourteen.[7] He was placed in the intelligence unit, where the army did not permit voluntary departure.[8] In October of 1982, after thirteen years of service, Ramos-Vasquez deserted

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which such person has last habitually resided, and who . . . is unable or unwilling to avail himself or herself of the protection of that country because persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C.A. § 1101(a)(42)(A) (1982).

3. 57 F.3d 857 (9th Cir. 1995).

4. *Id.*

5. *Id.* at 864.

6. *Id.* at 860.

7. *Id.*

8. *Id.*

the army, refusing to execute a friend who had deserted.[9] After deserting the army, Ramos-Vasquez left Honduras and went to Guatemala.[10]

He entered the United States in 1983 and began working as a gardener.[11] In October of 1988, his illegal presence in the U.S. was detected, and he received an Order to Show Cause from the Immigration and Naturalization Service ("INS").[12] Approximately one month later at a deportation hearing[13] before an Immigration Judge ("IJ"),[14] Ramos-Vasquez conceded deportability, and the IJ granted him leave either to apply for asylum[15] and withholding of deportation, or to exercise voluntary departure.[16] In May of 1989, at his hearing for asylum and withholding of de-

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9. *Id.* He asserts that, customarily, deserters were placed in handcuffs, submerged while naked in a tank of water for nine days, executed, and dumped in a river. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The deportation process officially commences with the issuance of an "Order to Show Cause" why the alien is not deportable by the INS. 8 C.F.R. § 242.1 (a). The Code of Federal Regulations requires that all orders to show cause must contain: 1) a statement of the nature of the proceeding, 2) a concise statement of the factual allegations supporting the order, 3) the legal authority under which the order was brought, and 4) a recitation of the specific provisions violated by the alien. This order serves as notice to the individual that he or she must appear at a hearing before an INS Immigration Judge, (hereinafter "IJ") to provide evidence of his or her legal right to remain in the U.S. 8 C.F.R. § 242.1(b).

13. The purpose of the deportation hearing is to determine whether the alien has the legal right to remain in the U.S. The individual is first advised of his/her rights and is asked to admit or deny the allegations of the order. 8 C.F.R. § 242.16. At this time the alien may also apply for discretionary relief, such as asylum and withholding of deportation, or voluntary departure. *See generally* 8 U.S.C.A. § 1158(a) (regarding asylum); 8 U.S.C.A. § 1253(h)(1) (regarding withholding of deportation).

14. Immigration Judges are selected by the Attorney General to conduct exclusion and deportation proceedings on behalf of the Immigration and Naturalization Service. 8 U.S.C.A. § 1101(b)(4). The Immigration and Nationality Act provides that the Immigration Judge shall "conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and . . . shall make determinations, including orders of deportation." 8 U.S.C.A. § 1252(b). It should be noted that this act allows the Immigration Judge to serve as both the judge and prosecutor during the deportation proceeding.

15. Unlike other forms of discretionary relief, asylum does not guarantee permanent residence in the United States. *See* 8 U.S.C.A. § 1158(b). Under the Refugee Act of 1980, an alien may apply for asylum if he or she satisfies the definitional requirements of a refugee. *See supra* note 2 and accompanying text. After a period of one year, if the alien's refugee status has not been terminated or he has not been afforded permanent status as a resident, the INS will determine whether the individual should be granted permanent residence. 8 U.S.C.A. § 1158.

16. *Ramos-Vasquez*, 57 F.3d at 860.

portation, Ramos-Vasquez testified that he was forced to serve thirteen years with the army.[17] He also testified that he conscientiously objected to orders to extort money from farm workers, and refused to follow orders to shoot deserters.[18] Ramos-Vasquez also asserted that the army would torture[19] and kill him for deserting if he returned to Honduras, and that he had knowledge through a friend that the army was still searching for him.[20] He introduced additional testimony that he was twice shot in the head in 1978 by a soldier,[21] and that he feared persecution by anti-military forces upon his return.[22] Finally, Ramos-Vasquez produced several letters verifying his good character and reliability as a worker.[23]

The IJ conceded that Ramos-Vasquez was credible, but concluded that he did not present enough evidence to show a clear probability that the Honduran government would persecute him because of his desertion from the military.[24] Ramos-Vasquez appealed the decision of the IJ to the Board of Immigration Appeals ("BIA").[25] The BIA affirmed the IJ's finding that the Petitioner failed to satisfy the requirements for withholding of deportation and asylum.[26] The majority determined that the water tank punishment inflicted on Ramos-Vasquez was common treatment for soldiers who refused to execute orders, and therefore was not persecutory in nature.[27] However, they failed to consider whether Ramos-Vasquez's fear of being executed by the army upon return to Honduras satisfied the

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17. *Id.*

18. *Id.*

19. *Id.* Each year, the United Nations High Commissioner for Refugees ("UNHCR") recommends an average of 120 tortured refugees for priority resettlement in other countries where they can safely reside without fear of persecution. However, priority resettlement is reserved for the most severe cases of torture, thus comprising only a small percentage of those who seek refuge due to physical and mental torture. UNHCR, THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION 23 (1993).

20. *Ramos-Vasquez*, 57 F.3d at 860.

21. *Id.* Ramos-Vasquez asserted that he was shot because he was mistaken for his father. *Id.*

22. *Id.* at 861.

23. *Id.* at 860. At the asylum hearing, the alien is permitted to present evidence that he qualifies for refugee status, including testimony, affidavits, witnesses, and tangible evidence. 8 C.F.R. § 242.14. Such evidence is customarily admissible if it is material and relevant to the issues being adjudicated. *Id.*; 8 U.S.C.A. § 1158.

24. *Ramos-Vasquez*, 57 F.3d at 860.

25. The Board of Immigration Appeals is the sole arbiter which determines the initial validity of the decision of the Immigration Judge. 8 C.F.R. § 3.1(a)(1). The BIA has the power to dismiss or remand a case to the Immigration Judge. 8 C.F.R. § 3.1(d),(h). Most decisions are based principally on the record of the deportation or exclusion,briefs submitted by counsel, and oral argument. 8 C.F.R. § 3.5.

26. *Ramos-Vasquez*, 57 F.3d at 860. *See supra* note 2.

27. *Id.*

requisite well-founded fear of persecution.[28] This error was a direct result of the BIA's conclusion that Ramos-Vasquez was not a credible witness.[29] The dissenting member of the Board disputed the majority's finding that Ramos-Vasquez was not credible, basing his opinion upon the affidavits and convincing evidence of persecution through testimony Ramos-Vasquez presented.[30] Ramos-Vasquez timely appealed the decision of the BIA to the Ninth Circuit Court of Appeals.[31]

The Ninth Circuit reviewed the decision of the BIA to decide whether it had abused its discretion in ruling that the Petitioner did not qualify for asylum and the withholding of deportation.[32] The court evaluated the factual findings of the BIA under a substantial evidence standard of review.[33] It found the BIA's determination that Vasquez was not credible to be unsupported by the substantial evidence in the record.[34] The three judge panel rejected the reasoning of the BIA, vacating the order to deport Vasquez and remanding the case for further consideration of whether his desertion was an expression of a political opinion.[35] It additionally held that the BIA's failure to specifically consider whether Ramos-Vasquez's testimony regarding treatment of military deserters constituted evidence establishing his eligibility for withholding of deportation and asylum was reversible error.[36]

A. Summary of the Court's Reasoning

In *Ramos-Vasquez*, the court first addressed Ramos-Vasquez's argument that the BIA's finding that he was not a credible witness was unsupported by substantial evidence.[37] The court agreed with the BIA dis-

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 861.
33. *Id.* (citations omitted).
34. *See infra* note 97 and accompanying text.
35. *Ramos-Vasquez*, 57 F.3d at 864.
36. *Id.* at 862. Judge Stephen Trott concurred with the majority that the Ninth Circuit should remand the case because of the inadequacy of the BIA's credibility findings, but was wary of the court's guidance regarding the execution of military deserters, and did not join that section of the court's decision. *Id.* at 864.
37. *Id.* at 861 (citing Turcios v. INS, 821 F.2d 1396, 1399 (9th Cir. 1987)). The Ninth Circuit standard for reviewing credibility findings of the IJ and the BIA is whether the decision was supported by substantial evidence, based upon the Supreme Court decision *INS v. Elias Zacarias*. *See* 502 U.S. 478, 480 (1992); *See also* 8 U.S.C. § 1105(a)(4) (stating that agency decisions should be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole.").

sent and determined that the evidence presented by Vasquez "overwhelmingly contradicts the BIA's finding of adverse credibility."[38] It found that the IJ's opinion that Ramos-Vasquez was "in every way a credible witness," as based upon testimony, letters, and affidavits presented by Ramos-Vasquez,[39] to be dispositive in resolving the issue.[40] The Court concluded that the BIA's refusal to believe the testimony of Vasquez was erroneous, and rejected its finding of adverse credibility.

The court then flatly rejected Vasquez's argument that the shooting by a soldier who mistook him for his father was evidence of persecution on account of political opinion.[41] Although the Ninth Circuit had recognized persecutions of family members to be grounds for establishing a well-founded fear of persecution,[42] Vasquez had not shown that the violence was a method of persecuting the petitioner because of his political opinion, according to the court.[43]

Additionally, it rejected Ramos-Vasquez's argument, that he feared retaliation by anti-military forces who would impute to him the actions of the military if he returned to Honduras, as capable of furnishing the requisite fear of persecution necessary for political asylum.[44] It concluded that mere apprehension of persecution is insufficient to establish a well-founded fear for granting of asylum,[45] and that the BIA did not abuse its discretion in rejecting the applicant's claim on this basis.[46]

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38. *Ramos-Vasquez*, 57 F.3d at 860.

39. *Id.* Ramos-Vaquez presented several letters verifying his good character and reliability as a worker.

40. *Id.*

41. *Id.*

42. *Ramos-Vasquez*, 57 F.3d at 861 (citing Arriaga-Barrientos v. INS, 937 F.2d 411,414 (9th Cir. 1991)).

43. *Id.*

44. *Id.* Although usually the fear must be the result of actions by governmental entities, it has been recognized that persecution by anti-government forces may satisfy the "well founded fear" requirement. Rodriquez-Rivera v. INS, 848 F.2d 998, 1002 (9th Cir. 1988). However, the fear must be genuine in the subjective opinion of the applicant. The applicant is required to make an objective showing of facts, by specific evidence in the record, that would support the applicant claim of reasonable fear. *Id.*

45. It should be noted that according to the Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter "the Handbook"), whether prejudicial actions other than those falling within the five listed factors depends upon the particular circumstances of each case, and should be considered based upon an evaluation of the opinions and feelings of the person involved. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, at 14 (1979)(hereinafter, "Handbook").

46. *Id.* (citing Arriaga-Barrientos v. INS, 937 F.2d 411, 414 (9th Cir. 1991)).

Finally, the court addressed the central issue of whether the punishment for desertion that Vasquez feared amounted to persecution because of political opinion. It disagreed with the BIA's opinion that Ramos-Vasquez "would voluntarily spend so much time in a unit that ostensibly carried out summary executions if [he] . . . was so repulsed by such duties."[47] Because the BIA found that Vasquez' testimony was not credible, they did not consider the execution of military deserters as evidence that established his eligibility for refugee status.[48] The court also noted that when the record contained no evidence to support adverse credibility, federal law requires that the BIA consider the applicant's claims for asylum and withholding of deportation separately.[49]

The Ninth Circuit then found reversible error in the BIA's failure to distinguish between the two separate forms of relief requested by Vasquez.[50] Relying heavily upon the Refugee Act[51] and previous Supreme Court rulings, the Court noted the BIA's failure to use the two prong test established by the Supreme Court.[52] This test requires both a subjective showing and an objective showing by the applicant that he has the requisite fear of persecution for political asylum.[53] The court found that Vas-

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47. *Id.*

48. *Id.* at 862. The BIA in its majority opinion stated "we do not find the punishment meted out to the respondent to be persecutory in nature. . . . If the Honduran army desires to punish its soldiers by placing them in water-filled tanks for 24 hours, this Board is in no position to pass judgment."

49. *Id.* (citations omitted). The statutory provision which governs the withholding of deportation is section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h). Asylum is governed by section 208 of the Act, 8 U.S.C. § 1158(a). Section 243(h) of the Immigration and Nationality Act requires the withholding of deportation of an alien to a country if the Attorney General determines that the "alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or *political opinion.*" Bolanos-Hernandez v. INS, 767 F.2d 1277, 1281 (9th Cir. 1984). In *INS v. Stevic*, the Supreme Court held that an alien must prove that it is "more likely than not that the alien would be subject to persecution" upon return to his country of origin. 467 U.S. 407, 424-30 (1984).

50. *Ramos-Vasquez*, 57 F.3d at 862; *See also infra* notes 100 & 104, and accompanying text. The court determined that the Board's failure to specify which standard it was applying when it denied Ramos-Vasquez relief was reversible error. The two standards which the court admonished the BIA to apply were the "more likely than not" standard which governs withholding of deportation procedures, and the "well-founded fear" requirement which governs asylum applications. *Ramos-Vasquez*, 57 F.3d at 862.

51. *Id. See also infra* notes 100 & 104,and accompanying text.

52. *Id. See also infra* notes 100 & 104, and accompanying text.

53. *Id.* (Citation omitted). *See also* INS v. Cardoza-Fonesca, 480 U.S. 421, 430-431 (1987). In *Cardoza-Fonesca*, the Court announced that for a grant of asylum, the reviewing court must examine both the subjective feelings of the applicant, and the objective reasons for that person's fear. The Court also determined earlier in INS v. Stevic, that "it

quez' testimony, lacking adverse credibility, would likely support a claim for asylum in the United States.[54] It also determined that the BIA and the IJ had improperly concluded that being asked to execute military deserters was "merely an 'unpleasant' military duty," and that they had thereby ignored the fact that Vasquez himself was in fear of persecution for desertion from the military upon his return to Honduras.[55] According to the court, being ordered to murder another individual is more than an "unpleasant duty," it is an act that is in direct contravention of "basic rules of human conduct."[56] To support this contention, the court cited the United Nations High Commissioner for Refugees (UNHCR) Handbook on the Procedures and Criteria for Determining Refugee Status.[57] The court observed that punishment for refusing to take military action that the international community condemns as contrary to the basic rules of human conduct could be regarded as persecution.[58] The United Nations Handbook provided " 'significant guidance' " for the court's determination that punishment for military desertion could constitute persecution for obtaining political asylum.[59]

The court then turned to Vasquez' argument that he satisfied the requirements of refugee status because his desertion was an expression of his political opinion. Vasquez based his claim of persecution on his polit-

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need not be shown that the situation will probably end in persecution, but it is enough that persecution is a reasonable possibility." 467 U.S. 407, 424-25 (1984). Therefore, a reasonable possibility standard can also be utilized in examining whether an applicant qualifies for asylum.

54. *Ramos-Vasquez*, 57 F.3d at 863. As the requirement for asylum is more difficult to satisfy than that for withholding of deportation, it is likely that Ramos-Vasquez would qualify for withholding of deportation also.

55. *Id.* at 863. Such a statement is in direct contravention to the purpose of the international asylum laws, which were designed to provide protection to those who have suffered at the hands of those who violate the human rights of others residing within their borders. It additionally evidences the need for a uniform definition of terms which may provide clear guidance to tribunals and officers charged with determining the fate of asylum seekers throughout the world. *See generally* GIL LOESCHER, BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS, 140-43 (1993).

56. *Ramos-Vasquez*, 57 F.3d at 863.

57. The court relied on Section 171 of the United Nations Handbook, which states:

> [W]here . . . the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to the rules of basic human conduct, punishment for desertion . . . could, in light of all other requirements of the definition, in itself be regarded as persecution.

Handbook, at Chapter V, Section 171.

58. *Id.*

59. *Id.* (citation omitted).

ical neutrality,[60] which was exemplified his refusal to follow military orders to execute deserters as an expression of political opinion.[61] The court cited prior Ninth Circuit cases for the proposition that political neutrality is an expression of political opinion for purposes of asylum.[62] The applicant must not only affirm his political neutrality, but he must also show that he sufficiently expressed his opinion so as to place himself in danger of persecution, according to the majority.[63] The majority acknowledged that the Ninth Circuit and the BIA have recognized conscientious objections to participation in military actions that are contrary to acceptable human rights practices as grounds for relief for withholding of deportation.[64] The court found *Barraza-Rivera v. INS* to be dispositive in its determination that Vasquez' refusal to perform inhuman acts ordered by the military was ground for political asylum.[65]

Finally, the Court considered the policies and laws of the nation of Honduras.[66] As a democratic nation that provides due process of law and constitutional protections against torture and capital punishment, the Court concluded that military desertion may be the most efficacious way for Vasquez to express a political opinion.[67] And, if a soldier is reasonably likely to face persecution if he returns to his country, then desertion is grounds for asylum based on the expression of his political opinion.[68]

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60. *Id. See infra* note 112 and accompanying text.

61. *Id.*

62. *Id. See* Arriaga-Barrientos v. INS, 937 F.2d 411, 413 (9th Cir. 1991); Arteaga v. INS, 836 F.2d 1227, 1231-32 (9th Cir. 1988); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286-87 (9th Cir. 1984).

63. *Id.*

64. *Id.* at 864.

65. *Id.* at 863.

66. *Id.* at 864. The court noted that Honduras purports to be a democratic nation, which follows the laws stipulated in its Constitution. As such it must observe the constitutional protections of human life and due process of law. It held that because Ramos-Vasquez left Honduras after the Constitution had been adopted, it would apply to his situation. The court also observed that although the Honduran government is not bound by the United States interpretation of due process, it is bound by its own. In doing so, it notes that the Honduran constitution provides similar protections as the constitution of the United States. *Id. See* Constitution of the Republic of Honduras, No.131, Title III, Chs.I-II, Art.59-64(1982)(Hon.).

67. *Id.* at 864.

68. *Id.* Justice Stephen Trott concurred in the opinion of the majority, agreeing that the BIA's treatment of Vasquez' testimony was unusual, and that the Ninth Circuit should remand the case for further proceedings. In a brief statement, he concluded that he was unwilling to join in Part IV of the majority's opinion because he disagreed with the guidance offered to the BIA regarding the treatment of military deserters.

III. LEGAL BACKGROUND

A. International Law

1. The History of International Refugee Law

Since the early 1930's, international efforts to obligate nations to observe a consistent standard of treatment of refugees have been a major priority. The 1933 Convention Relating to the Status of Refugees was the first instrument introduced to define the status of immigrants.[69] However, World War II required the creation of an instrument that would allow the international community to limit the mass influx of postwar refugees. In 1951, the United Nations called an international conference in Geneva, assembling plenipotentiaries of major countries to adopt a universal definition of a refugee.[70] Signed by 109 countries, the 1951 Convention was designed to define the status of refugees who resided in Europe before January 1, 1951, the date of the adoption of the Convention.[71] The definition provided by the Convention affords refugee status to individuals who have a fear of being persecuted based upon their race, religion, nationality, social group, or political opinion.[72] Although no party to the Convention has an obligation to admit refugees,[73] this standard provides substan-

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69. 1938 Convention Relating to the International Status of Refugees, 192 L.N.T.S. 59.

70. Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 137.

71. Article 1 of the Convention provides in pertinent part:

> A. For purposes of the present Convention, the term "refugee" shall apply to any person who: (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.

Convention Relating to the Status of Refugees, *opened for signature* July 28 (Stat.), 1951, U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137.

The Convention allows states to interpret the "occurring before January 1, 1951" language to mean either occurring in Europe before January 1, 1951 or Europe and elsewhere before January 1, 1951. Fullerton, 26 CORNELL INT'L L.J. 505, 508. *See also* M.J. Bowman & D.J. Harris, Multilateral Treaties: Index and Current Status, at 29 (Supp. 1991). The U.S. was not a party to this agreement.

72. Handbook, Chapter 2, Section 34.

73. Neither the 1951 Convention nor the 1967 Protocol requires that adopting states admit refugees, which enables each participating sovereign to maintain a level of author-

tial guidance to applicants and countries who participated in the admission of aliens.

Nonetheless, crises occurring around the world causing individuals to flee their homelands continued after 1951, and the United Nations was compelled to draft an instrument to address this growing problem.[74] The 1968 United Nations Protocol Relating to the Status of Refugees removed the geographical and durational limitations of the previous Convention to create a refugee policy that reflected the universal spirit of the Convention. By allowing individuals who faced persecution in scattered locations and times to seek refuge from persecution in countries all over the globe, the Protocol created a long awaited and uniform basis for asylum relief. The Protocol additionally bound its participants to comply with the substantive provisions of the 1951 Convention, thus obligating its signatories who had not adopted the Convention.[75] Article 1.2 defines a "refugee" as an individual who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, owing to such fear . . . to return to it.[76]

It also prohibits contracting states from returning refugees to such countries where their lives would be threatened because of five listed factors.[77] This Protocol definition originated in the 1946 Constitution of the International Refugee Organization (IRO).[78] The IRO Constitution classified a refugee as "a person who had a valid objection" to returning to his native country, and stated that "fear, based on reasonable grounds of persecution because of race, religion, nationality, or political opinion"

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ity concerning the admission of refugees into their countries. Handbook, Chapter 2, Section 34.

74. *See* Handbook, Section 8.

75. *See* Handbook, Section 9.

76. Protocol Relating to the Status of Refugees, 19 U.S.T. 6224, 6225 (1967) (1968).

77. Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 6276 (1967); 189 U.N.T.S. 150, 176 (1954). Article 33 of the Convention provides: "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life would be threatened on account of race, religion, nationality, membership of a particular political social group or political opinion."

78. Constitution of the International Refugee Organization, 18 U.N.T.S. 3 (1948)(hereinafter "IRO Constitution"). The IRO was the first international organization created by the United Nations. Fullerton, 26 CORNELL INT'L L.J. at 507, n. 11 (citation omitted). The IRO Constitution provided regulations which governed new refugees and regularized the treatment of refugees in several countries.

was a valid objection.[79] The Committee that drafted the definition intended the "well-founded fear of persecution" phrase to mean that the person has either "actually [been] a victim of persecution, or can show good reason why he fears persecution."[80]

The adoption of the IRO constitutional definition of a refugee by the United Nations was meant to partially insure that refugees would receive at least the same level of protection afforded to refugees before the creation of a formal instrument.[81] The Committee additionally articulated reasonable grounds for persecution as meaning that "the applicant can give a plausible and coherent account of why he fears persecution."[82] These statements are particularly important in the adjudication of asylum claims, as the intent of the drafters often provides crucial guidance in the application and implementation of international refugee laws.

2. Political Opinion: From the Perspective of International Law

The success of the 1967 Convention is evidenced by its virtually universal adoption. However, the drafters of this document failed to include a definition which may be used by immigration courts to determine if applicants satisfy the five factors required for political asylum. Specifically, the Convention does not include a definition of the term "political opinion." This failure creates a greater problem when determining whether the expression of a desire to remain neutral in a political situation would satisfy the political opinion requirement.

The term "political opinion," in the realm of international law, has been defined as an expression of an opinion on any matter "on which the machinery of the state may be engaged."[83] The Handbook on Procedures and Criteria For Determining Refugee Status (hereinafter "the Handbook"), a guide which provides practical guidance on application of the 1951 Convention and 1967 Protocol, also addresses the requirements for political opinion.[84] It states that the individual must not only hold opinions opposed to those of the government, but also must fear persecution for holding these opinions.[85] These opinions are presumed to be ones

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79. IRO Constitution, Annex 1, Pt. 1, § C1(a)(i), 18 U.N.T.S. 3, 19 (1948).

80. *Cardoza-Fonesca*, 480 U.S. at 438 (citations omitted).

81. U.N. ESCOR, *Report of the Ad Hoc Committee on Statelessness and Related Problems*, at 37, U.N. Doc. E/1618, E/AC.32/5 (1950) (hereinafter U.N. Rep.).

82. *Cardoza-Fonesca*, 480 U.S. at 438 (citations omitted).

83. RICHARD PLENDER, INTERNATIONAL IMMIGRATION LAW 432 (1988).

84. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, U.N. DOC. HCR/IP/4/ Eng. Rev.1. (1988) (hereinafter "Handbook").

85. *Id.* at § f, 19.

which are not tolerated by authorities in the country fled from because they criticize its policies and methods.[86] Additionally, it is assumed that these opinions have come to the attention of the appropriate authorities who oppose them.[87] The Handbook also notes that the importance of the opinion, and the supposed detriment to the government flowing from its exposure, are also relevant considerations when determining whether the opinion was political in nature.[88]

The Handbook notes that an individual need not prove that the authorities knew of his political opinion before he left the country.[89] In fact, he may have concealed his opinion in order to escape persecution until the point of his departure.[90] The fact that the individual merely fears to return can indicate the state of mind of the individual, and prove to be dispositive in determining if the expression was political.[91] Additionally, the Handbook states that an individual may fear persecution because of his political opinion although he has not expressed any opinion to the authorities at all.[92] In such a situation, it could be assumed that the individual's convictions will be expressed somehow in the near future, and as a result he will come into conflict with the government because of his political opinion.

Unfortunately, the Handbook does not address the issue of whether a refusal to join the position of the government or authorities due to a desire to remain neutral is an expression of political opinion which affords refugee status. The conscientious objector serving in the armed forces of a government whose practices he opposes will be required to show that his opinion was political within the meaning of the Protocol. The fact that his opinion may be considered neutral was addressed only indirectly by the statement that the objector's convictions may become known to the oppressor at a later date, and his refusal to stand against or for the government may be considered an expression of political opinion. It is increasingly evident that the United States neglects to examine international law in adjudicating claims of refugees, thus diluting the spirit and viability of the treaty it signed in 1968.

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86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 20.
90. *Id.*
91. *Id.*
92. *Id.*

B. Commentary on United States Law

1. The Refugee Act of 1980

Prior to 1967, the United States had not joined the 1951 Convention, thus, it had not adopted the international definition of a refugee. Instead, it promulgated the Refugee Act of 1952, a statute which served as the sole statutory authority governing refugee status in the United States. However, the increasing need to create a uniform definition throughout the world by which refugees may receive protection prompted the United States to sign the United Nations Protocol of 1967. After signing the Protocol of 1967, the U.S. began efforts to amend the Refugee Act of 1952. The primary goal of the amendment was to incorporate the Protocol into American law through the adoption of a statutory provision that would govern all asylum procedures. Congress amended the 1952 Act in 1980 to include the international refugee definition and to provide a form of relief for all individuals seeking political asylum in the United States. In drafting the Immigration and Nationality Act, Congress intended to adopt a universal definition that would provide adequate human rights protections for all refugees seeking asylum in the United States. The Refugee Act of 1980 defines a refugee as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to 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.[93]

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93. 8 U.S.C. § 1101(a)(42)(A) (1982). The decision to grant or deny asylum rests in the discretion of the Attorney General of the United States. The Attorney General may refuse refugee status to an applicant if:

> (A) the alien 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;
> (B) the alien, having been convicted of a final judgement of a particularly serious crime, constitutes a danger to the community of the United States;
> (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or
> (D) there are reasonable grounds for regarding the alien as a

This definition is identical in language to the Protocol definition of refugees. Therefore, the legislative intent of the drafters of the Protocol is helpful in interpretation of the Refugee Act to U.S. asylum applicants.

Congress interpreted the Protocol to provide two distinct forms of relief: asylum and withholding of deportation. Section 243 of the Immigration and Nationality Act grants the Attorney General discretion to withhold deportation of an alien "to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[94] This language requires an objective showing by the asylum applicant that he satisfy the requirements of § 243(h).

The Supreme Court in *INS v. Stevic* held that Congress intentionally drafted the statute to require no subjective showing by the applicant that his life would be threatened.[95] The alien must only show "a clear probability of persecution" through objective evidence that it is "more likely than not" that he will be persecuted upon return to his country.[96] The legislative intent of the drafters of the Refugee Act was to create an instrument that was broad enough to include those who are persecuted, homeless, and tormented by oppressive governmental regimes in their native countries.[97] However, in an attempt to create a more cohesive approach to the admission of refugees, the Court created an ambiguous standard that has spawned federal decisions that are unsupported by international statutory and legislative precedent.

Similar problems plague § 101 of the Act, which governs asylum procedure in the United States. This section grants asylum to an applicant who proves a well-founded fear of persecution by qualifying under one or more of five listed factors.[98] Section 101(a)(42) of the Refugee Act of 1980 authorizes the BIA to grant asylum to an alien who is "unable or

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danger to the security of the United States.

Id. Withholding of deportation is required where an alien's life or freedom would be threatened on account of race, religion, membership in a social group, or political opinion. *See id.*; 8 U.S.C. § 1253(h) (1982).

94. Immigration and Nationality Act, Pub.L.No. 414, 243(h), 66 Stat. 166, 213 (1952) (codified as amended at 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993)).

95. 467 U.S. 407, 416 (1984).

96. *Id.* at 424. *See also* INS v. Cardoza-Fonesca, 480 U.S. 421, 430 (1987).

97. 126 CONG. REC. 4501 (1980) (statement of Rep. Rodino); *id.* at 3758 (statement of Sen. Thurmond).

98. Immigration and Nationality Act, 94 Stat. 102, 105 (1980), 8 U.S.C. § 1158 (1980). Section 208 of the Act grants the Attorney General discretion to grant asylum claims of applicants, but this duty is delegated to the IJs and Special Inquiry Officers to expeditiously adjudicate asylum claims.

unwilling to return to his native 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.*"[99] The Supreme Court determined in *INS v. Elias-Zacarias* that a reviewing court must uphold the BIA's denial of asylum if it is "supported by reasonable, substantial, probative evidence on the record considered as a whole."[100] The *Elias-Zacarias* court further defined this substantial evidence standard of review, as providing that the BIA's decision could only be reversed if the evidence presented by the asylum seeker "was such that a reasonable fact finder would be compelled to conclude that the requisite fear of persecution existed."[101]

The Court in *Elias-Zacarias* held that an individual wishing to gain asylum in the United States based on the assertion that a guerilla opposition party was attempting to recruit him would not satisfy the "well-founded fear requirement," because the asylum seeker could not prove that his opinions, or in the alternative, his persecutor's opinions were political.[102] Thus, according to the Court, the burden is on the asylum seeker to present *some* evidence that he satisfies the well-founded fear requirement, or that the motive of those who wish to persecute him is political in nature.[103]

3. The Ninth Circuit Treatment of Refugees in the United States

The Ninth Circuit has repeatedly examined the issue of persecution on the basis of political opinion. In 1984, it held that persecution is "on account of political opinion" if the alien's motive or the persecutor's motive is political in nature.[104] In *Bolanos-Hernandez v. INS*, the Ninth Circuit held that refusal to join a guerilla party because of a desire to be neutral in a civil war was an expression of political opinion, entitling an alien to political asylum.[105] Later, in 1988, the Ninth Circuit broadened the *Bolanos-Hernandez* ruling by holding in *Arteaga v. INS* that forced recruitment by a guerilla party was persecution for political opinion when the recruit had decided to refrain from supporting them.[106] The court determined that the applicant need only show that he had affirmatively expressed his political opinion before leaving his native country, and that

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99. 8 U.S.C. § 1101(a)(42)(A) (1980) (emphasis added).
100. 502 U.S. 478, 481 (1992).
101. *Id.* at 817.
102. *Id.*
103. *Id.*
104. Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984).
105. *Id.*
106. Arteaga v. INS, 836 F.2d 1227 (9th Cir. 1988).

his persecutor's motives were political.[107]

In *Zacarias v. INS*, the Ninth Circuit held that forced recruitment to a non-governmental group, the guerrillas, was persecution because of political opinion.[108] The Supreme Court decided to review the Ninth Circuit's position on political neutrality. The Court ultimately rejected the Ninth Circuit's standard, and held instead that the applicant must be able to show that the persecutor's motivation is to punish the applicant because of his political opinion.[109] The Court determined that the applicant must establish that "he has a 'well-founded fear' that the guerrillas will persecute him because of his political opinion, rather than because of his refusal to fight with them."[110] In addition, the Court held that a persecutor's generalized political motive for recruiting Elias-Zacarias into the military was not sufficient to establish persecution because of political opinion.[111] The Court questioned the Ninth Circuit's treatment of applicants who claimed persecution because of a neutral political opinion. In dicta, it questioned whether Elias-Zacarias' opinion was political in nature, stating that there are several non-political reasons why an individual may not wish to join the guerilla party. More importantly, the Court determined that the phrase "persecution on account of political opinion" means "persecution on account of the applicant's political opinion."[112] Additionally, the court required that the applicant make a showing that the persecutor's motives were in fact, political in nature.

In 1987, the Ninth Circuit created yet another standard that has yet to be addressed by the Supreme Court. It held, in *Canas-Sergovia v. INS*, that a political belief imputed to the applicant by his persecutor is grounds for political asylum.[113] The Ninth Circuit utilized the "imputed political belief" standard in *Barraza-Rivera v. INS*, where it held that "punishment based on objection to participation in inhuman acts as part of forced military service is 'persecution' within the meaning of the Refugee Act."[114]

In *Ramos-Vasquez v. INS*, the Ninth Circuit concluded that Ramos-Vasquez qualified for political asylum under both the political neutrality

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107. *Id.*

108. 921 F.2d 844 (9th Cir. 1990).

109. Elias-Zacarias v. INS, 502 U.S. 478 (1992).

110. *Id.* at 816.

111. *Id.*

112. *Id.*

113. 970 F.2d 599, 601 (9th Cir. 1992). The theory of imputed political belief first arose in Lazo-Majano v. INS. *See* 813 F.2d 1432, 1435 (9th Cir. 1987). *See also* Barraza-Rivera v. INS, 913 F.2d 1443, 1449 (9th Cir. 1990).

114. *Barraza-Rivera*, 913 F.2d at 1453 (9th Cir. 1990).

and the imputed political belief standard.[115] In doing so, the Court rejected Supreme Court precedent, and relied solely upon statutory international law to support its holding. This bold step towards international responsibility demonstrates a willingness by the Ninth Circuit to obligate the United States to the Protocol it signed in 1967.

IV. ANALYSIS

In *Ramos-Vasquez v. INS,* the Ninth Circuit Court of Appeals held that abandoning service in the military because of refusal to execute military deserters was an expression of political opinion, and constitutes grounds for political asylum. In doing so, it has rejected Supreme Court precedent, but has embraced the universal spirit of refugee law by providing refuge to those who have no place to go. By appealing to the fundamental right to refuse to participate in acts which are morally repugnant, the court has raised an important question in refugee law: Should federal courts look the other way, and return asylum applicants to their native lands to be persecuted for refusal to commit acts which are contrary to basic rules of moral conduct?

A. A Holding at War with Precedent

In *Ramos-Vasquez,* the court addressed the applicant's argument that his request for asylum was based upon his political neutrality. The court stated that under Ninth Circuit caselaw, political neutrality constitutes a political opinion for purposes of gaining political asylum in the U.S.[116] The court relied upon its decision in *Arriaga-Barrientos* to conclude that the applicant "must not merely avow his political neutrality, however, but must also show that his opinion was articulated sufficiently for it to be the basis of his past or anticipated persecution." [117]

The Supreme Court, however, in *Elias-Zacarias* held that the applicant must provide "some evidence, direct or circumstantial" that his persecutor's motives are political.[118] The applicant must additionally show that the evidence presented was so compelling that "no reasonable factfinder could fail to find the requisite fear of persecution."[119] The narrow standard applied by the Supreme Court would make it virtually impossible for any applicant to gain reversal of a BIA decision on the

115. Ramos-Vasquez v. INS, 57 F.3d 857 (9th Cir. 1995).
116. *Id.* at 863.
117. 937 F.2d at 414.
118. 502 U.S. at 483.
119. *Id.*

grounds of persecution on account of political opinion, including Jacobo Ramos-Vasquez.

Ramos-Vasquez did not submit any evidence of newspaper accounts, Amnesty international reports, or House and subcommittee reports to the Immigration Judge or the BIA. Nor did he represent that his desertion from the military was an expression of his desire to remain neutral in a political situation. In fact, he asserted to the BIA that he left the military because he did not want to execute his friend who had deserted the military. This case would certainly be a factual scenario where the Supreme Court would assert that Vasquez' purpose for leaving the military was non-political, in that he did not want to execute a military order.

By holding that Ramos-Vasquez' desertion of the military for refusal to participate in inhumane acts was an expression of political opinion, the Ninth Circuit has opened asylum to all persons who refuse to follow army orders, for whatever reasons. What the Supreme Court failed to recognize, and the Ninth Circuit did, is that in countries whose armies traditionally participate in military acts which are inhumane, the refusal to participate in those acts is considered to be an act against the government. Therefore, the refusal to follow a governmental order in some oppressive regimes will often be an assertion of a political opinion, whether the individual refusing to participate wishes it to be or not.

B. A Holding in Harmony with International Law

Although the Ninth Circuit abandoned federal precedent in holding Vasquez' military desertion to be an expression of political opinion, its holding was consistent with international asylum law. The court cited the Handbook of the United Nations High Commissioner for Refugees which advised that, where "military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to the basic rules of human conduct, punishment for desertion . . . [could], in itself be regarded as persecution."[120] It also held that the military's actions in Honduras were contrary to the provisions of the Constitution of the Republic of Honduras. The court held that under the Honduran Constitution, torture and capital punishment are forbidden, and that military desertion may be the most effective way to express opposition to military practices which are in contravention of stated national policy.

Such an analysis as that applied by the Ninth Circuit not only furthers the goals of the 1967 Protocol, but also serves as reinforcement of the notion that violations of human rights should not be tolerated by the

120. Handbook, at § 171, (cited in *Ramos-Vasquez*, 57 F.3d at 863).

international community. Furthermore, the IRO, from which the INA originated, defines a refugee as an individual who has a valid objection to returning to his country. Political opinion would satisfy the valid objection requirement.[121] As the purpose of the INA was to create a statutory definition which would provide political asylum to those who are homeless, persecuted, and oppressed, extension of asylum to Vasquez would be consistent with that goal.

V. CONCLUSION

The Ninth Circuit has prioritized the goals of the refugee statute above the narrow interpretations given it by the Supreme Court. In doing so, it has neutralized the legal technicalities which often plague the immigration system and has strengthened the commitment to human rights obligations the United States undertook 29 years ago. Unfortunately, it is probable that the Supreme Court will attempt to further define the "political opinion" requirement, creating new tests and rigid standards with which circuit courts must comply. In the process, millions of refugees, just like Jacobo Ramos-Vasquez, will be sent back to the hands of their oppressors to be abused, tortured, and murdered. Perhaps this decision will force the judiciary to view asylum seekers as more than nameless faces, but as human beings with rights as real as those Americans exercise every day.

Jineki C. Butler

121. *See Ramos-Vasquez*, 57 F.3d at 864.