



Conscientious Objection as Political Opinion: The Jurisprudence of Refusal in Asylum Law

FEDERICA DELL'ORTO AND JUDITH WOOD

Individuals who defy their state by refusing to participate in officially sanctioned wrongdoing occupy a fraught position in law and morality. On one hand stands the sovereign's demand for obedience—even, at times, to fight in wars—backed by the threat of severe punishment. On the other lies the individual's conscience and the dictates of international humanitarian norms that condemn unjust wars and atrocities. This tension raises a profound legal and philosophical dilemma: when, if ever, should a person's moral refusal to partake in a state's unlawful or abhorrent conduct entitle them to protection as a refugee? The question has gained sharp salience in the wake of Russia's 2022 invasion of Ukraine, an armed conflict broadly denounced as an illegal war of aggression and marked by widespread allegations of war crimes. In the past two years, thousands of Russian men of conscription age have fled abroad rather than be conscripted to fight in Ukraine. Their plight compels a closer examination of how U.S. asylum law treats claims of conscientious objection or desertion in the face of state-coerced wrongdoing.

I. Individual Accountability and the Limits of State Command

In adjudicating asylum claims based on refusal to perform state-mandated acts, U.S. decision-makers implicitly grapple with a foundational principle of modern legal and moral order: individual accountability for obeying or defying unlawful commands. This principle emerged with unmistakable clarity in the aftermath of World War II. The Nuremberg Tribunal rejected the notion that “following orders” could exonerate perpetrators of atrocities, declaring that “[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”¹ Nuremberg Principle IV thus established that even low-ranking actors bear personal responsibility for crimes of war and against humanity; official commands are no blanket excuse. In essence, international law affirmed a *duty of moral choice*: individuals must resist manifestly

unlawful orders when they can. This ideal of individual moral agency underpins international humanitarian law (IHL) and its treatment of superior orders. Under the laws of armed conflict, orders to commit war crimes are considered void, and subordinates are expected—at least in theory—to disobey them.² Yet in practice, this moral imperative clashes with the stark reality of state power: domestic law in authoritarian settings often compels obedience without regard to the lawfulness of the command. A soldier who heeds his conscience may face court-martial or worse. Refugee jurisprudence must navigate between two poles: respect for sovereign prerogatives (such as conscription for legitimate self-defense) and protection of the individual who stands up against egregiously unlawful state conduct.

Classic IHL distinguishes *jus ad bellum* (the legality of waging war) from *jus in bello* (lawfulness of conduct in war).³ Generally, only political and military leaders are held accountable for an illegal war of aggression (*jus ad bellum* violations), whereas even rank-and-file

soldiers can be held responsible for war crimes (*jus in bello* violations).⁴ This distinction has informed the treatment of conscientious objection claims. If a conscript's refusal is based on the mere fact that a war itself is illegal or unjust (a *jus ad bellum* objection), courts have been reluctant to grant refugee status. By contrast, if the objection is to the *way* the war is fought—e.g., orders to commit atrocities violating the “basic rules of human conduct” in war—then the individual's stance directly aligns with *jus in bello* norms and the case for protection becomes more compelling. In asylum jurisprudence, this is reflected in the emphasis on whether the military action in question is “condemned by the international community as contrary to basic rules of human conduct.”⁵ That phrase, drawn from the UNHCR Handbook on refugee status and echoed in U.S. case law, effectively serves as a proxy for egregious violations of IHL—encompassing genocide, deliberate attacks on civilians, torture, and other war crimes broadly denounced by the world. It sets a high threshold: ordinary soldiers cannot claim refugee status merely because they disagree with the political rationale of a war. States worry that if every soldier with misgivings could claim asylum abroad, military discipline and national security would be undermined. These principles—rooted in Nuremberg and refined through IHL—supply the normative backdrop against which U.S. asylum law draws the line between lawful conscription and persecutory complicity.

II. Asylum Law and the Doctrine of Humanitarian Refusal

Under U.S. law, a person may be granted asylum if, inter alia, they are a “refugee” as defined by statute: a person who is unable or unwilling to return to their home country “because of persecution or a well-founded fear of persecution on account of” one of five enumerated grounds—race, religion, nationality, political opinion, or membership in a particular social group (PSG).⁶ A claim founded on refusing military service could, in theory, invoke any of these grounds, but in practice the two most relevant are political opinion and particular social group. U.S. asylum jurisprudence has developed specific rules to distinguish ordinary enforcement of conscription laws (which does not generally amount to “persecution” under the Refugee Convention or INA) from exceptional situations where enforcement becomes a vehicle of persecution.

It is long settled that a sovereign state retains the right to conscript its citizens for legitimate defense and to punish draft evasion.⁷ Neutral application of a generally applicable conscription law, even with criminal penalties, is ordinarily regarded as lawful prosecution rather than persecution.⁸ As the Board of Immigration Appeals (BIA) explained in *Matter of Canas*, an applicant must demonstrate that the draft law “was enacted or is applied in a persecutory manner,” such as where a particular faith or viewpoint is singled out.⁹ The same reasoning underlies *Matter of Vigil*, where the BIA emphasized that prosecution for draft evasion, without evidence of discriminatory intent or disproportionate punishment, “does not necessarily result in a colorable asylum claim.”¹⁰

Yet the law also recognizes that rare cases fall outside this rule. The BIA's landmark decision in *Matter of A-G* articulated two exceptions: (1) where a refuser faces *disproportionately severe punishment* on account of a protected ground, and (2) where compliance would “necessarily entail participation in ‘inhuman conduct’ condemned by the international community as contrary to the basic rules of human conduct.”¹¹ The latter, reaffirmed in *Matter of R-R*, explicitly adopts the UNHCR Handbook's formulation and brings humanitari-

an norms into U.S. asylum jurisprudence.¹²

Federal courts have elaborated these principles into a coherent doctrine. The Fourth Circuit's en banc decision in *M.A. v. INS* held that asylum may be granted when a conscript “would be forced to serve in a military whose acts are condemned by the international community,” provided the condemnation rests on authoritative international bodies or state practice rather than media reports.¹³ The First, Seventh, and Ninth Circuits have consistently followed this approach, emphasizing that it is *punishment for refusal*—not the draft itself—that can constitute persecution, so long as there is a reasonable possibility of conscription into such condemned conduct.¹⁴ In *Mojsilovic v. INS* and *Vujisic v. INS*, the Seventh Circuit found that Serbian and Slovenian draft resisters who refused to fight against their own ethnic groups satisfied this standard, linking moral refusal with political opinion and nationality.¹⁵ The Second Circuit's *Islami v. Gonzales* went further, observing that where the conflict itself targets a population sharing the applicant's race or religion, the evidentiary threshold for showing “inhuman conduct” is lower.¹⁶ Even the Fifth Circuit, while adopting a narrower view, acknowledged that when a refuser “would necessarily be required” to commit condemned acts, punishment for refusal may rise to persecution.¹⁷

Across circuits, a coherent standard has emerged. An applicant must show that the military in question has been internationally condemned for systemic violations of humanitarian law, that there is a reasonable possibility of being conscripted and compelled to participate in those violations, and that lawful alternatives such as civilian service or recognized conscientious-objection procedures are unavailable or ineffective. The punishment anticipated must be “on account of” a protected ground—most commonly actual or imputed political opinion—and the harm feared, whether imprisonment, torture, or extrajudicial reprisal, must be sufficiently severe or disproportionate to constitute persecution.

The nexus requirement is central. As the Supreme Court underscored in *Elias-Zacarias*, persecution must be “on account of” political opinion, whether expressed or imputed.¹⁸ In the context of refusal, that nexus often arises from the state's own interpretation of dissent: the refuser is branded a traitor or enemy, punished not for the act of evasion but for the disloyal meaning ascribed to it. Alternatively, certain claimants may frame their eligibility through membership in a PSG—for instance, “conscientious objectors opposing the Ukraine war”—a group sharing immutable moral conviction and recognized social distinctness. UNHCR's 2013 *Guidelines on Military Service* endorse this approach, recognizing conscientious objectors as a potential PSG where societal perception and risk of punishment are evident.¹⁹

By the late 2000s, the convergence of BIA precedent and federal circuit authority had crystallized a workable standard: in effect, the law shields those who decline complicity in atrocity, the moral counterpart to Nuremberg's insistence that legality cannot absolve unlawful obedience.

III. The Limited Viability of PSG Claims Based on Conscientious Objection

Although some applicants frame refusal-based asylum claims under the protected ground of “membership in a particular social group,” this pathway is doctrinally narrow in U.S. jurisprudence. Under the three-part test articulated in *Matter of M-E-V-G-* and *Matter of W-G-R-*, a cognizable PSG must (1) share a common immutable

characteristic, (2) be defined with particularity, and (3) be socially distinct within the society in question.²⁰ While *Matter of Acosta* recognized that immutability may include characteristics “fundamental to an individual’s identity or conscience,”²¹ conscience-based groups nearly always fail the latter two prongs.

The key obstacle is social distinction. In *Matter of S-E-G-*, the BIA rejected a proposed group of “Salvadoran youth who resist gang recruitment because of their personal, moral and religious opposition to the gang’s activities,” holding that the group lacked both social distinction and definitional clarity.²² The reasoning applies with equal force to conscientious objectors: to prevail, an applicant would need to show that society at large perceives “conscientious objectors to the Ukraine war” as a discrete and socially recognizable class—an evidentiary burden that is virtually insurmountable in a society where dissent is suppressed rather than acknowledged.

This doctrinal limitation places U.S. asylum law at odds with international guidance. A USCIS asylum officer training lesson plan expressly notes that “U.S. asylum and refugee law regarding conscientious objection diverges from guidance in the UNHCR Handbook,” emphasizing that U.S. law requires evidence of the persecutor’s motive rather than the applicant’s conscience.²³ Whereas UNHCR Handbook § 171 permits recognition of claims grounded solely in refusal to engage in internationally condemned acts, U.S. adjudication channels such claims into political-opinion analysis, where nexus turns on whether the state imputes disloyalty or opposition to its military aims. The PSG framework, in contrast, rarely provides a viable basis for relief in conscientious-objection cases.

IV. Application to the Russia-Ukraine Conflict

Condemnation of Russia’s invasion of Ukraine has been both overwhelming and authoritative. On March 2, 2022, the U.N. General Assembly adopted Resolution ES-11/1 “deplor[ing] in the strongest terms the aggression by the Russian Federation against Ukraine,” with 141 member states in support—a declaration of illegality that reaffirmed the Charter’s core prohibition on wars of aggression.²⁴ Subsequent findings by the U.N. Human Rights Council, the International Criminal Court, and multiple national inquiries have detailed a pattern of war crimes and crimes against humanity attributable to Russian forces.²⁵ Taken together, these pronouncements do more than censure a sovereign’s conduct; they delineate the kind of conflict that the asylum jurisprudence of *Matter of A-G-* and *Matter of R-R-* contemplated—one “condemned by the international community as contrary to the basic rules of human conduct.”²⁶

Within this framework, the evidentiary inquiry is not mechanical but moral-judicial. The applicant must demonstrate, through credible record evidence, that the conflict into which he would be conscripted falls within this category of international condemnation; that conscription would entail a substantial risk of forced complicity in violations of humanitarian law; and that no effective civilian or conscientious-objection alternative exists. The punishment feared must arise not from the neutral enforcement of conscription, but from the *meaning* ascribed to refusal—an act the state interprets as political dissent or betrayal. When such punishment is severe, discriminatory, or disproportionate, it crosses the threshold from lawful prosecution into persecution.

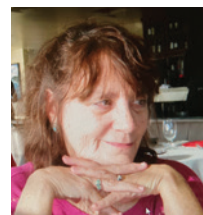
U.S. courts have repeatedly held that where an applicant faces punishment for refusing service in a military campaign meeting the “inhuman conduct” threshold—and where the state reads refusal as

political dissent—the resulting harm constitutes persecution within INA § 101(a)(42)(A), ordinarily under a political-opinion theory and, where appropriate, as membership in a particular social group.²⁷

V. Conclusion

The examination of conscientious objection and asylum law reveals a delicate balancing act between upholding fundamental humanitarian values and respecting state sovereignty. U.S. asylum jurisprudence, informed by international and moral principles, attempts to protect genuine acts of conscience in extreme cases without extending refuge to ordinary draft evaders. The current state of the law, distilled from the cases and principles discussed, can be synthesized as follows: When a state’s demands force an individual to choose between violating the most basic norms of humanity and suffering severe punishment, and when that individual’s refusal is rooted in conscientious or political opposition to the state’s unlawful aims, refugee law should—and generally does—offer a shield.

The Russia-Ukraine war captures the core of a jurisprudence of humanitarian refusal: when a state wages a conflict condemned by the international community for grave breaches of humanitarian law, punishment for those who refuse to fight is no longer a neutral act of governance but the persecution of conscience. U.S. asylum law, through its “inhuman conduct” exception, thus becomes a modest but vital acknowledgment that legality cannot shield atrocity. The protection of such refusers affirms that in the hierarchy of laws, the duty not to commit crimes against humanity stands above the duty to obey the state. ☉



Federica Dell’Orto is the principal attorney at the Law Office of Federica Dell’Orto in New York City, where she focuses on U.S. immigration and international human rights law. Her practice spans

humanitarian relief, complex removal defense, and global mobility matters. Judith Wood has defended the rights of asylum seekers since graduating from Pepperdine University School of Law, and has had her own law firm since 1984. She has won numerous appeals at the administrative and federal level, and is admitted to practice before the U.S. Courts of Appeals for the Second, Third, Fourth, Fifth, Ninth and Tenth Circuits, as well as the Supreme Court. She has chaired the FBA International Law Section’s International Human Rights Law committee for several years, and is a frequent speaker for the FBA, the American Immigration Lawyers Association, Los Angeles County Bar Association, the Asian-Pacific Law Center, and several other groups. A film entitled “St. Judy” was made about her advocacy on behalf of women refugees in 2018.

Endnotes

¹Principle IV, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int’l L. Comm’n 374, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

²Rome Statute of the International Criminal Court art. 33, July 17, 1998, 2187 U.N.T.S. 90.

³*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8).

⁴Rome Statute *supra* note 2, arts. 8 bis, 25, 28, 30.

continued on page 35

- ⁵UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 171 (1979, reissued 2019); see also *Matter of A-G-*, 19 I. & N. Dec. 502, 506 (B.I.A. 1987).
- ⁶Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2018).
- ⁷*Matter of Vigil*, 19 I. & N. Dec. 572, 578 (B.I.A. 1988).
- ⁸*Matter of Canas*, 19 I. & N. Dec. 697, 707–08 (B.I.A. 1988); *Vigil*, 19 I. & N. Dec. at 578.
- ⁹*Canas*, 19 I. & N. Dec. at 707.
- ¹⁰*Vigil*, 19 I. & N. Dec. at 578.
- ¹¹*Matter of A-G-*, 19 I. & N. Dec. 502, 506 (B.I.A. 1987).
- ¹²*Matter of R-R-*, 20 I. & N. Dec. 547, 551 (B.I.A. 1992); UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, *supra* note 5, ¶ 171.
- ¹³*M.A. v. INS*, 899 F.2d 304, 312–13 (4th Cir. 1990) (en banc).
- ¹⁴See, e.g., *Mekhoukh v. Ashcroft*, 358 F.3d 118, 126–27 (1st Cir. 2004); *Mojsilovic v. INS*, 156 F.3d 743, 747 (7th Cir. 1998); *Ramos-Vasquez v. INS*, 57 F.3d 857, 862–63 (9th Cir. 1995).
- ¹⁵*Mojsilovic*, 156 F.3d at 747; *Vujisic v. INS*, 224 F.3d 578, 581–82 (7th Cir. 2000).
- ¹⁶*Islami v. Gonzales*, 412 F.3d 391, 396–97 (2d Cir. 2005).
- ¹⁷*Milat v. Holder*, 755 F.3d 354, 362–63 (5th Cir. 2014).

- ¹⁸*INS v. Elias-Zacarias*, 502 U.S. 478, 482–84 (1992).
- ¹⁹UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status Related to Military Service* ¶¶ 54–55 (Nov. 3, 2013).
- ²⁰*Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (B.I.A. 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 212–18 (B.I.A. 2014).
- ²¹*Matter of Acosta*, 19 I&N Dec. 211, 233 (B.I.A. 1985).
- ²²*Matter of S-E-G-*, 24 I&N Dec. 579, 584–88 (B.I.A. 2008).
- ²³USCIS Asylum Officer Basic Training Course Lesson Plan, *Military Service and Conscientious Objection* 5–7 (2006).
- ²⁴G.A. Res. ES-11/1, U.N. Doc. A/RES/ES-11/1 (Mar. 2, 2022).
- ²⁵See, e.g., U.N. Hum. Rts. Council, *Report of the Independent International Commission of Inquiry on Ukraine*, U.N. Doc. A/HRC/52/62 (Mar. 15, 2023); Int'l Crim. Ct., *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC* (Mar. 2, 2022).
- ²⁶*Matter of A-G-*, 19 I. & N. Dec. 502, 506 (B.I.A. 1987); *Matter of R-R-*, 20 I. & N. Dec. 547, 551 (B.I.A. 1992).
- ²⁷See, e.g., *M.A. v. INS*, 899 F.2d 304, 312–13 (4th Cir. 1990) (en banc); *Mohammed v. U.S. Att'y Gen.*, 547 F.3d 1340, 1345–47 (11th Cir. 2008); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 126–27 (1st Cir. 2004); *Mojsilovic v. INS*, 156 F.3d 743, 747 (7th Cir. 1998); *Ramos-Vasquez v. INS*, 57 F.3d 857, 862–63 (9th Cir. 1995).

Judicial Profile Writers Wanted

The Federal Lawyer is looking to recruit current law clerks, former law clerks, and other attorneys who would be interested in writing a judicial profile of a federal judicial officer in your jurisdiction.

A judicial profile is approximately 1,500-2,000 words and is usually accompanied by a formal portrait and, when possible, personal photographs of the judge. Judicial profiles do not follow a standard formula, but each profile usually addresses personal topics such as the judge's reasons for becoming a lawyer, his/her commitment to justice, how he/she has mentored lawyers and law clerks, etc. If you are interested in writing a judicial profile, we would like to hear from you. Please send an email to social@fedbar.org.

