Draft Dodger/ Deserter or Dissenter? Conscientious objection as grounds for refugee status
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This working group paper looks at the state of the law concerning conscientious objectors in a number of jurisdictions: Canada, Australia, New Zealand, Switzerland, Germany, and the United Kingdom. The author would like to thank all judges who provided case-law and comments, along with Ms Trina Ng who collected more case law and secondary literature and the colleagues working on the IARLJ working group papers. In general, the law may be considered up to date as of December 2010, although a 2011 decision of the European Court of Human Rights and a 2011 German decision have been included because of their importance.

The paper considers the following questions:

1. What have international authorities said regarding conscientious objection and human rights and what questions arise for consideration by refugee status decision-makers?
2. Are conscientious objectors to military service presently granted refugee status as a general rule in the jurisdictions surveyed, and why/not?
3. Do the jurisdictions surveyed recognize a 'partial' conscientious objector status when a particular war involves violations of international law?
4. Does the national case law require the illegality to stem from the *jus in bello* or international humanitarian law, or may it also stem from the *jus ad bellum*, particularly the United Nations Charter's prohibition on unilateral uses of force in Article 2(4)?
5. Where a partial exception is recognized on the basis of international humanitarian law violations, how serious and widespread must they be, and is risk of participation or mere association through military service required for refugee status to be granted?
6. What is the role of 'state protection' with respect to conscientious objectors?

1. What have international authorities said regarding conscientious objection and human rights and what questions arise for consideration by refugee status decision-makers?

As sections two through six demonstrate, the municipal law of the states surveyed appears to be very unsettled. If we apply first principles, it is possible to fit conscientious objectors to military service within the Convention definition of a refugee and to do so without even considering the well-known paragraphs on the subject in the UNHCR Handbook. However, in some jurisdictions laws relating to military service will be treated as 'laws of general application', and conscientious objections are denied refugee status as a result. There may be a variety of explanations for this. Even in those jurisdictions where a 'human rights approach' to the concept of persecution[1] is openly adopted, decision-makers may not be entirely comfortable reaching out to general human rights standards, or familiar with the jurisprudence. In

[1] For a thorough explanation of the human rights approach to the definition of a refugee, see Michele Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) ch 2. New Zealand is an example of a jurisdiction in which the human rights approach has been embraced in a very systematic and comprehensive manner.

Australia, while many judges do refer to human rights concepts, there is the added distraction of a 'refined' definition of persecution in section 91R of the *Migration Act* 1958 (*Cth*), in which persecution is defined as 'serious harm' involving 'systematic and discriminatory' conduct, and which also requires the Convention reasons to be 'the essential and significant reasons' for the *conduct*. Furthermore, it is only recently that clear statements by international bodies have emerged in support of the right of conscientious objection. In addition, of course, decision-makers are likely to be more familiar with the relevant paragraphs of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status,[2] to which this paper will turn shortly. I fear that when decision-makers turn to the Handbook without referencing more recent developments in general human rights law relating to conscientious objection, 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 and then reedited and published in 1992.

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 view point is protected by general human rights law, namely freedom of conscience (Article 18 International Covenant on Civil and Political rights 'ICCPR'; Article 18 Universal Declaration of Human Rights). Article 18(1) of the 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.
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> 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]

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 slightly more difficult to make out, but is still readily apparent. A political opinion is any opinion relating to the power of government.[3] 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 act to against his or her conscience. As stated by Goodwin-Gill and McAdam, '[r]efusal to bear arms, however motivated, reflects an essentially political opinion regarding the

[2] 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.1 Reedited, Geneva, January 1992, UNHCR 1979.

[3] Goodwill-Gill and McAdam write that political opinion 'should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged.' Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007), p. 87.

permissible limits of State authority; it is a political act.'[4] Membership in a particular social group may also be relevant, however given the constraints of this paper it will not be addressed.

The next question is whether there is enough of a 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 Convention grounds is satisfied not only by motivation on the part of the persecutor,[5] 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 adopted by the Michigan Guidelines on Nexus to a Convention ground and known as the 'predicament-based' approach. To quote the Guidelines,

> The causal link may … be established in the absence of any evidence of intention to harm or to withhold protection, so long as it is established that the Convention ground contributes to the applicant's exposure to the risk of being persecuted.[6]

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 Article 18(1) are non derogable, even in times of public emergency threatening the life of the nation, [7] which, of course, includes war or armed conflict. However, article 18(3) ICCPR 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 with respect to these beliefs.

Paragraphs 2 and 3 of Article 18 are as follows:

> 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.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Limitations analysis in the context of human rights requires us to ask whether the limitation is necessary and proportionate. Is it imposed in order to pursue a legitimate and important goal? Does the chosen

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[4] Goodwin-Gill and McAdam, *ibid*, p. 111.

[5] This was required by the US Supreme Court in *INS v Elias-Zacarias* 502 US 478 (1992), and some of the case-law cited in this paper also proceeds on the basis that what matters is what is in the mind of the persecutor.

[6] Michigan Guidelines on Nexus to a Convention Ground, [10], available at: http://www.law.umich.edu/CENTERSANDPROGRAMS/PRAL/Pages/guidelines.aspx. Participants in the colloquiua that led to the adoption of the Michigan Guidelines have been a mix of 'eminent publicists' and more junior colleagues in the field of refugee law, meaning that the guidelines may be appropriately referred to as a guide to interpreting the Refugee Convention and related human rights treaties. The Guidelines have been frequently referred to by courts, though not always followed.

[7] See Article 4 ICCPR.

limitation bear a rational relationship to this goal? Is it proportionate and in particular, is it the least restrictive means for pursuing the legitimate and important goal?[8] In its general comment on Article 18, the Human Rights Committee, which supervises the ICCPR, had this to say with respect to conscientious objection to military service:

> Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service.[9]

While not completely unambiguous[10] – unfortunately, ambiguity is sometimes a feature of the general comments, especially early ones like this – it seems that the Committee is saying that a requirement of military service cannot be justified as a limitation on freedom of conscience. Why else would the Committee ask states parties to report 'on the conditions under which persons can be exempted from military service on the basis of their rights under article 18' and point to alternative national service, which so clearly flags the idea inherent in limitations analysis that we look for the least restrictive alternative when considering a restriction on a right?

The Committee's recent jurisprudence makes crystal clear that failure to respect a conscientious objection to military service is a violation of Article 18.[11] The Committee has considered a number of complaints against South Korea concerning compulsory military service. South Korea provided no alternatives for conscientious objectors. In the first cases involving South Korea, which concerned two Jehovah's witnesses, the Committee was presented with arguments by South Korea concerning its precarious

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[8] See for example, Human Rights Committee, General Comment No. 27, freedom of movement (Art. 12), CCPR/C/21/Rev.1/Add.9 (Vol. 1), p. 223, [14].

[9] General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) CCPR/C/21/Rev.1/Add.9 (Vol. 1), p. 204, [11].

[10] In the lead judgment in the UK House of Lords decision in *Sepet and Bulbul*, Lord Bingham of Cornhill stated that '[t]his is perhaps the nearest one comes to a suggestion that a right of conscientious objection can be derived from article 18 of the ICCPR. But it is, again, a somewhat tentative suggestion ("believes that such a right can be derived"), and the Committee implicitly acknowledges that there are a member states in which a right of conscientious objection is not recognised by law or practice. Thus while the thrust of the Committee's thinking is plain, one finds no clear assertion of binding principle.' *Sepet (FC) and Another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2003] UKHL 15, per Lord Bingham, [13] (hereinafter 'Sepet and Bulbul').

[11] For a useful survey of the position prior to this recent jurisprudence, see Karen Musalo, 'Conscientious Objection as a Basis for Refugee Status: Protection for the Fundamental Right of Freedom of Thought, Conscience and Religion', 26 *Refugee Survey Quarterly* 69 (2007).

situation vis-a-vis North Korea, along with the possible abuse of a conscientious objector exception. [12] The Committee did not find these reasons convincing.[13] Subsequently, in Communications Nos. 153 to 1603/2007,[14] The Committee recalled its previous jurisprudence that 'the authors' conviction and sentence amounted to a restriction on their ability to manifest their religion or belief'[15] and again found that South Korea had not demonstrated that this restriction was *necessary*, as required under Article 18(3).[16]

In light of the general interpretative provisions in Article 5 of the Covenant, the Human Rights Committee's most recent jurisprudence on Article 18 has to be the correct approach.[17] To allow freedom of conscience with respect to something as fundamental as the taking of human life to be swallowed up at precisely the moment when that freedom needs to be protected is difficult to justify. Even a utilitarian approach that looks to the preferences (or even survival) of the majority might find it difficult to justify compulsory military service over conscientious objection. It seems unlikely that so many persons would be conscientious objectors that the military effort would collapse, therefore 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.[18] Compulsory military service may meet some elements of the test for valid limitations, particularly the requirement of an important goal such as defence. However, it must be noted that 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 even, if arguments concerning the impact on morale and effectiveness of the armed forces are accepted, 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*.

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[12] *Yeo-Bum Yoon and Myung-Jin Choi v. The Republic of Korea*, Communication no 1321/2004 and 1322/2004, 3 November 2006, CCPR/C/88/D/1321 – 1322/2004,[4.2] – [4.3].
[13] *Ibid*, [8.4].
[14] Communications nos. 1593 to 1603/2007, 30 April 2010, CCPR/C/98/D/1593-1603/2007.
[15] Ibid, [7.2].
[16] Ibid, [7.4].
[17] Article 5 ICCPR provides:

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

[18] In his judgment in *Sepet and Bulbul,* Lord Hoffmann stated that although European state practice of permitting conscientious objection *did not* demonstrate a *right* to be treated differently, it did support '[Ronald] Dworkin's view that recognition of the strength of the objector's religious, moral or political feelings is only part of a complex judgment that includes the pragmatic question as to whether compelling conscientious objectors to enlist or suffer punishment will do more harm than good. Among the relevant factors are the following: first, martyrs attract sympathy, particularly if they suffer on religious grounds in a country which takes religion seriously; secondly, unwilling soldiers may not be very effective; thirdly, they tend to be articulate people who may spread their views in the ranks; fourthly, modern military technology requires highly trained specialists and not masses of unskilled men.' *Sepet and Bulbul,* note 10 above, per Lord Hoffmann, [44].

It should also be noted that in the first cases involving South Korea, there were two dissenting opinions. Ms Ruth Wedgwood disagreed that Article 18 was violated by compulsory military service. Mr Hipolito Solari-Yrigoyen agreed with the result reached by the majority of the Committee, but disagreed with their reasoning. He pointed out that the right to freedom of conscience must not be impaired by coercion;[19] that Article 18 cannot be derogated from even in a time of public emergency;[20] that the Committee in General Comment No. 22 had recognized that 'the obligation to use lethal force may seriously conflict with the freedom of conscience';[21] and that Article 18(1) protected conscientious objectors, regardless of the ability to impose limitations in Article 18(3). He stated that:

> The mention of freedom to manifest one's religion or belief in article 18, paragraph 3, is a reference to the freedom to manifest that religion or belief in public, not to recognition of the right itself, which is protected by paragraph 1. Even if it were wrongly supposed that the present communication does not concern recognition of the objector's right, but merely its public manifestation, the statement that public manifestations may be subject only "to such limitations as are prescribed by law" in no way implies that the existence of the right itself is a matter for the discretion of States parties.'[22]

The views of the Human Rights Committee are supported by other bodies within the UN human rights system. The Working Group on Arbitrary Detention has also found that some states have failed to justify compulsory military service in the context of conscientious objection and that detention accompanying the failure to service is therefore arbitrary.[23] The Special Rapporteur on Freedom of Religion and Belief has made similar statements concerning the right of conscientious objection.

Before leaving the question of the interpretation of Article 18 of the ICCPR and permissible limitations under Article 18(3), another provision of the ICCPR should be acknowledged. Article 8 of the ICCPR prohibits forced labour. Its terms include an exception for compulsory military service which is expressed in a form that may suggest the framers thought that recognition of conscientious objector status remained a matter of State discretion, rather than being required by the terms of Article 18.

> Article 8(3) ICCPR provides:
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> (a) No one shall be required to perform forced or compulsory labour;
> ...
> (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
> ...
> (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors ... .

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[19] *Yeo-Bum Yoon and Myung-Jin Choi v. The Republic of Korea*, note 12 above, [8.2].
[20] *Ibid*, [8.3].
[21] *Ibid*, [8.3].
[22] *Ibid*, [8.3].
[23] 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. For a very useful discussion of the jurisprudence from the UN human rights system as of 2008, see Rachel Brett, 'International Standards on Conscientious Objection to Military Service' (Quaker United Nations Office, Human Rights & Refugees Publications, November 2008).

The UK House of Lords referred to this provision in its decision in *Sepet and Bulbul*[24] in which it found that a right to conscientious objection did not exist as yet. Importantly, the Court did not rule out the possible development of Article 18 so as to include conscientious objection.[25]

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 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*. As Goodwin-Gill and McAdam argue, '[w]hat the Court [in *Sepet and Bulbul*] did not note was that this formulation [in Article 8(3)] leaves open the possibility that (permissible) military service may still infringe human rights other than the prohibition on forced labour.'[26] The Human Rights Committee has therefore said that 'article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection.'[27] The European Court of Human Rights has taken a similar approach in *Case of Bayatyan v Armenia*.[28]

Batyatyan v Armenia is an important and very recent precedent from the European Court of Human Rights' (Grand Chamber). The case involved a Jehovah's witness imprisoned in Armenia for refusing to do compulsory military service. No civilian service was offered to Mr Bayatyan, although he was prepared to perform such service. The chamber decided 16 to 1 that there had been a violation of Article 9 of the European Convention on Human Rights (which protects freedom of thought, conscience and religion). The Court expressly overruled contrary jurisprudence of the European Commission on Human Rights. The Court referred to the exception to forced labor for compulsory military service contained in Article 4§3(b) (which is similar to the exception in Article 8 of the International Covenant on Civil and Political Rights). 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.'[29] The Court also underlined the importance of the European Convention as a living instrument and the steady developments towards recognition of conscientious objection as part of freedom of thought, conscience and religion.[30] The Court examined whether this right could be limited. Finding it unnecessary to determine whether Armenia's law prescribed a limitation[31] or whether such a limitation pursued a legitimate aim,[32] the Court found that a limitation on the right was not proportionate, being unnecessary in a democratic society:

> ... the system existing at the material time imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions

[24] *Sepet and Bulbul*, note 10 above.
[25] Lord Bingham stated that while the applicants could not show there is clear recognition of conscientious objection now, 'international opinion is dynamic and the House cannot do more than give effect to what it understands to be the current position.' *Sepet and Bulbul*, note 10 above, per Lord Bingham, [16].
[26] Goodwin-Gill and McAdam, note 3 above, p. 113.
[27] *Yeo-Bum Moon and Mung-Jin Choi v. Republic of Korea*, note 12 above, [8.2].
[28] *Case of Bayatyan v Armenia* (Appl. No 23459/03), 7 July 2011).
[29] *Ibid*, at [100].
[30] *Ibid*, at [98] – [110].
[31] *Ibid*, at [116].
[32] *Ibid*, at [117].

> and penalising those who, like the applicant, refused to perform military service. In the Court's opinion, such a system failed to strike a fair balance between the interests of society as a whole and those of the applicant. It therefore considers that 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.[33]

The Court pointed to the importance of 'pluralism, tolerance and broadmindedness' in a democratic society.[34] The Court also distinguished the situation of military service from taxation, saying that a general taxation obligation 'has no specific conscientious implications in itself',[35] which is important in light of decisions such as that of Lord Hoffmann in *Sepet and Bulbul*, where he queried whether or not there was a distinction.[36]

Turning from the provisions of the ICCPR and European Convention to the guidance available from the United Nations High Commissioner for Refugees, the UNHCR Handbook contains a whole section devoted to 'deserters and persons avoiding military service.' It is worth setting out all eight paragraphs before commenting on them.

> 167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The Penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.
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> 168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.
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> 169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.
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> 170. There are, however, also *cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military*

[33] *Ibid,* at [124].
[34] *Ibid,* at [126].
[35] *Ibid,* at [111].
[36] See note 64 *infra* and accompanying text.

service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for 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'.[37]

[37] In *Sepet and Bulbul,* for example, Lord Bingham stated that '[t]he paragraph most helpful to the applicants is paragraph 170. But this appears to be qualified by paragraph 171, which immediately follows and is much less helpful to the applicants. Less helpful also is paragraph 172, in its tentative suggestion that a person "may be able to establish a claim to refugee status". The same comment may be made of paragraph 173: "it would be open to contracting states to grant refugee status". Read as a whole, these paragraphs do not in my opinion provide the clear statement which the applicants need.' *Sepet and Bulbul,* note 10 above, per Lord Bingham, [12]. Lord Bingham's narrow reading of the UNHCR Handbook can be contrasted with the broad reading adopted by the US Court of Appeals (9th Circuit) in *Canas-Segovia v Immigration and Naturalization Service* 902 F.2d 717 (1990).

Importantly, UNHCR has issued more recent guidance on the topic of conscientious objectors in its '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.[38]

> 25. A number of religions or sects within particular religions have abstention from military service as a central tenet and a significant number of religion-based claimants seek protection on the basis of refusal to serve in the military. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably a criminal offence.
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> 26. Where military service is compulsory, refugee status may be established if the refusal to serve is based on genuine political, religious, or moral convictions, or valid reasons of conscience. Such claims raise the distinction between prosecution and persecution. Prosecution and punishment pursuant to a law of general application is not generally considered to constitute persecution, although there are some notable exceptions. In conscientious objector cases, a law purporting to be of general application may, depending on the circumstances, nonetheless be persecutory where, for instance, it impacts differently on particular groups, where it is applied or enforced in a discriminatory manner, where the punishment itself is excessive or disproportionately severe, *or where the military service cannot reasonably be expected to be performed by the individual because of his or her genuine beliefs or religious convictions*. Where alternatives to military service, such as community service, are imposed there would not usually be a basis for a claim. Having said this, some forms of community service may be so excessively burdensome as to constitute a form of punishment, or the community service might require the carrying out of acts which clearly also defy the claimant's religious beliefs. In addition, the claimant may be able to establish a claim to refugee status where the refusal to serve in the military is not occasioned by any harsh penalties, but the individual has a well-founded fear of serious harassment, discrimination or violence by other individuals (for example, soldiers, local authorities, or neighbours) for his or her refusal to serve. [emphasis added]

Three sets of questions arise for refugee status decision-makers in light of the international authorities examined above and the case-law examined below.

a. Conscientious objection in general

International law authorities now clearly hold that failure to recognize conscientious objectors to military service and to permit appropriate alternative service in line with their religious beliefs or valid reasons of conscience is a violation of the international right to freedom of conscience. It appears that international bodies see the difference between conscientious objection to military service and objection that results in refusal to pay tax as the direct requirement to act against one's conscience which is involved in armed military service. It is apparent that the case law in many of the jurisdictions surveyed below is in conflict with the rulings of these international bodies. The question now arising for domestic refugee status decision-makers is what they can do to address the fact that domestic precedents are often out of step with international authorities, bearing in mind the role of *stare decisis* in common law jurisdictions, the need for the judiciary to interpret domestic law so as to comport with international legal authorities where possible (and the requirement that they do so in some cases), and the importance of international human rights law and refugee law marching in step on important issues such as the question of conscientious objection.

[38] 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.

b. Partial conscientious objection

'Partial conscientious objection' is sometimes used to describe persons resisting military service not on the basis of a total objection to carrying arms, but with respect to a particular conflict because of some kind of illegality in the conflict. Many questions arise from the case-law set out below.

Can conscientious objection be founded on violation of the *jus ad bellum* as well as violations of *jus in bello*? Is it correct to draw a sharp distinction between objection based on reasons of conscience, on the one hand, and objection based on perceived illegality of a particular conflict? Is it possible that a person might believe that it is *morally* wrong to fight a war that is illegal as a matter of international law? Could the requirement of an *objective* element – some clear indication that the conflict is illegal – be founded in the concept of 'well-founded fear' as opposed to viewing individual conscience as simply irrelevant? Does it create a 'catch-22' situation by requiring a soldier to ask for recognition as a refugee only if he or she would be liable for an excludable crime such as a 'crime against peace' (involving *jus ad bellum*) or a war crime or crime against humanity (involving *jus in bello*)? Should the threshold for conscientious objection be mere association through service (which clearly catches cases of participation in wars violative of the *jus ad bellum*) or only a risk of active participation in violations of international humanitarian law? Is there a point at which valid reasons of conscience cannot be invoked for refugee status because there are other ways for soldiers to rectify what is occurring in the context of conflict, and could this be a satisfying way of resolving the questions around the relevant threshold? For example, can sporadic violations be brought to the attention of commanding officers, whereas widespread violations might signal that the only moral path of action is desertion or draft evasion?

c. State protection

Is it ever permissible to require a refugee applicant to request protection from the state when the state itself, rather than a non-state actor, is the persecutor (which is usually the situation in conscientious objection cases)? Is it right to cut to state protection in the context of conscientious objection cases, as Canadian case law tends to do,[39] when we may need to ask 'protection from what'? For example, if we think international law accepts partial conscientious objections, but the military authorities in the country of origin do not allow that,[40] what is the point of accessing 'state protection' by the military? 'Protection' may be a misnomer: if the state's law does not permit certain types of conscientious objection, but we think international law requires exception in these cases, then the state's laws and procedures should be viewed as inherently persecutory.

[39] See *Hinzman and Hughey,* note 100 *infra* and accompanying text. This case has been followed a number of times. See for example, *Colby v Canada (Minister of Citizenship and Immigration)* 2008 FC 805, [22].

[40] In the United States, the current relevant regulation is very clear that '[a]n individual who desires to choose the war in which he or she will participate is not a Conscientious Objector under the law. The individual's objection must be to all wars rather than a specific war.' Department of Defense Instruction, Number 1300.06, May 5, 2007, 3.5.1.

Is it right to characterise access to state protection as a requirement to exhaust local remedies, as in some of the case law? In a previous paper I co-authored with Jim Hathaway and Michelle Foster, we argued that it is incorrect to equate exhaustion of local remedies for the purposes of state responsibility with the availability of protection for the purposes of refugee law.[41] 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. Moreover, even if exhaustion of local remedies was to be imported into refugee law as a duty, it is well accepted by the UN treaty bodies and regional human rights courts that there is no requirement to exhaust local remedies if it would be futile to do so.

Is it right to talk about a 'presumption' of state protection? Is it a presumption without a factual basis? Is it relevant to talk about democratic states and the presumption of protection when we're really dealing with a separate culture (and its own disciplinary mechanisms) i.e., the military? Consider the case of *Smith v Canada*.[42] Ms Smith was a 21 year old who deserted the US military because of harassment regarding her sexual orientation. Judicial review was allowed, and the Court considered documentary evidence that US military superiors are often complacent about, or actively participate in harassment of gay men and lesbians.

2. Are conscientious objectors to military service presently granted refugee status in the jurisdictions surveyed, as a general rule, and why/not?

The jurisdictions surveyed for this paper reveal a variety of approaches to this question.

2.1. Australia

In Australia, the only times the High Court has looked at objection to military service, conscientious or not, are the cases of *Applicant S v MIMA*[43] and *MIMA v Yusuf*.[44] In *Yusuf*, which considered the Minister for Immigration's appeals against two applicants – Ms Yusuf and Mr Israelien – the High Court did not look in detail at the substantive issues, but was concerned with whether the Federal Court should have overturned the decision of the Refugee Review Tribunal. In so doing, the joint judgment of McHugh, Gummow and Hayne JJ noted in relation to Mr Israelien (the applicant who was arguing a case based on conscientious objection), that the Tribunal

[41] 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, 15 *International Journal of Refugee Law* 444 – 460 (2003).
[42] *Smith v. Canada (Minister for Citizenship and Immigration)* [2009] F.C.J. No 1404.
[43] *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25.
[44] *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30.

> … concluded that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of general application. The Tribunal is not shown to have made an error of law in that respect.[45]

Similarly, Justice Callinan adopted what Justice Emmett, the dissentient in the Full Federal Court below, had said of conscientious objectors: 'They are simply a particular group of law breakers, members of whom are punished, in the same way as all other citizens … .'[46] In *Applicant S*, the issue was not conscientious objection *per se*, but objection to fighting with the Taliban, an illegitimate authority which pursued conscription in a 'random and arbitrary' manner, which the court acknowledged could be viewed as persecution given that it was clearly not proportionate to a legitimate aim,[47] so it is what we might call a case of 'ancillary' persecution. [48] The potential Convention ground was membership in a particular social group i.e. young able-bodied men, and the Court found that the Tribunal had wrongly required the suggested group to be perceived as such by Afghan society, instead of considering whether they were simply cognisable as a group.[49]

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:

> … when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. 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. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. See *Wang v Minister for Immigration & Multicultural Affairs* [2000] FCA 1599 (2000) 105 FCR 548 at [65] per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason.[50]

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[45] *Yusuf*, *ibid*, per McHugh, Gummow and Hayne JJ, [97].
[46] *Yusuf*, *ibid*, per Callinan J, [245].
[47] *Applicant S*, note 43 above, [47] – [49], per Gleeson CJ, Gummow and Kirby JJ.
[48] See the discussion in Martin Jones, 'The Refusal to Bear Arms as Grounds for Refugee Protection in the Canadian Jurisprudence', 20 *International Journal of Refugee Law* 123 (2008).
[49] *Applicant S*, note 43 above, per Gleeson CJ, Gummow and Kirby JJ, [17] –[36].
[50] *Erduran v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 814, per Gray J, [28].

This reasoning has neither been overturned, nor applied by the Full Federal Court. The Guide to Refugee Law produced by the Refugee Review Tribunal raises some questions about the reasoning in light of the legislative framework,[51] and the reasoning in the High Court's decision in *Yusuf*, referred to previously.

2.2. United Kingdom

In the United Kingdom, the leading case on conscientious objection is the House of Lords' decision in *Sepet and another v Secretary of State for the Home Department*.[52] The case involved two Turkish 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 international humanitarian law in Kurdish areas of Turkey. The lead judgment is that of Lord Bingham of Cornhill. Lord Bingham 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[53] and the provisions exempting forced military service from the prohibition on forced labour.[54]

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 'prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses ...'[55] is an example of persecution, but goes no further. Lord Bingham said of this provision that it 'plainly affords a narrower ground for claiming asylum'[56] than some of the other international instruments he examined.[57]

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[51] The guide notes that 'a test that focuses on discriminatory *impact* would appear to be inapplicable in the context of s.91R(1)9(c) of the Act which requires that the persecution involve systematic and discriminatory *conduct*.' Guide to Refugee Law in Australia, (January 2011) Ch 10, p. 22 http://www.mrt-rrt.gov.au/Conduct-of-reviews/Guide-to-Refugee-Law/Guide-to-Refugee-Law-in-Australia/default.aspx. However, I think it is arguable that a systematic omission of alternative service for conscientious objection in the form of a blanket law requiring military service, followed up by action on the law in the form of punishment, is a form of conduct that is both discriminatory and systematic, in the same way that failure to hire people on the basis of gender, race, sexuality, age or any other prohibited ground of discrimination amounts to 'systematic and discriminatory conduct'. There appears to be nothing inconsistent with the predicament-based analysis and this provision in s.91R(c). Section 91R(a) on the other hand, the provision that deals with the nexus to the Convention grounds, is concerning from an international legal perspective and much more relevant to the issue at hand. Arguably, however, it is also not inconsistent with the predicament-based analysis argued for here. S91R(a) does not explicitly impose a motivation test. Conscientious objectors may argue that the 'essential and significant reason' for the 'conduct'—namely enforced compulsory military service regardless of conscientious objections – is the failure to properly consider a Convention ground.

[52] Note 10 above.

[53] *Ibid*, per Lord Bingham, [12] & [13].

[54] *Ibid*, [19].

[55] Article 9(2)(e) Qualification Directive: Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of the third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30/09/2004 p. 0012 – 0023.

[56] *Sepet and Bulbul*, note 10 above, per Lord Bingham, [16].

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

The Charter of Fundamental Rights in the European Union states in Article 15(2) that 'the right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.' Of this provision, Lord Bingham stated the 'difficulty is that national laws and national constitutional traditions may, or may not, recognise a right of conscientious objection … .'[58]

Lord Bingham concluded that international law did not yet accept a right of conscientious objection.[59] In *obiter*, Lord Bingham also rejected the predicament-based approach to the nexus between persecution and the Convention grounds.[60] There was no consideration of the question of objection to service that would involve violations of international humanitarian law because the decision-maker at first instance found against the applicants. That topic has since been addressed by the Court of Appeal in *Krotov v Secretary of State for the Home Department* ,[61] a case which is examined in section 3 of this paper.

Lord Hoffman wrote a separate concurring judgment in *Sepet and Bulbul* which is worthy of consideration given the deep philosophical approach he adopted. Citing philosopher Ronald Dworkin, Lord Hoffmann said the standard moral position is that

> 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.[62]

Lord Hoffman concluded that:

> This suggests that while the demonstrator or objector cannot be morally condemned, and may indeed be praised, for following the dictates of his conscience, it is not necessarily unjust for the state to punish him in the same way as any other person who breaks the law. It will of course be different if the law itself is unjust.[63]

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.[64]

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[58] *Sepet and Bulbul*, note 10 above, per Lord Bingham, [15]. However, the provision may mean that national laws may set out the ways in which conscientious objection is to be observed.
[59] *Ibid,* [16].
[60] *Ibid*, [21] – [23].
[61] *Krotov v. Secretary of State for the Home Department*, [2004] EWCA Civ 69.
[62] *Sepet and Bulbul*, note 10 above, [32], per Lord Hoffmann, citing Ronald Dworkin, *Taking Rights Seriously* (1977), at pp. 186 – 7.
[63] *Ibid*, [33].
[64] *Ibid*, [34].

Lord Hoffman 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.[65] He concluded that a right to conscientious objection was 'not supported by either a moral imperative or international practice.'[66]

2.3. Switzerland

The description of Swiss law in this paper is reliant upon communication with IARLJ member Christa Luterbacher. According to Judge Luterbacher, the general position is that prosecution of conscientious objectors to military service does not provide a basis for refugee status. It is viewed as legitimate to require military service, and there is a perception that there is no relationship between a law requiring compulsory military service and the persecution grounds.

However, if the penalty applied discriminates for one of the Convention reasons, in comparison to the penalties applied to other conscientious objectors, for example, then the penalty is termed a 'polit-malus' and viewed as persecutory. Similarly, if the penalty is disproportionate it will also be regarded as a 'polit-malus' as it appears the prosecuting state regards the conscientious objector as an enemy or political opponent. Judge Luterbacher gives the examples of Swiss cases involving 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.[67]

Exception is also made where the objector refuses to take part in war crimes or military actions that violate international humanitarian law. In such cases, it is not legitimate for the state to insist that citizens take part. Judge Luterbacher has argued in her doctoral thesis that it is the duty of citizens under international criminal law to resist participation.

2.4. New Zealand

In New Zealand, the position with respect to conscientious objectors in general terms appears not to have been definitively settled.[68] What is clear is that 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 international humanitarian law, refugee status *will* be granted.

The current key precedent appears to be Refugee Appeal No 75378.[69] 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

[65] *Ibid*, [46].
[66] *Ibid*, [53].
[67] *In re I.H., Eritrea* (Swiss Asylum Appeal Commission), 20 December 2005. The Swiss Asylum Appeal Commission has since been replaced by the Swiss Federal Administrative Court (Bundesverwaltungsgericht).
[68] 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 status'. Refugee Appeal No 75995, 31 October 2007, [29]. However, the leading precedent seems open to interpretation in the view of the current author, as it did not need to settle the issue of conscientious objection in general. Please note that the New Zealand Refugee Status Appeals Authority was replaced by the Immigration and Protection Tribunal on 29 November 2010.
[69] Refugee Appeal No 75378, New Zealand Refugee Status Appeals Authority, 19 October 2005.

Convention grounds and persecution. It noted two 1999 authorities which hold that conscientious objectors are generally not recognized as refugees, subject to exceptions.[70] The authority summarised the exceptions in those older authorities as follows:

(a) conscription is conducted in a discriminatory manner in relation to one of the five Convention grounds;
(b) prosecution or punishment for evasion or desertion is biased in relation to one of the five Convention grounds; and
(c) the objection relates to being required to participate in military action where the military engages in internationally condemned acts. In such cases it is necessary to distinguish between cases:

(i) where the internationally condemned acts were carried out as a matter of government policy. If so, all conscripts face a real chance of being required to act; and
(ii) those where the state encourages or is unable to control sections of its armed forces. In such circumstances a refugee claimant is required to show there is a real chance he/she will be personally involved.

As the 1999 authorities pre-dated 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).[71] 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, although it did seem to indicate that alternative service is not a requirement, thus leading to the conclusion that conscientious objectors are *not* entitled to refugee status *per se*.[72] The latter statement might be regarded as *obiter*, however, as the case fell comfortably within the exceptions as expounded in the 1999 decisions by the Authority, and these exceptions were cases in which limitations under Article 18(3) of the ICCPR could not be justified.

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.*[73] The Authority described 'public safety' as the relevant legitimate goal nominated by Article 18(3):

The Siracusa Principles[74] (at para 33) define "public safety" as meaning:

" ... protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property."

[70] Refugee Appeal No 70742/97 (28 January 1999) and Refugee Appeal No 71219/98 (14 October 1999).
[71] Refugee Appeal No 75378, note 69 above, [68].
[72] *Ibid*, [85].
[73] *Ibid*, [70].
[74] United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, (28 September 1984) Annex [IA3]. The Siracusa Principles can be viewed as 'soft law' relevant to the interpretation of human rights treaties, and as a 'subsidiary source' of international law under Article 38(1)(d) of the Statute of the International Court of Justice, as they represent the views of 'eminent publicists'.

> It is hard to conceive of a situation where an issue of national security would not involve an issue of public safety so defined.[75]

Moving to the question of proportionality between aim 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.'[76] 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.'[77]

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.[78]

Concerning the nexus to the Convention ground, the Authority stated simply that

> [o]nce it is accepted that the refugee claimant genuinely subscribes to the religious or other belief informing the claimed objection to military service, there can be no doubt that this contributes to the predicament of the claimant.
>
> Considering claims of this nature in this way avoids making fine and arguably artificial distinctions as to the political or other nature of the belief, depending on whether the conflict is "internationally condemned" or not. It is difficult to discern how the nature (political or otherwise) of the objection changes with the form of service that may be required. 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 ... .[79]

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[75] Refugee Appeal No 75378, note 69 above, [74]. This reasoning might be questioned on the basis that the ground of national security appears explicitly in other provisions of the ICCPR (for example, Article 12(3) relating to restrictions on freedom of movement). In General Comment No. 22, the Human Rights Committee stated that 'paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.' General Comment No. 22, note 9 above, [8]. Further, Article 18 as a whole, as the Authority notes, is non derogable. A threat to the life of the nation – the classic example of which is armed conflict – does not even justify temporary derogation.

[76] Refugee Appeal No 75378, note 69 above, [81].

[77] *Ibid*, [89].

[78] *Ibid*, [109]. Although the standard of proof is low, the requirement of active participation in violations sets a high standard. It may be debatable whether there should be a requirement of active participation in the violations or merely a requirement to serve in a conflict where such violations may occur (noting the likelihood in all conflicts that such violations may occur) given that the issue involves not only well-founded fear (which has an objective element) but a question of *conscience*. For a persuasive argument that privileges the individual conscience, see Cecilia M. Bailliet, 'Assessing *Jus Ad Bellum* and *Jus In Bello* within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum', 20 *Georgetown Immigration Law Journal* (2006) 337.

[79] Refugee Appeal No 75378, note 69 above, [115] – [116]. Given the accepted exceptions in which refugee status may be grounded in a claim to conscientious objection pursuant to the New Zealand jurisprudence, the Convention reasons for persecution vary in New Zealand case law and may include race, religion or political opinion, depending on the circumstances. For example, in Refugee Appeal No 75968, possible reasons for discriminatory treatment

On the facts of the case, which involved the resumption of hostilities between the Turkish government and its Kurdish population, the Authority found the applicant to be a refugee. It said that the country information showed that '[r]eports of breaches of the laws of war by the armed forces have begun to resurface, against a background of widespread breaches during the last period of conflict.'[80] Regarding the risk of participation in such breaches, the Authority said that:

> the standard of proof in refugee matters is one which does not require it to be satisfied that the appellant will probably be so required or that it is even likely to happen. Given the history of the conflict, attendant breaches of the laws of war on a widespread scale in the past and a continuing climate of impunity for those who commit the breaches, the chance of the appellant being personally involved by being required to commit acts in breach of the laws of war now that open conflict has resumed, cannot be dismissed as mere surmise or conjecture. There is a sufficiently solid evidential foundation to establish that the risk to the appellant crosses the real chance threshold.[81]

2.5. Canada

In Canada, the law also appears unsettled. In the case of *Ates v Canada*,[82] which is consistently cited in subsequent case law,[83] the Federal Court of Appeal answered 'no' to the question 'in a country where military service is compulsory, and there is no alternative thereto, do repeated prosecutions and incarcerations of a conscientious objector for the offence of refusing to do his military service, constitute persecution based on a Convention refugee ground?' This ruling appears to mean that total conscientious objectors will not succeed in claiming refugee status, whereas 'partial' conscientious objectors may well succeed.

As in other jurisdictions, 'ancillory' persecution arising from conscientious objection may found a claim to refugee status. An example is *Rivera v. Canada*.[84] The case involves a pre-removal risk assessment in Canada, rather than a primary determination as to refugee status. The Court held that the officer had to consider the ample evidence of selective prosecution in the United States based on criticism of the law, which would mean that instead of administrative discharge, Ms Rivera would receive a prison sentence.[85]

2.6. Germany

The description in this paper of the relevant German law draws on a paper prepared by Dr Paul Tiedemann. Although a 1962 decision of the Supreme Administrative Court granted refugee status to a

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with respect to military service included the possibility that the applicant would be viewed as '"unpatriotic' having spent all of his life outside the country' and that the applicant's father's 'anti-government profile' could also play a role. Refugee Appeal No 75968, 19 February 2007, [88] & [89].

[80] Refugee Appeal No 75378, note 69 above, [141].

[81] *Ibid*, [142].

[82] *Ates v Canada (Minister of Citizenship and Immigration)* 2005 FCA 322.

[83] See for example, *Volkovitzky v. Canada (Minister of Citizenship and Immigration)* 2009 FC 893, [28]; *Ozunal v Canada (Minister of Citizenship and Immigration)* 2006 FC 560.

[84] *Rivera v. Canada (Minister of Citizenship and Immigration)* 2009 FC 814.

[85] *Ibid*, [96] – [102].

Yugoslav citizen on the basis of conscientious objection,[86] the case law since then has required that the persecutor is *motivated* by the Convention grounds,[87] which in general is not the case with compulsory military service.[88] The concept of polit malus is applicable in the German context (see description of Swiss law above), but in general, there has been no evidence in the cases of differentiation in punishment on the basis of the Convention grounds.[89]

However, some decisions have departed from this line of authority. In particular, Dr Tiedemann notes a 2001 decision in which a conscientious objector was granted refugee status.[90] In another interesting decision from 1995, 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.[91]

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 decided in March 2011 that Shepherd was not a refugee as there was no polit malus, Shepherd was only repairing helicopters and there was little risk that he would be required to participate in war crimes or crimes against humanity. There was no possibility that Shepherd would commit a crime against peace, since only persons in a leading political or military position would be able to commit such a crime and the Office also took the view that the troops were now operating in Iraq on the basis of Security Council resolution 1483 and bilateral agreements between Iraq and the US. An appeal is pending.

3. Do the jurisdictions surveyed recognize a 'partial' conscientious objector status when a particular war involves an illegality?

One of the progressive aspects of the UNHCR Handbook is that it discusses the possibility of what is sometimes called 'partial' conscientious objector status. The UNHCR handbook refers to cases in which a conflict 'is condemned by the international community as contrary to basic rules of human conduct'. The jurisdictions surveyed in this paper have sometimes recognized refugee status in so-called 'partial conscientious objector' cases. The New Zealand case-law has already been referred to, as has the Swiss and German jurisprudence. Here the focus will be on UK and Canadian law.

3.1. UK case law

The key UK precedent is the decision of the Court of Appeals of England and Wales in *Krotov v Secretary of State for the Home Department*.[92] Andrey Krotov was a Russian who refused to serve in Chechnya. Lord Justice Potter, who wrote the lead judgment, noted that the House of Lords in *Sepet and Bulbul* had

[86] BVerwG, 29.06.1962 – I C 41/60 –, NWJ 1962, 2267.
[87] BVerG, 17.05.1983 – 9 C 36/83 –, B VerwGE 67, 184.
[88] BVerwG, 28.02. 1984 – 9 C 981/81 -, DVBI 1984, 780.
[89] Note that subsidiary protection was granted to an Eritrean where there was a risk of torture and inhuman treatment in a military prison camp: VG Ansbach, 23.09.2005 – AN 18 K 05.30343.
[90] OVG Schleswig 30.10.2001 – 4 L 130/95 –.
[91] VG Frankfurt, 10.11.1995 – 6 E 13593/93.A –.
[92] *Krotov*, note 61 above.

not dealt with a case involving military service which would violate international law.[93] He took the view that 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'[94] as evidenced by the relevant international treaties[95]

> 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, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the 1951 Convention.[96]

Lord Justice Potter pointed out that in such cases

> [i]t can well be argued that just as an applicant for asylum will not be accorded refugee status if he has committed international crimes as defined ... , so he should not be denied refugee status if return to his home country would give him no choice other than to participate in the commission of such international crimes, contrary to his genuine convictions and true conscience.[97]

In relation to the question of the nexus between the persecution and the Convention grounds, Lord Justice Potter said,

> ... while it must be acknowledged that the Convention itself is silent as to conscientious objection and the norms of international law, I consider that the terms of the Handbook and court decisions have recognised a point at which punishment for objection to participation in a particular conflict on grounds of its legality may properly be regarded as establishing persecution for the purposes of the Convention.
>
> The basis upon which they have done so is not by recognition of an internationally accepted right of (general or partial) conscientious objection (see *Sepet and Bulbul ...*) or by categorisation of such a stance as *ipso facto* protected under the express terms of the Convention, but by treating a genuine conscientious refusal to participate in a conflict in order to avoid participating in inhumane acts required as a matter of state policy or systemic practice, as amounting to an (implied or imputed) political opinion as to the limits of governmental authority, which thereby attracts the protection of the Convention ... .[98]

3.2. Canadian caselaw

Arguments concerning illegality of particular conflicts or military conduct within those conflicts have arisen quite frequently in Canadian cases. An early Canadian decision concerned an Iranian who deserted because he would be serving as a paramedic in a situation where he understood that the Iranian army

[93] *Ibid*, per Potter LJ, [19].
[94] *Ibid*, per Potter LJ, [30].
[95] *Ibid*, per Potter LJ, [31] – [36].
[96] *Ibid*, per Potter LJ, [37].
[97] *Ibid*, per Potter LJ, [39].
[98] *Ibid*, per Potter LJ, [45] – [46].

would be using chemical weapons against the Kurds. In *Zofagharkhani v. Canada*, the Federal Court of Appeal held that a conflict involving the use of chemical weapons would be one 'condemned' by the international community, as required by UNHCR Handbook paragraph 171, and further that in this particular case, '[t]here can be no doubt that 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.'[99]Recent Canadian cases involving US soldiers refusing to serve in Iraq have also generated a considerable and interesting jurisprudence.

Hinzman and Hughey v Canada[100]

Hinzman and Hughey v Canada is a decision of the Canadian Federal Court of Appeal concerning the conjoined cases of Jeremy Hinzman and Brandon Hughey.[101] 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.[102] As a result of his training (i.e. the element of desensitisation), he developed an objection to military service. He decided that killing was wrong.

He applied for a status as a conscientious objector, but for reasons that are not known, 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 on 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 doubted because of the fact that the decision-maker knew only about the second application for conscientious objector status, which was lodged just prior to deployment to Afghanistan.

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.[103] He elisted 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 basically told him to forget it.

The Immigration and Refugee Board ('IRB') rejected both Hughey and Hinzman's claims. The IRB referred to paragraph 171 of the UNHCR handbook and interpreted it so as to require a violation of

[99] *Zolfagharkhani v. Canada (Minister of Employment and Immigration)* , [1993] 3 F.C. 540, 15 June 1993.
[100] *Hinzman v. Canada (Minister of Citizenship and Immigration); Hughey v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 171 (hereinafter 'Hinzman and Hughey').
[101] Leave to appeal to the Supreme Court of Canada was subsequently refused.
[102] *Hinzman and Hughey,* note 100 above, [6]. The following description of the facts of his case are taken from paragraphs 6 – 16 of the judgment.
[103] The facts in Hughey's case are taken from *Hinzman and Hughey, ibid,* [17] – [22].

international humanitarian law – the *jus in bello* – rather than permitting consideration of the legality of the conflict as a whole. The Board found that:

1. There is a presumption that the US is capable of protecting its citizens.[104]
2. There is a presumption that ordinary laws of general application, eg US laws on desertion are not persecutory.[105]
3. Neither claimant had adduced sufficient evidence to show that they potentially would be required to engage in international humanitarian law violations.[106]
4. The United States would not apply the UMCJ (Uniform Military Code of Justice) in a discriminatory fashion and it would not result in cruel or unusual treatment or punishment.[107]

Arguments were then put before the Canadian Federal Court that:

1) the IRB's decision that illegality needed to stem from the *jus in bello* rather than the *jus ad bellum* was wrong.
2) the IRB erred by finding that there were not systemic violations of IHL.
3) the IRB required too high a level of personal involvement in the violations of IHL.
4) the IRB erred in its analysis of state protection and persecution.

Justice Mactavish rejected these arguments.[108]

1) Regarding the issue as to whether violations of the *jus ad bellum* would suffice, she found that a foot soldier (as opposed to someone involved in the prosecution of the war) can only rely on violations of international humanitarian law to found a claim to refugee status on the basis of conscientious objection.
2) On the question of whether there were systemic violations of IHL, she found that this was a matter of fact, that the standard for judicial review was patent unreasonableness, and the decision of the IRB was not patently unreasonable.
3) She found that the IRB had not imposed an inappropriate burden in terms of the level of personal involvement in violations of IHL.
4) She also found that it was reasonable for the IRB to find that the applicants had failed to rebut the presumption of state protection. She said this was appropriate because "there is no internationally recognized right to conscientiously object to a particular war" other than on the basis of 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, but she did certify a question, meaning that the matter could be taken before the Federal Court of Appeal. The question was:

[104] *Hinzman and* Hughey, *ibid,* [29].
[105] *Hinzman and* Hughey, *ibid,* [29].
[106] *Hinzman and* Hughey, *ibid,* [30].
[107] *Hinzman and* Hughey, *ibid,* [31].
[108] *Hinzman v. Canada (Minister of Citizenship and Immigration)* 2006 FC 420.

> when dealing with a refugee claim advanced by a mere foot soldier, is the question whether a given conflict may be unlawful in international law relevant to the determination by the Refugee Division [of the IRB] under paragraph 171 of the UNHCR Handbook.

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. It said that '[w]here sufficient state protection is available, claimants will be unable to establish that their fear of persecution is objectively well-founded and therefore will not be entitled to refugee status. It is only where state protection is not available that the court moves to the second stage, wherein it considers whether the conduct alleged to be persecutory can provide an objective basis for the fear of persecution.'[109]

Because the United States is a democractic country with constitutional checks and balances, the court found that the applicants had a 'heavy burden in attempting to rebut the presumption.'[110] It found that: deserters are given abundant procedural safeguards; that Army Regulation 600-43 provided conscientious objectors with exemptions from military service or alternatives to combat; there is a right to a hearing and appeal from decisions concerning conscientious objector status; and applicants for conscientious objector status are transferred to non-combat positions pending a decision.[111] The Court also found that deserters were generally not prosecuted or court-martialled, but dealt with administratively and given a less-than-honourable discharge from the military.[112]

The Court found that neither Hinzman nor Hughey made an adequate attempt to avail themselves of the protections afforded by the United States. Hinzman had failed to request an adjournment of the hearing about his conscientious objector status until his return to the US, which would have enabled him to call appropriate witnesses and he did not appeal the decision not to recognize him as a conscientious objector.[113] Hughey did not even apply for conscientious objector status.[114]

The Court found that the presumption of state protection was applicable in cases where the state was the alleged persecutor.[115] It also rejected the argument that protection would not be forthcoming because the American approach to conscientious objectors does not include partial conscientious objectors.[116]The Court said

> 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

[109] *Hinzman and* Hughey, note 100 above, [42].
[110] *Hinzman and* Hughey, *ibid*, [46].
[111] *Hinzman and* Hughey, *ibid*, [47].
[112] *Hinzman and* Hughey, *ibid*, [48].
[113] *Hinzman and* Hughey, *ibid*, [50].
[114] *Hinzman and* Hughey, *ibid*, [51].
[115] *Hinzman and* Hughey, *ibid*, [54].
[116] *Hinzman and* Hughey, *ibid*, [55] – [56].

> 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.[117]

In conclusion, the Court stated that

> the appellants have failed to satisfy the fundamental requirement in refugee law that claimants seek protection from their home state before going abroad to obtain protection through the refugee system. Several protective mechanisms are potentially available to the appellants in the United States. Because the appellants have not adequately attempted to access these protections, however, it is impossible for a Canadian court or tribunal to assess the availability of protections in the United States. Accordingly, the appellants' claims for refugee protection in Canada must fail.[118]

Lebedev v Canada[119]

Another important Canadian case, which has not been appealed, is *Lebedev v. Canada*, 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. In this case, Justice de Montigny noted the Federal Court of Appeal's decision in *Hinzman and Hughey*, stating that as a result of that decision 'there is still no definitive pronouncement on how to properly interpret paragraph 171 of the UNHCR Handbook – and particularly, whether the unlawfulness of a given conflict is relevant to the refugee claim of an ordinary foot soldier.'[120]

De Montigny J stated that it is 'important to go back to the basics' and consider 'whether forced military service *per se*, without any possibility for alternative service, constitutes a denial of a core human right. Of course, the punishment for the individual who evades compulsory military service will have to be severe enough to amount to persecution. Moreover, the persecution must be based on one of the five enumerated grounds ... and state protection must be unavailable.'[121]

He then looked at the UNHCR handbook, as a 'useful starting point' in interpreting the Refugee Convention.[122] He said he agreed 'for the most part' with Justice Mactavish's analysis in *Hinzman*, and

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[117] *Hinzman and* Hughey, *ibid,* [58].
[118] *Hinzman and* Hughey, *ibid,* [62]. Perhaps this is a reasonable holding overall on the facts of these two cases. However, there may be serious questions as to the role of state protection (see section 6 below).
[119] *Lebedev v Canada (Minister of Citizenship and Immigration)* 2007 FC 728.
[120] *Ibid*, [24].
[121] *Ibid*, [25].
[122] *Ibid*, [28].

noted the Federal Court's decision in *Ates*.[123] However, de Montigny J questioned the fit between the decision in *Ates* and the earlier decision in *Zofagharkhani v Canada*.[124] Noting the ambiguity in that decision, which appeared to be decided on the basis of conscientious objection generally, but turned on objection to a war on the basis that IHL standards were violated, de Montigny J stated,

> I would personally be inclined to think that, 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. As we shall see, 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.[125]

Justice de Montigny's reasons for distinguishing between objections based on subjective and objective grounds is that in the case of conscientious objection as he 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.[126] In the case at hand, de Montigny J agreed with the Board that Mr Lebedev did not hold a general conscientious objection to military service.[127]

Regarding general conscientious objection, de Montigny J found, as did Justice Mactavish, that there is no internationally recognized right to either total or partial conscientious objection, noting the ruling to this effect in the House of Lords' decision in *Sepet and Bulbul*,[128] and saying that he felt compelled to follow the Federal Court of Appeals decision in *Ates*.[129] However, he was prepared to effectively endorse claims based on objection to participation in violations of IHL and he remitted the case for proper consideration of: the facts concerning the Chechnyan war, noting that it had been widely condemned on an objective basis;[130] the question of what involvement is required, calling for some flexibility given the 'difficult moral dilemma confronted by those called to serve in wars of dubious legitimacy';[131] and the question of what consequences Mr Lebedev would face if returned to Russia and whether these amounted to a risk to life or of cruel and unusual treatment or punisment.[132]

De Montigny J also certified three questions:

1. What is the difference between claiming Convention refugee status as a conscientious objector and claiming Convention refugee status on the basis that one does not want to participate in an internationally condemned conflict? What are the different requirements to prove each?

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[123] *Ates*, note 82 above.
[124] *Zofagharkhani v Canada (Minister of Citizenship and Immigration)* [1993] F.C. 540, cited in *Lebedev*, note 119 above, [38].
[125] *Lebedev*, note 119 above, [42].
[126] *Ibid*, [45].
[127] *Ibid*, [47].
[128] *Ibid*, [48].
[129] *Ibid*, [50].
[130] *Ibid*, [79 – 81].
[131] *Ibid*, [89].
[132] *Ibid*, [90] – [99].

2. Is there such a thing as "partial" conscientious objection or does that phrase merely indicate that an applicant's claim really relates to the "international condemnation" exception at paragraph 171 of the UNHCR Handbook?
3. How should decision makers define "international condemnation"? Does it refer to breaches of international law only? Must it come from an official body that claims to speak with an international voice, like the United Nations? Or would a consensus of reputable international sources, like non-government organizations be sufficient?[133]

These questions were not answered, because, although an appeal was launched, it was discontinued.

4. Does the 'illegality' need to stem from the *jus in bello* or international humanitarian law, or may it also stem from the *jus ad bellum*, particularly the United Nations Charter prohibition on unilateral uses of force in Article 2(4)?

As seen above, the Canadian Federal Court in *Hinzman* rejected the idea that a mere 'foot soldier' could claim persecution on the basis of a requirement to fight an illegal war, as he or she could not be held accountable in the way that an architect of the conflict could be held responsible for a crime against peace. The Court did not apply an earlier precedent of the Federal Court of Appeal, *Al-Maisri v Canada*.[134] In *Al-Maisri v Canada*, the Court accepted that UNHCR Handbook paragraph 171 applied to a Yemeni soldier who refused to fight with Yemeni forces joining Iraq's invasion of Kuwait. It relied on the statement in Hathaway's *The Law of Refugee Status*, that:

> ... there is a range of military activity which is simply never permissible, in that it violates basic international standards. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory.[135]

While questions concerning the legality of the Iraq war have been certified by the Canadian courts, they have not been answered at the end of the day. None of the other recent decisions of senior courts examined for the purposes of this paper involved successful arguments for refugee status on the basis of objections to a particular war because it violates the *jus ad bellum*, either. For example, the argument has so far failed in the Shepherd case (Germany).

5. Where a partial exception is recognized on the basis of international humanitarian law violations, how serious and widespread must they be, and is a risk participation or mere association through military service required for refugee status to be granted?

5.1. United Kingdom

In the key UK precedent, *Krotov*,[136] 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 that involved violations of international humanitarian law. He stated that this emphasised,

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[133] *Ibid,* [101].
[134] *Al-Maisri v Canada (Minister of Employment and Immigration*) [1995] F.C.J. No. 642.
[135] James C Hathaway, *The Law of Refugee Status* (1991), pp. 180 – 181.
[136] *Krotov,* note 61 above.

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.[137]

5.2. Canada

The Canadian case law has dealt with the issue of how wide-spread international humanitarian law violations have to be and how serious they must be, in particular whether they must rise to the level of excludable crimes under Article 1F of the Refugee Convention before grounding recognition of conscientious objector status.

Key v Canada [138]

Joshua Key claimed that he had witnessed unjustified abuse, unwarranted detention, humiliation and looting by US forces in Iraq.[139] 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.[140] The Board identified possible violations of Articles 27, 31, 32 and 33 of the 4th Geneva Convention and said that '[i]n so raiding the homes, the military showed little understanding that the residents were protected persons under the Convention.'[141] The IRB said the military's actions were 'arguably disproportionate to the military objective of recovering contraband and bringing in men for questioning.'[142] 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 against humanity, and since the actions would not amount to excludable crimes, Key could not rely on paragraph 171 of the UNHCR handbook.[143]

The Federal Court considered paragraph 171 of the UNHCR handbook and held that the IRB had taken too narrow a view, based on a misreading of Justice Mactavish's decision in *Hinzman*.[144] *Hinzman* involved isolated incidents and the applicants failed to adduce sufficient evidence to show they personally would be involved in violations of IHL.[145] The Court in *Key* noted that the IRB in *Hinzman* did not have the evidence that was available in Key's case.[146] The Court found that 'military action which <u>systematically</u> degrades, abuses or humiliates either combatants or non-combatants is capable of supporting a refugee

[137] *Ibid*, per Potter LJ, [40].
[138] *Key v. Canada (Minister of Citizenship and Immigration)* 2008 FC 383.
[139] The facts are taken from the judgment in *Key v Canada*, *ibid*, at paragraphs 2 – 5.
[140] *Ibid*, [5].
[141] *Ibid*, [6].
[142] *Ibid*.
[143] *Ibid*.
[144] *Ibid*, [17].
[145] *Ibid*, [18].
[146] *Ibid*, [19].

claim where that is the proven reason for refusing to serve.'[147] The Court also held that the Board's ruling that *past* conduct of the asylum seeker had to amount to an excludable crime was an unacceptable catch-22[148] and that if the feared future required conduct were to be excludable *or* violate IHL without amounting to an excludable crime, refugee status would be required.[149] Further, '[i]f there [was] clear and convincing evidence presented that Mr Key faced a serious risk of prosecution and incarceration nothwithstanding the possible availability of less onerous, non-persecutory treatment, he [was] entitled to make that case and to have that risk fully assessed.'[150] Regarding the ruling in *Hinzman*, the Court said:

> neither the Board nor Justice Mactavish were required in that case to determine the precise limits of protection afforded by paragraph 171 of the UNHCR Handbook. I do not consider Justice Mactavish's remarks to be determinative of the issue presented by this case – that is, whether refugee protection is available for persons like Mr. Key who would be expected to participate in widespread and arguably officially sanctioned breaches of humanitarian law which do not constitute war crimes or crimes against humanity.[151]

In addition to the question of the threshold of violations of IHL, the Court unpacked other elements in paragraph 171. Regarding international condemnation, the Court said it was relevant but not necessary – the key is objective evidence of violations of IHL rather than international reactions which might not be forthcoming.[152] 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 text does not require actual or likely participation in the violations of IHL.[153] 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.

Treskiba v Canada[154]

In *Treskiba v Canada*, by contrast, despite the finding that there were violations of international humanitarian law in Gaza, the Court upheld the Board's ruling on the basis that Treskiba would not be required to participate. This finding seemed to depend on the unlikelihood of him personally having to perform particular acts, as opposed to a finding that violations were isolated.[155]

5.3. New Zealand

As noted above, one important New Zealand case[156] has treated the question as requiring risk of participation, but given the relatively low standard of proof in refugee cases, it was prepared to find that

[147] *Ibid*, [29].
[148] *Ibid*, [30].
[149] *Ibid*, [20].
[150] *Ibid*, [34].
[151] *Ibid*, [19].
[152] *Ibid*, [21].
[153] *Ibid.*
[154] *Treskiba v. Canada (Minister of Citizenship and Immigration)* 2009 FC 15.
[155] *Ibid*, [8] – [9].
[156] Refugee Appeal 75378, note 69 above.

the particular applicant had a well-founded fear of being required to participate in breaches of IHL given the country information.

6. What is the role of 'state protection' with respect to conscientious objectors?

As seen in section 3.2. above, the role of state protection has played an important role in the Canadian cases involving US servicemen. In *Hinzman and* Hughey, the applicants were found not to have exhausted avenues of protection available in the US. This section looks at a further question concerning state protection, namely whether there are circumstances in which it is unnecessary or futile to exhaust these avenues.

Key v Canada

In *Key*,[157] the Canadian Federal Court found that state protection was a live issue, unlike the situation in *Hinzman* where it was determined that state protection would be available and Hinzman had not availed himself of it. The Court considered what Key might face if returned to the US and what the IRB would now have to consider in determining whether state protection was available. The Court considered that what Key would face now, having deserted and ensured that he did not have to involve himself in violations of IHL, was a matter of speculation, [158] but if an administrative discharge was the likely result then the outcome 'may well be unfair to Mr Key but it would not constitute persecution.'[159] In other words, the Court is saying we have not just to consider whether Mr Key fled because of well-founded fear of persecution ie having to associate himself with oppressive military conduct against his conscience, but what he would now face at home having deserted instead of running the risk of such association 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.' [160] The Court said

> The significance of a failure to exhaust the options for domestic protection is not, after all, assessed in a vacuum. Such protections must be actually available and not illusory. It is also not a complete answer to the problem presented in cases like this to point to the presence of due process guarantees (although this is an aspect of the analysis).
>
> While the Hinzman (F.C.A.) decision has certainly set the bar very high for deserters from the United States military seeking refuge in Canada, the Court of Appeal acknowledged in that case the point made in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, that one's failure to fully pursue state protection opportunities will not always be fatal to a refugee claim. 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

[157] *Key v. Canada,* note 138 above.
[158] *Ibid,* [34].
[159] *Ibid*.
[160] *Ibid.*

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. Because the outcome of this case cannot be considered to be a foregone conclusion, Mr. Key should be given the opportunity to address fully the issue of state protection in a rehearing before the Board.[161]

Landry v Canada

The reasoning in *Key* is convincing to the present author, but it has been subjected to criticism[162] and it has not been followed in all cases. In *Landry v Canada*, the Court distinguished *Key* on the basis that in *Key*, state protection had not been considered by the IRB at the first instance.[163] The Court found the IRB's determination that Landry should have waited for the outcome of his hearing under Article 15 of the UCMJ, which permits a commanding officer to impose non-judicial punishment, and that there were other avenues to pursue, including court martial and appeal to the US Supreme Court, was reasonable.[164]

7. Conclusions

It is clear that there is now a disjuncture between the state of the international authorities regarding conscientious objection and much of the domestic case law concerning refugee status on the basis of conscientious objection. The Human Rights Committee and the European Court of Human Rights have not had to consider questions concerning objections to particular wars and related issues that have arisen during the course of national determinations of refugee status. Guided by the questions posed in section one of this paper, the author hopes that together the human rights nexus working group will engage in a vigorous discussion.

[161] *Ibid*,[34] – [35].
[162] For a vigorous critique of the decision in *Key*, see Patrick J Glen, 'Judicial Judgment of the Iraq War: United States Armed Forces Deserters and the Issue of Refugee Status', 26 *Wisconsin International Law Journal* 965 (2008-2009).
[163] *Landry v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 781 [30].
[164] *Ibid*, [23] – [25].