6. Draft dodger/deserter or dissenter? Conscientious objection as grounds for refugee status

Penelope Mathew*

INTRODUCTION

In June 2012, as the conflict in Syria continued and the UN Security Council stalled, a Syrian colonel defected by flying his MiG jet over the border to Jordan.[1] This act highlighted the importance and radical potential of conscientious objection to military service. This individual, and the many who have since followed his example, would not be participating in the atrocities unfolding on a daily basis in Syria.

In cases where one of the parties to the conflict is not readily characterized as evil, conscientious objection – whether to the very idea of carrying arms or to a particular conflict – has often met with ambivalence and hostility. Bearing arms has traditionally been the mark of (male) citizenship,[2] and considerations of humanity rarely outweigh

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[1] Ruth Pollard, 'Syrian colonel defects in MiG fighter jet as world explores a way out for Assad', *Sydney Morning Herald*, 22 June 2012, available at www.smh.com.au/world/syrian-colonel-defects-in-mig-fighter-jet-as-world-explores-a-way-out-for-assad-20120622-20rod.html.

[2] Cecilia M. Bailliet, 'Assessing *Jus Ad Bellum* and *Jus In Bello* within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum' (2006) 20 *Georgetown Immigration Law Journal* 337, 377–82; Cynthia Cockburn, 'Preface' to Ozgur Heval Cinar and Coskun Usterci, *Conscientious Objection: Resisting Militarized Society* (London/New York: Zed Books, 2009).

that duty. Many national decision-makers confronted with asylum claims based on conscientious objection have refused to recognize the claimants as refugees, instead reinscribing the power of the state to require military service of its citizens.

National decision-makers have also distinguished between total conscientious objectors (i.e., persons who refuse to serve in the military on grounds of conscience in all situations) and partial conscientious objectors (persons who refuse to serve in the military only with respect to some conflicts). One assumes that the Syrian colonel who defected to Jordan was a partial conscientious objector, a man quite willing to serve in the military in most situations, but not to fight against his own people. His case would undoubtedly be viewed with sympathy. However, American servicemen and women objecting to the wars in Iraq and Afghanistan on the grounds of illegality, whether based on violation of the *jus ad bellum* (the rules regulating the resort to use of force in international relations) or the *jus in bello* (the rules regarding the means and methods of warfare) have generally not been successful in their claims for refugee status despite strong legal arguments in their favour.[3]

This chapter examines some of this national jurisprudence and shows that it is out of step with current international legal developments. International law has now recognized that citizenship does not require a person to serve in the military where this compels the individual to act against the dictates of their conscience. Rather, any state which overrides individual conscience has failed to protect the citizen's rights and the surrogate protection of the international community in the form of refugee status (barring some reason for exclusion such as participation in war crimes) is required. However, some very difficult questions concerning the balancing act between individual and collective, and subjectivity and objectivity, still confront decision-makers.

The chapter begins by setting out first principles regarding the treatment of conscientious objectors. It then examines some of the key precedents in a number of national jurisdictions to show that all too frequently, refugee claims based on conscientious objection fail, or that the law is unsettled and requires clarification. Next, the chapter reviews the development of international human rights and refugee law concerning conscientious objection and demonstrates that conscientious objection

[3] For example, the majority of international opinion confirms that the 2003 invasion of Iraq by the United States and allies was illegal. For the view of 43 Australian international lawyers, see D. Anton *et al.*, 'Coalition of the willing? Make that war criminals', *Sydney Morning Herald*, 26 February 2003, available at www.smh.com.au/articles/2003/02/25/1046064028608.html.

is protected by the human right to freedom of conscience, and that conscientious objectors should, in principle, be recognized as refugees. The chapter then turns to examine whether both total conscientious objectors and partial conscientious objectors are equally protected by freedom of conscience. This section looks first at case law concerning conflicts that may violate the rules of *jus ad bellum*. Conflicts in which there are violations of the *jus in bello* or international humanitarian law (IHL) are then examined, and following this the threshold required before a moral objection to conflicts involving violations of IHL should be recognized is explored. Finally, the chapter looks at the question of when a conscientious objector may be required to avail him or herself of home state protection. The chapter concludes by calling on national decision-makers to revisit their jurisprudence on the topic of conscientious objection.

CONSCIENTIOUS OBJECTION AND FIRST PRINCIPLES

If we apply first principles, conscientious objectors to military service comfortably fall within the definition of a refugee in the 1951 Convention relating to the Status of Refugees.[4] According to that definition, a refugee is a person outside their country of origin and unwilling or unable to return or to avail themselves of home state protection owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.[5]

A conscientious objector to military service is, in lay terms, a person who will not carry arms because of religious beliefs or a general pacifist outlook. It is clear that such a viewpoint is protected by general human rights law, namely, freedom of thought, conscience and religion.[6] Article

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[4] 1951 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ('Refugee Convention').

[5] Article 1A(2) of the Refugee Convention as modified by the 1967 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[6] Article 18 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Art. 18 of the Universal Declaration of Human Rights, GA Res. 217A(III), UN GAOR, 3rd sess., 183rd plen. mtg, UN Doc. A/810 (10 December 1948).

18(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that:

> 1. Everyone shall have the right to freedom of thought, *conscience* and religion. This right shall include freedom to have or to 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.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. (emphasis added)[7]

Being forced to bear arms against one's conscience is a form of persecution – a serious violation of human rights – and, depending on the severity, punishment for failure to serve may also constitute persecution.

It is also clear that the objection to military service hinges on one of the Convention grounds of persecution, for example, religion or political opinion. The connection to religion when a conscientious objector is motivated by religion is patently obvious. The connection to political opinion is perhaps not as obvious, but it is still readily apparent. A political opinion is any opinion relating to the power of government.[8] When a person in good conscience does not believe in killing, and is not prepared to bear arms, then that person, by refusing to serve, is expressing a view about the powers of government to require him or her to act to against his or her conscience. Goodwin-Gill and McAdam argue that '[r]efusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of State authority; it is a political act'.[9] The other Convention grounds of persecution may also be relevant, for example, race or nationality is relevant where only a particular race is conscripted.[10]

The next question is whether there is a sufficient relationship between the grounds and the persecution to result in refugee status. If we adopt the view that the nexus between well founded fear of persecution and the

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[7] ICCPR, Art. 18(1).

[8] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford: Oxford University Press, 2007) 87.

[9] *Ibid.* 111.

[10] For the argument that conscription is a form of gender-based violence against men, see R. Charli Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations' (2006) 37 *Security Dialogue* 83. See also Martin Jones, 'The Refusal to Bear Arms as Grounds for Refugee Protection in the Canadian Jurisprudence' (2008) 20 *International Journal of Refugee Law* 123, 159–60.

Convention grounds is satisfied not only by motivation on the part of the persecutor,[11] but also by differential impact on the asylum seeker, then we can say that to require someone to act against their conscience in this context is not only a violation of human rights, but is related to the Convention grounds for persecution. This approach is known as the 'predicament-based' approach.[12] It asks why the asylum seeker is in a particular situation or predicament, and if the answer is a Convention ground of persecution, s/he is a refugee.

Only conscientious objectors will suffer the particular harm of being forced to act against their conscience. It is their belief structure that puts them at risk of persecution (violation of freedom of conscience) and there is a sufficient link to the Convention grounds if one takes the predicament-based approach.

The only remaining question is whether or not limitations may be imposed on freedom of conscience so as to require military service despite a conscientious objection. The freedoms protected in ICCPR, Article 18(1) are non-derogable, even in times of public emergency threatening the life of the nation,[13] which, of course, includes war or armed conflict. However, ICCPR, Article 18(3) does permit limitations (which may be imposed at any time) on manifestation of religion, conscience and belief. On the other hand, Article 18(2) does not permit coercion 'which would impair [the] freedom to have or to adopt a religion or belief of [one's] choice'.

The recent jurisprudence of the Human Rights Committee (examined below) has moved from viewing conscientious objection as a manifestation of belief governed by the limitations clause in Article 18(3) to regarding it as non-derogable in all circumstances. In any event, limitations must be proportionate and failure to provide a reasonable alternative to military service is unreasonable.

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[11] See e.g., *INS v Elias-Zacarias*, 502 US 478 (1992).

[12] See e.g., Michigan Guidelines on Nexus to a Convention Ground, para. 10, available at www.law.umich.edu/CENTERSANDPROGRAMS/PRAL/Pages/guidelines.aspx.

[13] See ICCPR, Art. 4.

A SURVEY OF NATIONAL ASYLUM DECISIONS ON THE GENERAL TOPIC OF CONSCIENTIOUS OBJECTION

In some jurisdictions, laws relating to military service are treated as 'laws of general application', and conscientious objectors are often denied refugee status as a result. Examples include Switzerland,[14] Canada[15] and the United Kingdom. There may be exceptional cases involving 'ancillary persecution',[16] such as disproportionate or discriminatory punishment,[17] or cases where the objection involves violations of international humanitarian law, but conscientious objection in general does not provide a basis for refugee status.

There may be a variety of explanations for this. Even in those jurisdictions where a 'human rights approach' to the concept of persecution[18] is openly adopted, decision-makers may not be entirely comfortable reaching out to general human rights standards, or familiar with the jurisprudence. Furthermore, it is only recently that clear statements by international bodies have emerged in support of the right of conscientious objection. Decision-makers are likely to be more familiar with the relevant paragraphs of the United Nations High Commissioner for

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[14] The description in this chapter of the relevant Swiss law draws on a communication in 2011 with IARLJ member, Judge Christa Luterbacher.

[15] *Ates v Canada (Minister of Citizenship and Immigration)* 2005 FCA 322. For examples of case law following this precedent see *Volkovitzky v Canada (Minister of Citizenship and Immigration)* 2009 FC 893, at para. 28; *Ozunal v Canada (Minister of Citizenship and Immigration)* 2006 FC 560.

[16] I am borrowing from Jones, above note 10, at 163.

[17] In Canada, see *Rivera v Canada (Minister of Citizenship and Immigration)* 2009 FC 814; *Walcott v Canada (Minister of Citizenship and Immigration)* 2011 FC 415. In Switzerland, successful cases have involved penalties imposed by Saddam Hussein's regime, which included mutilation, amputation of the ears, branding and the death penalty; and cases involving torture of conscientious objectors in Eritrea: *In re IH Eritrea*, Swiss Asylum Appeal Commission, judgment of 20 December 2005. (The Swiss Asylum Appeal Commission has since been replaced by the Swiss Federal Administrative Court (Bundesverwaltungsgericht).)

[18] See Michele Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007) ch. 2.

Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status*[19] (described below). Decision-makers may turn to the Handbook without referencing more recent developments in general human rights law or within UNHCR, and there is a risk of misconstruing the Handbook and rendering it obsolete. The Handbook contains no reference to the relevant recent jurisprudence of the Human Rights Committee, as this jurisprudence postdates the Handbook which was first written in 1979, re-edited and published in 1992, and reissued in 2011. The 2011 reissue contains all current guidelines, which effectively update the Handbook. At the time of writing, UNHCR had drafted, but not finalized a set of guidelines on the subject of conscientious objection.[20]

The leading case on conscientious objection in the United Kingdom, the House of Lords' decision in *Sepet and another v Secretary of State for the Home Department* ('*Sepet and Bulbul*'),[21] illustrates these problems. The case involved two Kurds who objected to compulsory military service in Turkey on the basis of their opposition to government policy with respect to the Kurds, and the alleged likelihood of being required to participate in violations of IHL in Kurdish areas of Turkey. There was no consideration of the question of objection to service that would involve violations of IHL because the decision-maker at first instance found against the applicants on this issue. (That topic has since been addressed by the Court of Appeal in *Krotov v Secretary of State for the Home Department*,[22] a case which is examined below.) In the lead judgment, Lord Bingham of Cornhill canvassed the state of international law regarding conscientious objection in general terms, noting ambiguities in the UNHCR Handbook and the Human Rights Committee's extant jurisprudence[23] as well as the provisions of the ICCPR and the European

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[19] *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.3 (Geneva: UNHCR, 1979, re-edited 1992, reissued 2011) ('UNHCR Handbook').

[20] The present author was a member of the external reference group for the draft UNHCR Guidelines.

[21] *Sepet (FC) and another (FC) (Appellants) v Secretary of State for the Home Department (Respondent)* [2003] UKHL 15 ('*Sepet and Bulbul*').

[22] *Krotov v Secretary of State for the Home Department* [2004] EWCA Civ 69.

[23] *Sepet and Bulbul*, above note 21, at paras 12–13 (Lord Bingham).

Convention on Human Rights (ECHR)[24] exempting forced military service from the prohibition on forced labour.[25]

He examined European regional international law too. The European Qualification Directive (in draft at the time of the judgment in *Sepet and Bulbul*) merely provides that one example of persecution is 'prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion'.[26] Lord Bingham said of this provision that it 'plainly affords a narrower ground for claiming asylum'[27] than some of the other international instruments he examined.[28]

The Charter of Fundamental Rights of the European Union states in Article 10(2) that 'the right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right'.[29] Of this provision, Lord Bingham stated that the 'difficulty is that national laws and national constitutional traditions may, or may not, recognise a right of conscientious objection'.[30]

Lord Bingham concluded that international law did not yet accept a right of conscientious objection.[31] In obiter, he also rejected the predicament-based approach to the nexus between persecution and the Convention grounds.[32]

Lord Hoffmann wrote a separate concurring judgment in *Sepet and Bulbul*. Citing philosopher Ronald Dworkin, Lord Hoffmann said the standard moral position is that:

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[24] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS No. 5 (ECHR).

[25] *Sepet and Bulbul*, above note 21, at para. 19.

[26] Article 9(2)(e) of Directive 2011/95/EU of 13 December 2011 on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9 ('Qualification Directive' (recast)).

[27] *Sepet and Bulbul*, above note 21, at para. 16 (Lord Bingham).

[28] This perhaps illustrates the dangers of an illustrative list, even where the list is not intended to be exhaustive.

[29] Charter of Fundamental Rights of the European Union [2010] OJ C83/389.

[30] *Sepet and Bulbul*, above note 21, at para. 15 (Lord Bingham). However, the provision could mean that national laws may set out the ways in which conscientious objection is to be observed.

[31] *Ibid.* para. 16.

[32] *Ibid.* paras 21–3.

> In a democracy, or at least a democracy that in principle respects individual rights, each citizen has a general moral duty to obey all the laws, even though he would like some of them changed. He owes that duty to his fellow citizens, who obey laws that they do not like, to his benefit. But this general duty cannot be an absolute duty, because even a society that is in principle just may produce unjust laws and policies, and a man has duties other than his duties to the state. A man must honour his duties to his God and to his conscience, and if these conflict with his duty to the state, then he is entitled, in the end, to do what he judges to be right. If he decides that he must break the law, however, then he must submit to the judgment and punishment that the state imposes, in recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his religious or moral convictions.[33]

He went on to make an analogy with someone who refused to pay their tax on the basis that it was against their conscience to contribute to military expenditure.[34]

Lord Hoffmann could not find sufficient basis in the practice of states or jurisprudence to support a right of conscientious objection. He thought that the framers of the ICCPR viewed public safety as a legitimate reason for not allowing conscientious objection.[35] He concluded that a right to conscientious objection was 'not supported by either a moral imperative or international practice'.[36]

In other jurisdictions, the law is unsettled. For example, in Germany,[37] the leading precedent[38] requires an element of motivation on the part of the persecutors which is often missing from conscientious objection cases,[39] although there have been some departures from this position.[40] In Australia, the High Court has indicated that conscientious objection

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[33] *Ibid.* para. 32 (Lord Hoffmann) citing Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) 186–7.

[34] *Ibid*. para. 34.

[35] *Ibid.* para. 46.

[36] *Ibid.* para. 53.

[37] The description in this chapter of the relevant German law draws on a paper prepared in 2011 by IARLJ member Dr Paul Tiedemann (copy on file with author).

[38] BVerG, 17 May 1983, 9 C 36/83, BVerwGE 67, 184.

[39] BVerwG, 28 February 1984, 9 C 981/81, DVBI 1984, 780.

[40] OVG Schleswig, 30 October 2001, 4 L 130/95. In another interesting decision, Kosovar citizens fleeing military service in the Milosevic regime of the former Yugoslavia were granted refugee status because Kosovars were not equal sharers in the benefits of Yugoslavian citizenship and compulsory military service for them was therefore a form of persecution: VG Frankfurt, 10 November 1995, 6 E 13593/93.A.

might generally be viewed as a case of a law of general application.[41] However, it granted an appeal from a young man from Afghanistan who objected to fighting with the Taliban, an illegitimate authority which pursued conscription in a 'random and arbitrary' manner, on the basis that the Australian Refugee Review Tribunal had misapplied the High Court jurisprudence concerning membership in a particular social group (the putative social group being young able-bodied men).[42] In the Federal Court, different approaches have been taken, depending on whether or not the court has applied a predicament-based analysis or has looked to the motivation of the persecutor.

In the key example of a case involving predicament-based analysis, *Erduran v Minister for Immigration and Multicultural and Indigenous Affairs*, Justice Gray stated that:

> it is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason.[43]

This reasoning has been applied in some Refugee Review Tribunal decisions.[44]

In New Zealand, also, the position with respect to conscientious objectors in general terms appears not to have been definitively settled.[45]

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[41] *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30, 206 CLR 323, at para. 97 (McHugh, Gummow and Hayne JJ); at para. 245 (Callinan J).

[42] *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25, 217 CLR 387, at paras 47–9 (Gleeson CJ, Gummow and Kirby JJ).

[43] *Erduran v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 814, at para. 28 (Gray J).

[44] See e.g., RRT 1009727 (17 February 2011) [2001] RRTA 142.

[45] In one decision, it is noted that 'the Authority has consistently taken the position that objection to performing military service is not grounds for refugee

The major precedent is Refugee Appeal No. 75378.[46] In this case, the New Zealand Refugee Status Appeals Authority firmly grounded its approach to the question in human rights law, and it adopted the predicament-based approach with respect to the question of the nexus between the Convention grounds and persecution. It noted two 1999 authorities which hold that conscientious objectors are generally not recognized as refugees, subject to exceptions in two kinds of cases: those we may call persecution ancillary to conscientious objection and those which involve the possibility of participation in violations of IHL.[47]

As the 1999 authorities predated the adoption of the human rights-based approach to refugee status that now prevails in New Zealand, the Authority set out a new way of looking at the issues. Noting the developments towards recognition of conscientious objection as being protected under Article 18 of the ICCPR, the Authority said that a question arose as to whether a limitation could be imposed on the right of conscientious objection under Article 18(3).[48]

The Authority noted that for a limitation to be valid, it has to be *prescribed by law*, for a *legitimate goal* and the limitation has to be *proportionate.*[49] The Authority described 'public safety' as the relevant legitimate goal nominated by Article 18(3).[50] Moving to the question of proportionality between aims and means, the Authority stated that it was clear that where 'conscription laws are selectively enforced or breaches selectively punished, this can be seen to be a disproportionate method of achieving a legitimate aim'.[51] Further, cases of a conflict involving a real chance that the asylum seeker would have to commit human rights violations, are by definition not a legitimate aim: 'quite simply, the state does not enjoy the right to wage war in whatever manner it chooses'.[52] The Authority was not, at the end of the day, required to settle whether conscientious objection claims in general were capable of grounding refugee status. However, it did seem to indicate, in obiter, that alternative

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status'. Refugee Appeal No. 75995 (31 October 2007), at para. 29. However, the leading precedent seems open to interpretation. Note that the New Zealand Refugee Status Appeals Authority was replaced by the Immigration and Protection Tribunal on 29 November 2010.

[46] Refugee Appeal No. 75378 (19 October 2005).

[47] Refugee Appeal No. 70742/97 (28 January 1999) and Refugee Appeal No. 71219/98 (14 October 1999).

[48] Refugee Appeal No. 75378, above note 46, at para. 68.

[49] *Ibid.* para. 70.

[50] *Ibid.* para. 74.

[51] *Ibid.* para. 81.

[52] *Ibid.* para. 89.

service is not a requirement, thus leading to the conclusion that conscientious objectors are *not* entitled to refugee status per se.[53]

Concerning the nexus to the Convention ground, the Authority stated that 'under any circumstance, an objection by an individual to a law requiring compulsory military service is inherently an expression of an opinion as to the boundaries of state power in relation to the individual; it is inherently political'.[54] Regarding the standard of proof, the Authority stated that it involves a 'real chance' (more than mere speculation) that the applicant 'could be required' to commit violations of IHL.[55] On the facts of the case, which involved widespread breaches of the laws of war by Turkish forces,[56] the Authority found the 'real chance' threshold had been crossed.[57]

This brief survey shows that the domestic case law is either unsettled or against recognition of conscientious objection in general terms as a basis for refugee status. Developments at the international level suggest there is a need to rethink approaches to asylum in this area.

INTERNATIONAL LAW DEVELOPMENTS REGARDING CONSCIENTIOUS OBJECTION

In the past, international legal authorities may have provided unclear guidance on conscientious objectors' claims to refugee status. In the last 20 years, however, jurisprudence from the international legal arena has surged ahead of the national jurisprudence surveyed above, with particularly interesting and decisive developments occurring in the last six years.

The UNHCR Handbook contains a whole section devoted to 'deserters and persons avoiding military service'.[58] In addition to dealing with ancillary persecution, the Handbook acknowledges that conscientious objection itself may found a claim to refugee status:

> 170. There are … *cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience*.

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53 *Ibid.* para. 85.
54 *Ibid.* paras 115–16.
55 *Ibid*. para. 109.
56 *Ibid.* para. 141.
57 *Ibid.* para. 142.
58 UNHCR Handbook, above note 19.

171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.
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.*
174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions. (emphasis added)

These paragraphs, while useful, do suffer from a little ambivalence. The suggestion in paragraph 173 that it is open to states to grant refugee status is too weak, and undercuts the clearly correct analysis in paragraphs 170 and 172, which is also weakened by the use of the language 'may'.[59] Importantly, however, the UNHCR has issued more recent guidance on the topic of conscientious objectors in its Guidelines on

[59] See e.g., *Sepet and Bulbul*, above note 21, at para. 12 (Lord Bingham). Lord Bingham's narrow reading of the UNHCR Handbook can be contrasted

International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, which clearly state that conscientious objection is per se a basis for refugee status.[60]

The position that conscientious objection is protected by international human rights law is supported by other bodies within the UN human rights system, including the Human Rights Council,[61] the Working Group on Arbitrary Detention,[62] and the Special Rapporteur on Freedom of Religion or Belief.[63] The recent jurisprudence of the UN Human Rights Committee has confirmed this position and offered a new way of theorizing conscientious objector cases.

In 2006, the Human Rights Committee considered the first of many complaints against South Korea concerning compulsory military service. In these first cases, which concerned two Jehovah's witnesses, the Committee was presented with arguments by South Korea concerning its precarious situation vis-à-vis North Korea, along with the possible abuse of a conscientious objector exception.[64] The Committee did not find these reasons convincing.[65] Subsequently, in Communications Nos. 1593 to 1603/2007,[66] the Committee recalled its previous jurisprudence that 'the authors' conviction and sentence amounted to a restriction on their ability

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with the broad reading adopted by the US Court of Appeals (Ninth Circuit) in *Canas-Segovia v Immigration and Naturalization Service*, 902 F.2d 717 (1990).

[60] UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06 (28 April 2004) para. 26.

[61] Human Rights Council, *Conscientious Objection to Military Service*, UN Doc. A/HRC/RES/20/2 (16 July 2012).

[62] See Opinion No. 16/2008 (Turkey) and Opinion No. 8/2008 (Colombia), in Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Opinions Adopted by the Working Group on Arbitrary Detention*, UN Doc. A/HRC/10/21/Add.1 (4 February 2009). See further, Rachel Brett, *International Standards on Conscientious Objection to Military Service* (Quaker United Nations Office, Human Rights and Refugees Publications, November 2008).

[63] For example, see Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefelt*, UN Doc. A/AHRC/16/53/Add.1 (14 February 2011).

[64] *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, Comm. No. 1321/2004 and 1322/2004 (3 November 2006), UN Doc. CCPR/C/88/D/1321–1322/2004, at paras 4.2–4.3 ('*Yeo-Bum Yoon*').

[65] *Ibid.* para. 8.4.

[66] Comms Nos 1593 to 1603/2007 (30 April 2010), UN Doc. CCPR/C/98/D/1593-1603/2007.

to manifest their religion or belief'[67] and again found that South Korea had not demonstrated that this restriction was *necessary*, as required under Article 18(3).[68]

In light of the general interpretative provisions in Article 5 of the ICCPR, the Human Rights Committee's jurisprudence in the Korean cases was a move in the right direction. It is difficult to justify overriding freedom of conscience with respect to something as fundamental as the taking of human life precisely at the moment when that freedom needs to be protected. Even a utilitarian approach that looks to the preferences (or even survival) of the majority might find it difficult to justify compulsory military service in the face of a conscientious objection. It seems unlikely that there would be so many conscientious objectors that the military effort would collapse, thereby pitting the lives of the many civilians to be saved against the consciences (and lives) of the few, and, as is often pointed out, conscientious objectors are not going to make good fighters.[69] Compulsory military service may meet some elements of the test for valid limitations, particularly the requirement of an important goal such as defence. However, national security is *not* one of the grounds listed as a permissible reason for limitations in Article 18(3). In any event, compulsory military service fails the test for valid limitations when we consider elements such as whether there is a less restrictive means of achieving the goal, and, if arguments concerning the impact on morale and effectiveness of the armed forces are accepted, it may even fail the requirement that there be a rational relationship between goal and means. This probably explains the Human Rights Committee's focus on Korea's failure to show that the limitation on freedom of conscience is *necessary*.

In May 2011, a majority of the Committee shifted from regarding conscientious objection as governed by Article 18(3) and adopted the view that conscientious objection is a non-derogable aspect of freedom of conscience. In views concerning 100 South Vietnamese conscientious objectors, the Committee stated that:

> the right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an

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[67] *Ibid.* para. 7.2.

[68] *Ibid.* para. 7.4.

[69] See the discussion in *Sepet and Bulbul*, above note 21, at para. 44 (Lord Hoffmann).

> exception from compulsory military service if this cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion.[70]

The Committee reconfirmed this reasoning in 2012 in its views concerning a case in Turkey.[71] Although some members of the Committee are uncomfortable with the new direction,[72] two concurring opinions in the 2012 views of the Committee seek to justify the new jurisprudence. Sir Nigel Rodley, Krister Thelin and Cornelis Flinterman argued that there is a 'lack of reality' in basing the analysis on the limitations clause in Article 18:

> It is precisely in time of armed conflict, when the community interests in question are most likely to be under greatest threat, that the right to conscientious objection is most in need of protection, most likely to be invoked and most likely to fail to be respected in practice.[73]

They distinguished between cases involving taxation and military service on the basis of the 'level of complicity',[74] concluding that 'the right to refuse to kill must be accepted completely'.[75] Similarly, Mr Omar Salvioli argued that subjecting conscientious objection to limitations analysis would 'abolish the right altogether'.[76]

Before leaving the question of the interpretation of Article 18 of the ICCPR, Article 8 of the ICCPR, which prohibits forced labour, should be discussed. Article 8 includes an exception for compulsory military service in a way that suggests the framers regarded recognition of conscientious objector status as a matter of state discretion.[77] However, it is possible to reconcile Article 8(3)(c) with a reading of Article 18 that protects conscientious objection on a universal basis by acknowledging

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[70] *Min-Kyu Jeong et al. v Republic of Korea*, Comms Nos 1642-1741/2007 (27 April 2011), at para. 7.3.

[71] *Cenk Atasoy and Arda Sarkut v Turkey*, Comms Nos 1853/2008 and 1854/2008 (12–30 March 2012) (*Atasoy and Sarkut*).

[72] Individual opinion of Neuman, Iawasawa, O'Flaherty and Kaelin, in *Atasoy and Sarkut*, *ibid*., Appendix I.

[73] Individual opinion of Rodley, Thelin and Flinterman, *ibid*., Appendix II.

[74] *Ibid*.

[75] *Ibid*.

[76] Individual opinion of Omar Salvioli, *ibid*., Appendix III, para. 18.

[77] Article 8(3)(c)(ii) states that 'for the purpose of this paragraph the term "forced or compulsory labour" shall not include … any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors'.

that the question of whether someone may be forced into a particular kind of work is distinct from the question whether a person may be forced into a particular kind of work *against their conscience*.[78] The Human Rights Committee has therefore said that 'article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection'.[79]

The European Court of Human Rights (ECtHR) has taken a similar approach to the equivalent exception to forced labour for compulsory military service contained in Article 4(3)(b) of the ECHR in *Bayatyan v Armenia*.[80] In *Bayatyan v Armenia*, which involved a Jehovah's witness imprisoned in Armenia for refusing to do compulsory military service, the European Court of Human Rights (Grand Chamber) decided 16 to 1 that there had been a violation of Article 9 of the ECHR, which protects freedom of thought, conscience and religion. The Court examined the *travaux préparatoires* and held that they:

> confirm that the sole purpose of sub-paragraph (b) of Article 4§3 is to provide a further elucidation of the notion of 'forced or compulsory labour'. In itself it neither recognises nor excludes a right to conscientious objection and should therefore not have a delimiting effect on the rights guaranteed by Article 9.[81]

The Court also underlined the importance of the ECHR as a living instrument and the steady developments towards recognition of conscientious objection as part of freedom of thought, conscience and religion.[82]

Unlike the Human Rights Committee's most recent views, the ECtHR approached the issue using a limitations framework. Finding it unnecessary to determine whether Armenia's law prescribed a limitation[83] or whether such a limitation pursued a legitimate aim,[84] the Court found that a limitation on the right was not proportionate, being unnecessary in a democratic society:

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[78] See Goodwin-Gill and McAdam, above note 8, at 113.

[79] *Yeo-Bum Moon*, above note 64, at para. 8.2.

[80] *Bayatyan v Armenia* (GC) (App. No. 23459/03) ECtHR, judgment of 7 July 2011. See also *Tsaturyan v Armenia* (App. No. 37821/03) ECtHR, judgment of 10 January 2012 and *Bukharatyan v Armenia* (App. No. 3781/03) ECtHR, judgment of 10 January 2012.

[81] *Bayatan v Armenia*, above note 80, at para. 100.

[82] *Ibid*. paras 98–110.

[83] *Ibid.* para. 116.

[84] *Ibid.* para. 117.

> the imposition of a penalty on the applicant, in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society. Still less can it be seen as necessary taking into account that there existed viable and effective alternatives capable of accommodating the competing interests, as demonstrated by the experience of the overwhelming majority of the European states.[85]

The Court pointed to the importance of 'pluralism, tolerance and broadmindedness' in a democratic society.[86] The Court also distinguished the situation of military service from taxation, saying that a general taxation obligation 'has no specific conscientious implications in itself'.[87]

These international legal developments overwhelmingly support the argument that a universal conscientious objection to military service may found a claim for refugee status. The question of objection to a particular conflict has raised some challenging issues for decision-makers. These challenges are examined next.

'PARTIAL' CONSCIENTIOUS OBJECTOR STATUS AND REFUGEE STATUS

One of the progressive aspects of the UNHCR Handbook is that it discusses the possibility of what is sometimes called 'partial' conscientious objector status. Partial or selective conscientious objection describes persons resisting military service not on the basis of a total or universal objection to carrying arms, but an objection with respect to a particular conflict because of some kind of illegality in the conflict. The UNHCR Handbook describes these as cases in which a conflict 'is condemned by the international community as contrary to basic rules of human conduct'. In this section of the chapter, case law concerning breaches of the *jus ad bellum* and the *jus in bello* as bases for conscientious objection are examined.

Conscientious Objection and *jus ad bellum*

Modern case law relating to conscientious objection and *jus ad bellum* tends to involve US servicemen and women objecting to the wars in Afghanistan and Iraq. Most of these cases have been unsuccessful.

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[85] *Ibid.* para. 124.
[86] *Ibid.* para. 126.
[87] *Ibid.* para. 111.

In Germany, there has been one (as yet unsuccessful) case involving a US serviceman, André Shepherd, who was stationed in Germany, and after six months serving as a helicopter repairman in Iraq, claimed asylum in Germany on the basis that he had decided the war in Iraq was illegal. The Federal Office of Migration and Refugees determined in March 2011 that Shepherd was not a refugee. An appeal is pending.

Canadian jurisprudence has yielded similar results, despite an older precedent to the contrary concerning Yemeni forces joining Iraq's invasion of Kuwait.[88] One of the key precedents is *Hinzman and Hughey v Canada*,[89] a decision of the Canadian Federal Court of Appeal concerning the conjoined cases of Jeremy Hinzman and Brandon Hughey.[90]

Jeremy Hinzman was a volunteer who joined the army in order to have his college tuition paid and because he thought the army was a noble profession.[91] As a result of his training (i.e., the element of desensitization), he developed an objection to military service. He came to the concluson that killing was wrong.

He applied for status as a conscientious objector, but for reasons unknown, his application was not decided on the merits and he had to reapply for status as a conscientious objector just before he was deployed to Afghanistan. Pending a decision as to whether or not he should be recognized as a conscientious objector, Hinzman was reassigned to duties that did not involve combat and he performed kitchen duties in Afghanistan. However, Hinzman's application for conscientious objector status was eventually rejected by the US military because Hinzman indicated that he would be prepared to fight a defensive war or to be a part of a peacekeeping force. His credibility was also impugned because the decision-maker knew only about the second application for conscientious objector status, which was lodged just prior to deployment to Afghanistan.

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[88] *Al-Maisri v Canada (Minister of Employment and Immigration*) [1995] FCJ No. 642.

[89] *Hinzman v Canada (Minister of Citizenship and Immigration)*; *Hughey v Canada (Minister of Citizenship and Immigration)* 2007 FCA 171 ('*Hinzman and Hughey*').

[90] Leave to appeal to the Supreme Court of Canada was subsequently refused, however, Hinzman successfully appealed a decision not to permit him to stay in Canada on humanitarian and compassionate grounds: *Hinzman and others v Canada* (*Minister of Citizenship and Immigration*) 2010 FCA 177.

[91] *Hinzman and Hughey*, above note 89, at para. 6. The facts of Hinzman's case are described at paras 6–16.

Hinzman chose not to appeal the decision by the US military, saying that he was worn down and felt there was no point. On learning that he was to be deployed to Iraq, Hinzman deserted as he thought that this war was illegal as a matter of international law.

Brandon Hughey was only 17 when he joined the US military.[92] He enlisted for reasons similar to Hinzman. His opinion concerning the legality of the Iraq war evolved over time. He began to explore desertion before he learned of his deployment to Iraq. Prior to deserting, he sought advice regarding a discharge from the army, but the staff sergeant and his superior officer told him not to pursue the matter.

The Immigration and Refugee Board (IRB) rejected both Hughey's and Hinzman's claims. The IRB interpreted paragraph 171 of the UNHCR Handbook so as to require a violation of IHL – the *jus in bello* – rather than permitting consideration of the legality of the conflict as a whole. The Board found:

(1) There is a presumption that the United States is capable of protecting its citizens.[93]
(2) There is a presumption that ordinary laws of general application, e.g., US laws on desertion, are not persecutory.[94]
(3) Neither claimant had adduced sufficient evidence to show that they potentially would be required to engage in IHL violations.[95]
(4) The United States would not apply the Uniform Military Code of Justice (UMCJ) in a discriminatory fashion and it would not result in cruel or unusual treatment or punishment.[96]

On appeal before the Federal Court, Justice Mactavish found the following:[97]

(1) A foot soldier (as opposed to someone involved in the prosecution of the war) can only rely on violations of IHL to found a claim to refugee status on the basis of conscientious objection.

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[92] The facts in Hughey's case are taken from *Hinzman and Hughey*, *ibid*. paras 17–22.
[93] *Ibid*. para. 29.
[94] *Ibid.* para. 29.
[95] *Ibid.* para. 30.
[96] *Ibid.* para. 31.
[97] *Hinzman v Canada (Minister of Citizenship and Immigration)* 2006 FC 420.

(2) The question whether there were systemic violations of IHL was a matter of fact, and the decision of the IRB was not patently unreasonable.
(3) The IRB had not imposed an inappropriate burden in terms of the level of personal involvement in violations of IHL.
(4) It was reasonable for the IRB to find that the applicants had failed to rebut the presumption of state protection. Mactavish J said this was appropriate because the only basis for objection to a particular war is paragraph 171 of the UNHCR Handbook. Thus, the fact of prosecution is not a failure in state protection or persecution on the basis of political opinion.

Justice Mactavish did not grant the appeal, although she did certify a question concerning whether a foot soldier could base a claim to refugee status on the *jus ad bellum*, meaning that the matter could be taken before the Federal Court of Appeal. This question was not answered on appeal. The Federal Court of Appeal refused to answer the question on the basis of sufficiency of state protection.[98]

The reasoning concerning the *jus ad bellum* in *Hinzman and Hughey* is not convincing. It is unclear why a soldier may not hold a valid conscientious objection to a conflict on the basis that there is a violation of the *jus ad bellum*. It seems perfectly possible that a person who would otherwise be prepared to bear arms, even voluntarily, might believe that it is morally wrong to fight a war that is illegal as a matter of international law. It is also not clear why resolution of the matter should hinge on whether a soldier may be held criminally responsible given that there is usually no question of total conscientious objectors to military service being held criminally responsible if forced to bear arms. The pertinent issue is simply whether the person's conscience will permit them to fight and whether it is permissible for the state to override the dictates of a person's conscience. As Bailliet argues, 'reference to international law serves as a *framework* for the individual's beliefs, and its invocation should serve this purpose, regardless of whether or not the action is *justiciable*'.[99] More understandable, perhaps, are questions concerning the depth of the belief given the initial voluntary nature of the service and the apparent change of heart. However, it is entirely predictable that young recruits' perceptions about the morality and legality of conflict

[98] *Hinzman and Hughey*, above note 89, at paras 42–51.
[99] Bailliet, above note 2, at 377.

situations is likely to change markedly once they have been exposed to the reality of war.

Conscientious Objection and *jus in bello*

While none of the recent decisions of senior courts reviewed for this chapter have recognized refugee status for persons objecting to service on the basis of the *jus ad bellum*, many courts have recognized as refugees persons objecting to service on the basis of the *jus in bello*. For example, in the key UK precedent, *Krotov v Secretary of State for the Home Department*,[100] the English Court of Appeal held that, 'if committed on a systemic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military'[101] the crimes of 'genocide, the deliberate killing and targeting of the civilian population, rape, torture, the execution and ill-treatment of prisoners and the taking of civilian hostages'[102] as evidenced by the relevant international treaties,[103] constituted persecution. Lord Justice Potter pointed out that as a person would be excluded from refugee status for participation in such crimes, he or she should be granted refugee status if there would be no choice but to perform these acts contrary to the dictates of the person's conscience.[104] However, he did not regard this as recognition of a right to conscientious objection, but rather as a case of imputed political opinion.[105]

The Canadian jurisprudence takes a similar position. In *Zolfagharkhani v Canada*,[106] the Federal Court of Appeal held that a conflict involving the use of chemical weapons would be 'condemned' by the international community, as required by UNHCR Handbook, paragraph 171. Further, in this particular case, 'the appellant's refusal to participate in the military action against the Kurds would be treated by the Iranian government as the expression of an unacceptable political opinion'.[107]

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[100] *Krotov*, above note 22.
[101] *Ibid*. para. 37 (Potter LJ).
[102] *Ibid.* para. 30 (Potter LJ).
[103] *Ibid.* paras 31–6 (Potter LJ).
[104] *Ibid.* para. 39 (Potter LJ).
[105] *Ibid*. paras 45–6 (Potter LJ).
[106] *Zolfagharkhani v Canada (Minister of Employment and Immigration)* (15 June 1993) [1993] 3 FC 540.
[107] *Ibid*.

More recently, in *Lebedev v Canada*,[108] which involved a successful appeal against a decision to deny refugee status to a Russian asylum seeker who had not wanted to serve in Chechnya, de Montigny J stated:

> as a matter of principle and of precedent, conscientious objection can only be global and with respect to participation in all armed conflicts. When a claimant objects to a specific war, it is not because he rejects war on philosophical, ethical or religious grounds. Rather, he is objecting to the military's goals or strategies in a particular conflict … His objection is not driven by his conscience, but by an objective assessment about whether military action in a particular situation is valid. That is not the same thing as conscientious objection.[109]

In the case of conscientious objection as de Montigny J defines it, all that is required is proof of the asylum seeker's subjective beliefs, while objections to wars that violate international humanitarian law require, in addition, an objective assessment of the conflict.[110]

As well as remitting the case for consideration as a case in which violations of IHL were involved, de Montigny J certified three questions regarding the difference between conscientious objection and participation in an internationally condemned conflict, including a question as to how decision-makers must define 'international condemnation'.[111] These questions were not answered, because, although an appeal was launched, it was discontinued.

This is disappointing from an academic point of view because the questions are pressing and deserve answers. Clearly, it is problematic to wait for condemnation by the UN Security Council, as its failure to respond meaningfully to the conflict in Syria demonstrates, although there is international condemnation of the Syrian state, as evidenced by General Assembly resolutions.[112] In some rare cases, it is clear that the conflict violates norms of international law, but it may be viewed as morally acceptable, as many would argue was the case with the NATO intervention in the former Yugoslavia (an example involving the *jus ad*

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[108] *Lebedev v Canada (Minister of Citizenship and Immigration)* 2007 FC 728.

[109] *Ibid.* para. 42.

[110] *Ibid.* para. 45.

[111] *Ibid.* para. 101.

[112] General Assembly, The Situation in the Syrian Arab Republic, GA Res. 66/253, UN GAOR, 66th sess., 97th plen. mtg, UN Doc. A/RES/66/253 (21 February 2012).

bellum rather than IHL).[113] The trend in some of the jurisprudence to view cases involving IHL as something other than conscientious objection is also problematic.[114] The requirement that the conflict be verified objectively as illegal is valid. However, it may be possible to mediate between subjectivity and objectivity by relying on the concept of 'well founded fear'. A fear of fighting in a conflict that is in fact legal should be viewed as a case where the refugee claimant does not have a well founded fear of persecution since the person's conscience should be clear. The short step to the Refugee Convention ground of political opinion without questioning why being pressed into service could violate human rights means that judges fail to pinpoint what is persecutory about military service in these circumstances. True, consequences such as imprisonment violate the right to liberty, and the 'civil death' that accompanies conscientious objection in some countries involves many rights, including the prohibition on inhuman or degrading treatment or punishment.[115] However, at bottom, the requirement to serve necessarily implicates freedom of conscience and belief, and it is difficult to see why the label of conscientious objector should not apply.[116]

What is the Threshold for Violations of *jus in bello* to Ground a Refugee Claim?

One of the unsettled issues regarding claims based on *jus in bello* is whether the individual claimant for refugee status must prove that he or

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[113] For a critical view, see Antonio Cassese, 'Ex iniuria ius oritur: Are we Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23.

[114] For discussion of distinctions and relationships between conscientious objection and civil disobedience see Nilgun Toker Kilinc 'The Morals and Politics of Conscientious Objection, Civil Disobedience and Anti-militarism' in C. Usterci and O.H. Cinar (eds), *Conscientious Objection: Resisting Militarized Society* (London/New York: Zed Books, 2009) 61; Taha Parla, 'The Philosophical Grounds of Conscientious Objection' in Usterci and Cinar (eds), *Conscientious Objection: Resisting Militarized Society* (London/New York: Zed Books, 2009) 73.

[115] See *Osman Murat Ulke v Turkey* (App. No. 39437/98) ECtHR, judgment of 5 January 2006; *Ercep v Turkey* (App. No. 2226/10) ECtHR, judgment of 22 November 2011.

[116] For a critique of the reliance on political opinion, see Bailliet, above note 2, at 340–55. For discussion of the meaning of 'conscientious', see Kent Greenawalt, 'All or Nothing at All: The Defeat of Selective Conscientious Objection' (1971) *Supreme Court Review* 31, 59–67.

she would be forced to participate in violations of IHL. The alternative is that mere participation in the conflict could provide grounds for conscientious objection, but this raises a further question: are systemic, as opposed to isolated violations of IHL required?

In the key UK precedent, *Krotov*,[117] which concerned conduct that could potentially have been excludable, Lord Justice Potter required a risk of actual participation as opposed to mere association by service in a conflict that involved violations of international humanitarian law. He emphasized:

> that the grounds should be limited to reasonable fear on the part of the objector that he will be personally involved in such acts, as opposed to a more generalised assertion of fear or opinion based on reported examples of individual excesses of the kind which almost inevitably occur in the course of armed conflict, but which are not such as to amount to the multiple commission of inhumane acts pursuant to or in furtherance of a state policy of authorisation or indifference.[118]

The Canadian case law has also dealt with the issue. In *Key v Canada*,[119] Joshua Key claimed that he had witnessed unjustified abuse, unwarranted detention, humiliation and looting by US forces in Iraq.[120] The IRB considered evidence including the *Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (February 2004).[121] The Board identified possible violations of Articles 27, 31, 32 and 33 of the Fourth Geneva Convention[122] and said that '[i]n so raiding the homes, the military showed little understanding that the residents were protected persons under the Convention'.[123] The IRB said the military's actions were 'arguably disproportionate to the military objective of recovering contraband and bringing in men for questioning'.[124] However, the Board said these actions did not all amount to grave breaches of the Geneva Conventions and were therefore not war crimes, nor were they crimes

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[117] *Krotov*, above note 22.
[118] *Ibid.* para. 40 (Potter LJ).
[119] *Key v Canada (Minister of Citizenship and Immigration)* 2008 FC 383.
[120] The facts are taken from the judgment in *Key v Canada*, *ibid*. paras 2–5.
[121] *Ibid*. para. 5.
[122] Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
[123] *Key v Canada*, above note 119, at para. 6.
[124] *Ibid*.

against humanity, and since the actions would not amount to excludable crimes, Key could not rely on paragraph 171 of the UNHCR Handbook.[125]

On appeal, the Federal Court in *Key* held that the IRB had taken too narrow a view, based on a misreading of Justice Mactavish's decision in *Hinzman*.[126] *Hinzman* involved isolated incidents and the applicants failed to adduce sufficient evidence to show they personally would be involved in violations of IHL.[127] The court found that 'military action which *systematically* degrades, abuses or humiliates either combatants or non-combatants is capable of supporting a refugee claim where that is the proven reason for refusing to serve' (emphasis in original).[128]

The court unpacked other elements in paragraph 171 of the UNHCR Handbook. International condemnation was relevant but not necessary: the key is objective evidence of violations of IHL rather than international reactions which might not be forthcoming.[129] The court also considered the use of the term 'associated' in paragraph 171 and it examined previous Canadian precedent, and UK and US case law. The court noted that this term does not require actual or likely participation in the violations of IHL.[130] It appears to be enough that the soldier feels morally compelled not to fight in an operation in which violations are occurring at the relevant level. The relevant standard is not isolated incidents, but action that involves systematically degrading treatment.

Key may be usefully compared and contrasted with the case of *Treskiba v Canada.*[131] There, the court upheld the Board's ruling, despite the finding that there were violations of international humanitarian law in Gaza, on the basis that Treskiba would not be required to participate. This finding seemed to depend on the small likelihood of him personally having to perform particular acts, as opposed to a finding that violations were isolated.[132] As noted above, one important New Zealand case[133] has also treated the question as requiring risk of participation, but in light of the relatively low standard of proof in refugee cases, it was satisfied on

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125 *Ibid*.
126 *Ibid.* para. 17.
127 *Ibid.* para. 18.
128 *Ibid.* para. 29.
129 *Ibid.* para. 21.
130 *Ibid*.
131 *Treskiba v Canada (Minister of Citizenship and Immigration)* 2009 FC 15.
132 *Ibid.* paras 8–9.
133 Refugee Appeal No. 75378, above note 46.

the basis of relevant country information that the particular applicant had a well founded fear of being required to participate in breaches of IHL.

A satisfying position drawn from the best aspects of these judgments is that *either* actual participation in serious violations of IHL *or* participation in a conflict in which such violations are systemic provide grounds for conscientious objection. The Federal Court's decision in *Key v Canada* that the violations of IHL are not required to rise to the level of war crimes is probably the better view, although some level of seriousness may be required. As is often remarked, it is a violation of IHL to refuse cigarettes to prisoners of war,[134] but this is unlikely to raise a moral objection to military service. Actual participation in atrocities should not be required where there is evidence of systemic violations of IHL because here it is both likely and understandable that a person would hold a moral objection simply to participation in the conflict.[135] Further, refusal to serve is the only way out of the moral dilemma. By contrast, in cases of isolated or sporadic violations, especially low-level violations, there are other ways for soldiers to rectify what is occurring in the context of conflict–for example, they may be brought to the attention of commanding officers.[136]

Role of 'State Protection'

One final problematic issue in the domestic asylum cases is the role assigned to availability of state protection. In *Hinzman and Hughey*,[137] for example, the applicants were found not to have exhausted avenues of protection available in the United States. The court found that the presumption of state protection was applicable in cases where the state was the alleged persecutor.[138] It also rejected the argument that protection would not be forthcoming because the American approach to conscientious objectors does not include partial conscientious objectors.[139] The court said:

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[134] See Arts 26 and 28 of Geneva Convention III relative to the Treatment of Prisoners of War, 12 August 1949.

[135] For a persuasive argument that privileges the individual conscience, see Bailliet, above note 2, at 369–70.

[136] See Jones, above note 10, at 144.

[137] *Hinzman and Hughey*, above note 89.

[138] *Ibid*. para. 54.

[139] *Ibid.* paras 55–6.

> in the circumstances, it is difficult to conclude, without clear evidence of the appellants' experiences to the contrary, that the appellants would have inadequate protection for their beliefs in the United States. Mr. Hinzman's objections to combat transcend the war in Iraq and are grounded at least in part in his religious and spiritual beliefs. He may therefore very well have qualified as a conscientious objector had he pursued his application fully. Mr. Hughey may have more difficulty in seeking conscientious objector status because he objects only to the specific military action in Iraq on political grounds. Without evidence of his attempts to obtain such protection, however, it is impossible to know how he would have fared. In any event, conscientious objector discharges are not the only means by which soldiers can obtain early release from the military. Statistics adduced by the Crown indicate that approximately 94% of deserters from the U.S. Army have not faced prosecution and imprisonment, but have merely been dealt with administratively by being released from the military with a less-than-honourable discharge. Arguably, the chance of receiving an administrative discharge will be even higher for those who attempt to negotiate a discharge before deserting their units. Contrary to the appellant's assertions, therefore, these statistics suggest that appeal to the Executive is not an illusory resource.[140]

By contrast, in *Key v Canada*,[141] the Canadian Federal Court found that state protection was a live issue. The court considered that what Key would face now, having ensured through his desertion that he did not have to involve himself in violations of IHL, was a matter of speculation.[142] However, if an administrative discharge was the likely result then the outcome 'may well be unfair to Mr Key but it would not constitute persecution'.[143] In other words, the court is saying a decision-maker has not only to consider whether Key fled because of well founded fear of persecution, i.e., having to associate himself with oppressive military conduct against his conscience, but also what he would now face at home, and whether this also amounts to persecution. The court held that if 'there is clear and convincing evidence presented that Mr Key faced a serious risk of prosecution and incarceration, notwithstanding the possible availability of less onerous, non-persecutory treatment, he is entitled to make that case and to have that risk fully assessed'.[144] The court said that:

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[140] *Ibid.* para. 58.
[141] *Key v Canada*, above note 119.
[142] *Ibid.* para. 34.
[143] *Ibid*.
[144] *Ibid*.

> clear and convincing evidence about similarly situated individuals who unsuccessfully sought to be excused from combat duty or who were prosecuted and imprisoned for a refusal to serve, may be sufficient to rebut the presumption of state protection in the United States. I would add that because Pte Key would have been deployed back to Iraq within two weeks of his arrival in the United States, the opportunity to pursue a release or re-assignment may not have been realistic.[145]

The reasoning in *Key* has not been followed in all subsequent cases.[146] However, it is more convincing than the reasoning of the court in *Hinzman and Hughey*.[147] It is wrong to characterize access to state protection as a requirement to exhaust local remedies.[148] Soldiers should not have to wait for a court martial and imprisonment to show they have exhausted available remedies. Refugee law is not about state responsibility, but self-help based on a reasonable forward-looking risk assessment. State protection is relevant to the assessment of well founded fear, but it is important to remember that state responsibility may also be acquitted by punishment of a human rights violator after the fact. This is small consolation to a wrongly imprisoned ex-service man or woman who is now a prisoner of conscience.

It is also wrong to take a short-cut by basing the decision on state protection in the context of conscientious objection cases, as Canadian case law tends to do,[149] when we may need to ask 'protection from what'? If the military authorities in the country of origin do not allow conscientious objection at all, or to particular conflicts, then there may be little point in accessing 'state protection' from the military. 'Protection' may be a misnomer: if the state's law does not permit conscientious objection, then the state's laws and procedures should be viewed as

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[145] *Ibid.* paras 34–5.

[146] See e.g., *Landry v Canada (Minister of Citizenship and Immigration)* [2009] FCJ No. 781, at para. 30. However, similar reasoning to *Key* was applied in *Kirichenko v Canada (Minister of Citizenship and Immigration)* [2001] FC 12.

[147] But see Patrick J. Glen, 'Judicial Judgment of the Iraq War: United States Armed Forces Deserters and the Issue of Refugee Status' (2008–2009) 26 *Wisconsin International Law Journal* 965.

[148] Penelope Mathew, James C. Hathaway and Michelle Foster, 'The Role of State Protection in Refugee Analysis, Discussion Paper No. 2, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002' (2003) 15 *International Journal of Refugee Law* 444.

[149] *Hinzman and Hughey*, above note 89, has been followed a number of times. See e.g., *Colby v Canada (Minister of Citizenship and Immigration)* 2008 FC 805, at para. 22.

inherently persecutory. It may also be questionable whether one can ever talk about a 'presumption' of state protection, instead of adducing evidence to show that there are avenues of state protection available, especially when military culture may differ markedly from civilian culture and the military has its own disciplinary mechanisms which may deliver the wrong results.[150]

CONCLUSIONS

There is now a disjuncture between the international authorities regarding conscientious objection and much of the domestic case law on conscientious objectors' claims to refugee status. In the wake of important decisions by the Human Rights Committee and the European Court of Human Rights, national courts and tribunals responsible for refugee status decision-making should revisit contrary national jurisprudence where possible.

The questions concerning objections to particular wars and related issues that have arisen during the course of national determinations of refugee status are admittedly difficult. Suggestions concerning their resolution have been made in the course of this chapter, and it has been argued that selective or partial conscientious objection on the basis of either *jus ad bellum* or *jus in bello* provides the basis for recognition of refugee status. However, the deep moral, political and evidentiary concerns that may drive refugee status decision-makers need to be addressed.

It seems clear that decision-makers' perceptions concerning a citizen's obligations towards the state may inform decisions to grant or deny refugee status. This is not surprising given that refugee status compensates for lack of protection as a citizen. Most decision-makers are ready to accept that states may not demand participation in atrocities on the part of military personnel. However, they are reluctant to recognize conscientious objection in cases where the objection is to the legality of the conflict as a whole. This is viewed as an area of high state policy. The decision-maker's own state may not recognize conscientious objection in such cases. Moreover, decisions to grant refugee status may involve implicit criticism of a powerful state's policy decisions. However, decisions to go to war are governed by international law, and human rights law continues to protect the individual's moral compass during armed conflict. There is no difference between adjudicating on violations of

[150] See e.g., *Smith v Canada (Minister for Citizenship and Immigration)* [2009] FCJ No. 1404; *Walcott v Canada*, above note 17.

human rights in this context and the many others which arise in refugee status cases.

Decision-makers may also draw a distinction between voluntary military service and conscription. However, freedom of conscience should surely recognize the possibility of a changed moral appreciation of war in general or a particular conflict. All too sadly, many young recruits' lives are changed for the worse once they have witnessed the realities of armed conflict.[151] Can it be right to override one person's moral judgment when the moral rights and wrongs of resort to armed conflict are subject to vigorous and ongoing debate? Many others will make a different judgment call and, as a consequence, be willing to lay down their lives in defence of a cause, their fellow citizens or their fellow human beings. If the numbers of people objecting on moral, as opposed to merely self-interested, grounds are so high that the entire war effort is lost,[152] it is appropriate to question the state's appreciation as to the necessity of the conflict,[153] instead of its citizens' judgments.

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[151] For an account of the experience of soldiers in Iraq, see David Finkel, *The Good Soldiers* (Melbourne: Scribe Publications, 2011).

[152] The statistics for applications for conscientious objection applications by US citizens during the Vietnam conflict were particularly high.

[153] For a critique of the anti-democratic impulse behind compulsory military service, see Melek Goregenli, 'Patriotism and the Justification of Inequality in the Construction of Militarism' in C. Usterci and O.H. Cinar (eds), *Conscientious Objection: Resisting Militarized Society* (London/New York: Zed Books, 2009) 37.

Corey glass, conscientious objector/deserter. In 2002, I joined the Indiana National Guard. When I joined, I was told I would only be in combat if there were troops occupying the United States.Â Tens of thousands of American draft-dodgers and deserters took refuge in Canada. Canada's immigration laws are much stricter now: refugees must prove that they would face persecution - not just prosecution - if sent back home. On 3 June, Canada's parliament passed a non-binding motion in favour of allowing deserters to stay. I should have been in New Orleans after Katrina, not in Iraq.Â Refugee status was established to protect individuals who are victims of human rights violations. Misty, Dallas, USA. This article will examine the trends regarding the protection of the individual whose claim to refugee status is premised upon a conscientious objection to military service. It will begin by examining the internationally recognized right to freedom of thought, conscience and religion, and discuss its relationship to conscientious objection. It will then examine the position and underlying rationale of the United Nations High Commissioner for Refugees on the issue. It will look at the trends in a number of common law countries, and evaluate the degree to which UNHCR guidance and other relevant A conscientious objector is an "individual who has claimed the right to refuse to perform military service" on the grounds of freedom of thought, conscience, or religion. In some countries, conscientious objectors are assigned to an alternative civilian service as a substitute for conscription or military service. Some conscientious objectors consider themselves pacifist, non-interventionist, non-resistant, non-aggressionist, anti-imperialist, antimilitarist or philosophically stateless