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Article***337 ASSESSING JUS AD BELLUM AND JUS IN BELLO WITHIN THE REFUGEE STATUS DETERMINATION PROCESS: CONTEMPLATIONS ON CONSCIENTIOUS OBJECTORS SEEKING ASYLUM**Cecilia M. **Bailliet** [\[FNa1\]](#)

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INTRODUCTION

The evolution of international public law has resulted in the emergence of issues which require cross-disciplinary analysis. One subject exemplifying this dilemma is that of the treatment of conscientious objectors (hereinafter COs) within the asylum determination process. There is a lack of clarity as to the hierarchy of international refugee law, international humanitarian law, international criminal law, and human rights law when balancing the rights of individuals against those of particular states, as well as against those of the international community.

Traditionally, all states have the right to call upon their citizens to undertake military service. A state's prosecution of a person refusing to serve in the military is not usually considered persecution because the interest of the state in maintaining an army is deemed to outweigh the individual's own interests. However, there is an increased emphasis on the rights and duties of individuals to ensure respect for human rights within their nations, and thus there has been a growing recognition of an individual's right of conscientious objection--in particular, in cases where the state is deemed to engage in an ***338** illegitimate military action. [\[FN1\]](#) When a soldier believes that a military action in which he has been asked to participate contravenes international norms, the soldier may submit an asylum claim in another country. The policy of refusing asylum to COs leaves such applicants with little choice but to either engage in the illegal action or undergo prosecution and punishment for having refused to do so. In contrast, providing asylum to COs recognizes the individual's attempt to uphold international legal standards as one that deserves protection by the international community. [\[FN2\]](#) Although the applicant may base his opposition primarily in moral or religious convictions, the issues he raises may be linked to valid international legal standards, and the applicant may therefore be perceived as an international law or humanitarian law defender. [\[FN3\]](#)

It is important to examine to what extent the asylum applicant's perception of himself as a defender of jus ad bellum and/or jus in bello is taken into consideration in asylum determinations. [\[FN4\]](#) Jus ad bellum refers to the conditions under which one may resort to war. Violations constitute crimes against humanity or crimes against peace, including the planning or waging of a war of aggression or a war in violation of international agreements, and the participation in a common plan or conspiracy for the accomplishment of war crimes. [\[FN5\]](#) Liability for crimes against peace attaches to high-ranking members ***339** of government and policy-makers; nevertheless, soldiers may still hold themselves morally accountable for participation in such wars. Jus in bello refers to the laws and customs of warfare, which include the Geneva Conventions of August 12, 1949, and their Protocols. [\[FN6\]](#) Violations are characterized as war crimes and encompass the following: murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity. [\[FN7\]](#) Both soldiers and civilians may be held liable for violations of war crimes. [\[FN8\]](#) In theory, soldiers have a duty to obey lawful orders, and disobey unlawful ones. However, as will be discussed in this Article, the latter category is largely understood as referring to "manifestly illegal orders" and leaves little room for disobedience in situations involving less obvious violations affecting the morality of the soldier. [\[FN9\]](#)

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The distinction between jus ad bellum and jus in bello becomes somewhat ***340** convoluted when assessing the issues from an ethical perspective. Lene Bomann-Larsen queries, "If U.S. troops had no warrant to be in Vietnam in the first place, how can any killing and destruction in the pursuit of their unjust cause be morally justified?" [\[FN10\]](#) She concludes that in an objectively unjust action, no killing of defensive soldiers and collateral damage is permissible. This conclusion widens the margin for conscientious objection; from a moral standpoint, even if the specific orders themselves are not manifestly illegal according to the rules of engagement, the fact that they are issued within the context of a war of aggression would be sufficient to support dissent. Nevertheless, it is noted that in unjust wars, unjust combatants may be considered non-culpable on account of excuses such as coercion, conscription, loyalty and a sense of duty, or invincible false belief that the war is just. [\[FN11\]](#) Bomann-Larsen suggests:

For an unjust combatant to be completely culpable it seems that he must have chosen freely to participate in an unjust war with complete knowledge or culpable ignorance of its injustice Thus while we accept that killing in an unjust war is objectively wrong, unjust combatants are presumed not to be culpable for the killing Only the very few, if any, who fight freely in the knowledge (or who should have and could have known) about the injustice of their war are properly called murderers -- and these, in turn, are impossible to distinguish from the rest. [\[FN12\]](#)

Deserters and draft evaders acting according to their conscience present the opposite situation. They are exhibiting their knowledge about the injustice of war (both general and specific) and seek to identify themselves as different from the rest in voicing moral objection. [\[FN13\]](#)

COs may file asylum claims based on their fear of being persecuted for their effort(s) to assert their right to freedom of thought, conscience and religion as derived from both Article 18 of the International Covenant on Civil and Political Rights and Article 9 of the European Convention on Human Rights. Specifically, Article 18 of the International Covenant on Civil ***341** and Political Rights provides:

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. [\[FN14\]](#)

Article 9 of the European Convention on Human Rights contains similar language. [\[FN15\]](#) These rights are non-derogable, thus states are not to restrict them. [\[FN16\]](#)

While it is important to note that no international instrument explicitly recognizes a right to conscientious objection, there has been significant progress in the acknowledgement of this right internationally. For example, between 1987 and 2002, the U.N. Human Rights Commission issued several resolutions [\[FN17\]](#) in which it recognized the right to object to military service on conscientious grounds as a legitimate exercise of the right to freedom of thought, conscience and religion. Thus, the U.N. Human Rights Commission has resolved to recognize conscientious objection when it arises from religious, moral, ethical, humanitarian or similar motives. [\[FN18\]](#) The 1998 resolution ***342** sets forth minimum basic principles; it recognizes that persons performing military service may develop conscientious objections in the course of that service, and that states should consider granting asylum to those COs facing persecution owing to their refusal to perform military service where there is no provision for conscientious objection. [\[FN19\]](#) Furthermore, in 2004, the Office of the U.N. High Commissioner for Human Rights (hereinafter UNHCR) presented a report on best practices which stated directly, "Asylum should be granted to those COs compelled to leave their country of origin because they fear persecution owing to their refusal to perform military service." [\[FN20\]](#)

It is necessary to clarify the relevant terminology in cases involving conscientious objection. COs are people who refuse to participate in the military based on an internal conviction of what is morally right or wrong. Absolute COs are people who are opposed to participation in war in any form because of their religious, ethical or moral belief. Partial or selective COs are people whose consciences do not permit them to participate in what they believe to be an "unjust" war, but do permit them to participate in what they believe to be a just war. Partial

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or selective COs may also object to the use of certain weaponry or particular targeting. The objection may be raised prior to or during one's military service (the latter, for instance, due to change of mind as a result of experiences in combat or as a result of receiving an order to perform illegal duties). [\[FN21\]](#) UNHCR policy requires that selective objection merit consideration equal to absolute objection. [\[FN22\]](#)

Deserters are conventionally viewed as people who have abandoned their military posts, and draft evaders are defined as persons who have been conscripted into military service and seek to avoid that service. Nevertheless, *343 many deserters and draft evaders are also people acting out of conscience. During the Vietnam War, deserters were primarily of minority background and/or lower socio-economic class who were not aware of conscientious objection avenues prior to induction, while draft evaders tended to be from middle-class and/or white backgrounds on track for higher education. [\[FN23\]](#)

The ability of professional or voluntary soldiers to file for conscientious objection is limited. Both UNHCR and the Council of Europe Parliamentary Assembly set forth as "best practice" the recognition of the right to conscientious objection prior to and during military service. [\[FN24\]](#) The Quaker Council for European Affairs specifically calls upon states to recognize this right for professional soldiers and to provide clear procedures for honorable discharge. [\[FN25\]](#) Nevertheless, only the Netherlands, Japan, the United States, the United Kingdom, and Germany recognize the right of professional soldiers to register as COs, and practice in these countries may be limited. [\[FN26\]](#) The *344 recognition of professional soldiers' right to register as COs is further complicated when turning to refugee law, as the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook") notes that whether a soldier volunteered or conscripted "may be indicative of the genuineness of the conviction." [\[FN27\]](#) This presents a narrow view that ignores the fact that professional or voluntary soldiers may have issues of conscience, and that the notion of autonomy invites a change of view or action during the course of human experience. [\[FN28\]](#)

Within humanitarian law, the issue of the treatment of deserters acting out of conscience is absent from the primary instruments. Furthermore, it was not addressed in the International Committee of the Red Cross review of customary international humanitarian law. Individual states continue to issue dishonorable discharges and penalties, and to imprison their own deserters and draft evaders acting out of conscience. Guidelines are needed to clarify the standards of protection pertaining to COs.

This Article provides an overview of issues related to conscientious objector asylum seekers and offers suggestions for new guidelines. Part I *345 discusses the tendency of administrative agencies and courts to label claims of conscientious objection as "political," rather than as matters of religion or conscience, in order to withhold grants of asylum. Part II explains complications in the interpretation of UNHCR Handbook paragraph 171 that have led to the requirement that COs show evidence of international condemnation of the armed conflict in question, and to the rejection of claims on "political question" grounds. Part III reviews the practice of applying high standards of proof that require CO asylum applicants to show systematic or widespread violation of jus in bello and/or jus ad bellum. Part IV discusses the social and political notions of the citizen-soldier that undercut the recognition of conscientious objection. The Conclusion offers recommendations for new guidelines.

I. THE NEGATION OF POLITICAL OPINION AS A GROUND FOR SELECTIVE CONSCIENTIOUS OBJECTION

Adjudicators often seek to limit the recognition of selective conscientious objection claims by classifying them as political objections not meriting protection. However, the 1951 Convention Relating to the Status of Refugees sets forth that a refugee is one who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" and is unable or unwilling to return to his country. [\[FN29\]](#) A challenge in asylum cases is the identification of the grounds for protection under the 1951 Convention. Traditionally, grants of asylum to deserters have been linked to political opinion claims. [\[FN30\]](#) The legal scholars Guy Goodwin-Gill, James Hathaway, and Mark von Sternberg all agree that this category is the most relevant. [\[FN31\]](#) Goodwin-Gill offers the following explanation:

Objectors may be motivated by reasons of conscience or convictions of a religious, ethical, moral, humanit-

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arian, or philosophical nature Military service and objection thereto, seen from the point of view of the State, are also issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority; it is a political act. The 'law of universal application' can thus be seen as *346 singling out or discriminating against those holding certain political views. [\[FN32\]](#)

The scholar Atle Grahl-Madsen argues that because "'religion' and 'political opinion' are mentioned in Article 1(a)(2) of the Convention on the Status of Refugees as alternatives of equal rank," it should make no difference which reason forms the basis of evasion of military service. [\[FN33\]](#) However, the characterization of opposition as "political" has at times been misinterpreted by adjudicators. Problems arose from the wording of paragraph 171 in the UNHCR Handbook which places a limit on political justifications that can serve as the basis for objection, thereby raising the burden of proof:

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 light of all other requirements of the definition, in itself be regarded as persecution. [\[FN34\]](#)

As presented in paragraph 171, a political objection to military service requires an external assessment regarding the international community's perspective on the military action. In contrast, an objection based on religion or conscience requires an internal assessment of the subjective beliefs of the applicant. Similarly, analysis of a social group claim considers the applicant's subjective views.

To the extent that the religion category is utilized within refugee law, it appears that protection is more often linked to claims based on formal religious beliefs, which often espouse an absolute objection to all types of war. This stands in contrast to those views based on humanistic values that are in opposition to particular military actions. This aspect of refugee law runs counter to the principle of non-discrimination. Is not a moral code based on humanistic values of equal importance to values based on religious views? Experts around the world indicate an affirmative answer to this question. [\[FN35\]](#) *347 One may argue that there are more cases of partial objectors than of complete pacifists, and that the asylum determination process should reflect this reality. [\[FN36\]](#)

Emily Marcus argues that the right to conscientious objection is linked to the right to life, peace and liberty, and the freedoms of association and expression. [\[FN37\]](#) The issue of personal choice is of particular interest. For example, a person might be born into a family belonging to a given church and adopt the church's values. As a result, that person's worldview would be less personal because it would be pre-ordained and collectively defined by his group or family, even if it was expressed as an individual right. Furthermore, the term "personal choice" does not clarify the legitimacy or scope of any war, even though a partial objector, draft evader or deserter must actively make a choice when being forced to participate in military action. The choice is imminent, and the collective identity from which one seeks support is humanity itself.

Adjudicators, however, appear reluctant to discuss the human family, and a person is then viewed only as an individual, and not as a member of a community with common values. Somehow, when the applicant stands alone, his values are not considered his conscience, which would fall under the religion classification, but rather political opinion, which may be misunderstood and rejected. Hence, the examination of humanistic values is avoided, and our perception of religion is restricted to organized religious groups.

Selective objection has often been characterized as "merely" political as a rationale for denying protection to COs. Note the observation by Joseph Capizzi:

*348 Historically, the United States government has treated selective conscientious objection as merely politically-informed opinion, subject to vacillation on political grounds alone. It may be legitimate to equate conscience with political opinion, but neither has this been established, nor is there historical support for doing so. The privileged status of the conscience of the general objector, whose judgment presumably is based upon "non-

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political" grounds, has never been adequately articulated. The religiously sincere conscience that guides the decisions of the selective objector has continually been ignored. Further, as the literature on the subject reveals, the term "political" suffers from a lack of definition. In the broader sense it can mean "an assessment of the facts of reality," in other words, by definition opposed to claims about or based on the transcendent; more narrowly, "political" refers to membership in or participation with a particular partisan struggle within society. These meanings are connected, obviously, but they also represent different understandings of how the term should be used -- and usually the complexity is unnoticed. [\[FN38\]](#)

This key problem in protection was noted by the 1983 Report of the U.N. Commission on Human Rights Rapporteurs on Conscientious Objection, which stated that a reviewing body could treat a claim as political rather than as a conscientious belief because a government might interpret an objection to a particular military action that violates international norms as a political opposition: "States are not willing to acknowledge that their actions are morally incorrect or contrary to international law." [\[FN39\]](#) The examination of this issue thus excludes discussion of humanistic values as representative of conscience within the scope of religion. Indeed, some humanists would argue that this exclusion is entirely appropriate, as one might seek to eschew any linkage to religion whatsoever. However, one might also argue that political opinion alone does not successfully address matters of conscience, and that in the battlefield, personal crisis is more likely to be provoked by a personal, moral challenge than by political belief. A review of statements by soldiers *349 reveals reflections of wrongs committed against innocent victims, including women and children, and the impact these wrongs have had on their perception of their own identity. [\[FN40\]](#)

The U.S. Supreme Court rejected the legitimacy of selective objection in *Gillette v. United States*, in which petitioner Gillette objected to the "unjust" war in Vietnam based on his "humanist approach to religion" as well as "fundamental principles of conscience and deeply held views about the purpose and obligation of human existence." [\[FN41\]](#) The case also included *Negre*, a Catholic, who objected to the "unjust" war based on the doctrine of his Church. [\[FN42\]](#) The Court characterized selective objection as "conscientious objection of indeterminate scope" [\[FN43\]](#) and acknowledged the government's *350 concern that processing would prove difficult, variable, potentially erratic or discriminatory, subjective, and impossible to be conducted in a fair and consistent manner.

Similarly, in the Israeli Supreme Court case of *Zonstein v. Judge Advocate General*, the petitioners argued that their actions were not offenses, citing Section 125 of the Military Justice Law to claim that service in the occupied territories inherently involved illegal activity and that refusing to carry out illegal orders constituted a recognized legal defense. [\[FN44\]](#) In addition, the petitioners claimed that the orders violated their freedom of conscience and were invalid. [\[FN45\]](#) The Judge Advocate General held that the military activities were legal and the goals were to preserve peace and security and protect Israeli citizens from terrorist activities. [\[FN46\]](#) The Supreme Court of Israel rejected selective objection on the reasoning that it stemmed from ideological or political perspectives that could affect security considerations (under the assumption that there would be more objectors) and prove discriminatory and difficult to apply (distinguishing between good faith conscientious objection and political disagreement). [\[FN47\]](#) The court held that the recognition of selective conscientious objection might "loosen the ties which hold us together as a nation," given the pluralistic nature of the society. [\[FN48\]](#) The court also cited *Gillette* in noting concern for maintaining impartiality within the system. [\[FN49\]](#)

In September 2003, twenty-seven Israeli Air Force reservist pilots refused to carry out targeted killings or other operations in the West Bank and Gaza because they considered the actions "immoral and illegal." [\[FN50\]](#) The Israeli Chief of Staff characterized their actions as "political" rather than "ethical." [\[FN51\]](#) Hence the term 'political' is used by the state in order to remove selective claims from recognition as elements of 'conscience.' [\[FN52\]](#)

Within refugee law, adjudicators often use this argument to prevent *351 distinguishing an individual case or recognizing 'new' rights, and the argument is partially based on the fear of 'opening the floodgates' to claims. Indeed, this reasoning was used to caution against the recognition of gender-related persecution, only to be factually disproved in practice. [\[FN53\]](#) This absolute perspective is no longer defensible and in fact is discriminatory

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towards persons exhibiting selective objection because it denies them their right to autonomy and it represses their choice in belief. Beliefs are indeed as particular as the individuals that espouse them, but this does not mean that their claim should be refused.

Consider the United Kingdom case of *Sepet v. Secretary of State for the Home Department*, which involved *Sepet* and *Bulbul*, two Kurdish asylum seekers from Turkey whose claims were based on their objection to the performance of military service. [\[FN54\]](#) The Special Adjudicator characterized *Bulbul's* objection as being based on "his general antipathy towards the policy of the Turkish Government to oppose self-determination for the Kurdish people." [\[FN55\]](#) The Special Adjudicator further noted that *Bulbul* was not an absolute objector, but rather a partial objector, stating:

[H]is fear is that he might be sent to the operational area and be required to take military action, possibly involving atrocities and abuse of human rights, against his own people. I do not consider that his objection is therefore one of moral conviction but rather that it stems from his political views. [\[FN56\]](#)

Indeed, the UNHCR's amicus brief identified the petitioners' objection as 'political' because of their disagreement with Turkey on the use of its army against Kurds. [\[FN57\]](#)

The Special Adjudicator found that *Sepet's* objections "stem[med] from his political opposition to the present Turkish Government and from his determination not to be involved on behalf of the Turkish Army in atrocities which he claim[ed] he might [have been] required to participate in, especially against his own people in the Kurdish Areas." [\[FN58\]](#) The Special Adjudicator added that he discounted *Sepet's* "effusive embrace of human rights," but *352 determined that his objection was indeed linked to his genuine political opinion. [\[FN59\]](#) However, as with *Bulbul*, it was determined that there was no proof that he would have been "required to engage in military actions which have been condemned by the international community as contrary to the basic rules of human conduct." [\[FN60\]](#)

The Immigration Appeals Tribunal also rejected the petitioners' objection as meeting this requirement, referring to their reluctance to kill Kurdish people, but willingness to fight for a Kurdish state, as exemplifying discriminatory reasoning (i.e., focusing on resistance to killing one particular ethnic group as grounds for one's conviction). [\[FN61\]](#) Such a characterization is inappropriate, because an objection to the targeting of an ethnic group is arguably an expression of support for international humanitarian standards -- that is, the prohibition on the persecution and attack of particular ethnic groups as well as broader *jus ad bellum* concerns. [\[FN62\]](#)

The Court of Appeal confirmed the rejection of the petitioners' objection grounds as constituting deeply held convictions, further negating the likelihood of participation in service that would breach their convictions. [\[FN63\]](#) Lord Justice Laws recognized three clear circumstances "in which a conscientious objector may rightly claim that punishment for draft evasion would amount to persecution," one of which being when military service "involves acts, with which he may be associated, which are contrary to basic rules of human conduct." [\[FN64\]](#) Lord Justice Laws also stated that to place individual conscience over the legitimate interests of the State is a 'political decision' -- highlighting *353 a conservative interpretation of sovereignty without mention of a duty to protect human rights as a condition of sovereignty:

The balance here between legal duty and private conscience touches the question, what may the State demand of its citizens; and it does so in a context where the State's very function of protecting its people from internal or external threats--sometimes thought to be the first duty of governments--is or may be immediately involved. It might reasonably be thought that the striking of such a balance, at least in a democracy, is for the legislative and executive arms of government, and not for the judiciary. [\[FN65\]](#)

However, Lord Justice Laws pointed to a requirement of international condemnation of the particular action:

An activity, which may be required of the citizen by the law of his State, is either one which is condemned by international law, or it is not. If it is so condemned, then, subject to other issues ... the citizen who refuses to undertake it and is punished for his refusal would be entitled to assert that his punishment constitutes persecution. But if the activity in question is not thus internationally condemned, then if it happens to be compulsory military

service, there is no reason on the face of it why the law of the Convention should insist on any special allowance being made so that objectors are excused. [\[FN66\]](#)

In refusing grants of protection, he cited the lack of international condemnation *354 of the Turkish government regarding its resistance to Kurdish self-government and its use of the army to impose its will on the Kurds. [\[FN67\]](#)

The House of Lords upheld the Court of Appeal. [\[FN68\]](#) Lord Bingham of Cornhill characterized the petitioners' opposition as bearing no relation to internationally condemned acts or conflicts, being selective rather than absolute, and lacking foundation in religion. [\[FN69\]](#) He further explained that the unwillingness to serve is based "merely" on their "strong and sincere opposition to the policy of the Turkish Government towards their own Kurdish community." [\[FN70\]](#) It remains unclear how the House of Lords and lower entities could identify an opposition to targeting an ethnic group as being "strong and sincere," but not accept its relationship to conscience. [\[FN71\]](#)

Thus, the Sepet case reveals how identification of objection with the political opinion category convolutes the analysis of cases involving assertions of violation of international norms. "Humanitarian law defenders" are delegitimized as a result of the classification of their views as political reflections rather than efforts to uphold legal standards.

II. INTERNATIONAL CONDEMNATION

The Sepet opinion did indicate a possibility of providing asylum to persons refusing to participate in military service due to international condemnation of a conflict; however, this option is undercut by the unwillingness of many national and international institutions to issue condemnations. Most worrisome is the fact that the decision to state condemnation is often as affected by diplomatic and economic considerations as it is by a review of international standards.

National governments are often hesitant to adopt condemnatory language in part because it affects bilateral relations. (Witness the drop in sales of Beaujolais wine in the United States after France's opposition to the military action in Iraq in 2003.) [\[FN72\]](#) Political actors are often accused of not voicing condemnation when expected. For example, U.S. leaders have been much criticized for not taking a stronger stance against Israel regarding the *355 long-standing conflict between Israel and Palestine. [\[FN73\]](#)

Even when a government has condemned a military action, immigration authorities that hear asylum cases may not be aware of the statements made by heads of state and other diplomatic officials. When inquiry was made to the Norwegian Ministry of Foreign Affairs in 2003, the press officer there stated that criticism regarding the violation of international legal standards tends to be given in private meetings. [\[FN74\]](#) In addition, public criticism of individual incidents may employ circumspect diplomatic language rather than state outright condemnation. [\[FN75\]](#) A review of Norwegian press releases as well as news articles found only limited occasions where Norwegian government officials used condemnatory language. For example, in 2002, Prime Minister Bondevik condemned Arafat's house arrest and the Norwegian Ministry of Foreign Affairs condemned attacks by a Sudanese government gunship on civilians receiving humanitarian aid. [\[FN76\]](#) In 2001, Prime Minister Stoltenberg condemned "organized evil" in the form of terrorism after September 11th, employing language similar to that used by both President George W. Bush and U.N. Secretary General Kofi Annan. [\[FN77\]](#)

Similarly, a review of the U.S. State Department and White House press releases revealed condemnatory language used usually only with respect to terrorist acts or assassinations of key political actors. Such acts included the Madrid train bombing in March 2004, [\[FN78\]](#) the hostage-taking in the school in Beslan in September 2004, [\[FN79\]](#) the murder of Afghanistan's Vice President Haji Abdur Qadir in July 2002, [\[FN80\]](#) and the assassination of Israeli Tourism Minister Rehavam Zeevi in October 2001. [\[FN81\]](#)

Is it appropriate to expect an asylum determination to be contingent on the language used by diplomats? It may be argued that the immigration authorities *356 are expected to understand that the Foreign Ministry or State

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Department is unlikely to employ strong language which highlights violations of international law. As such, it may be further argued that immigration authorities are expected to refrain from strict interpretations of the Foreign Ministry or State Department's statements in the context of asylum determination. The Foreign Ministry or State Department is a political actor, and immigration authorities have a mandate to conduct an objective, legal analysis. Should such a determination depend on political output, the process of the examination is compromised. What follows is a survey of the role played in CO adjudications by the issuance (or lack thereof) of condemnations from state governments, international bodies, and NGOs.

A. Norway

One Norwegian Appeals Board decision involving a Russian partial CO addressed the complexity of assessing this issue, highlighting the need for the Norwegian government to present one voice with respect to assessing a country situation:

The international community, hereunder Norway, has expressed concern for the human rights situation in Chechnya, and for the attacks on civilians committed by both parties to the conflict. Nevertheless, the international community has not gone so far as to condemn the Russian military action in Chechnya, either during the first conflict from 1994-96, or during the latest conflict after 1999 Nor has the Norwegian State, via the parliament, government, or foreign ministry characterized the conflict to be in violation of fundamental human rights. [\[FN82\]](#)

A caseworker in the matter further referenced a comment from the Secretariat cautioning immigration authorities from straying from Norwegian authorities' assessments: "According to the Secretariat, the immigration authorities should take care when evaluating the general situation differently than the above Norwegian authorities." [\[FN83\]](#) The CO's application was rejected. [\[FN84\]](#)

B. NATO

Alexandra McGinley has argued that NATO countries were morally *357 accountable for deserters, draft evaders, and other COs from Serbia, due to NATO's encouragement of such action via airdrops of leaflets and television promotions during the 1999 air strikes. [\[FN85\]](#) Because the international community condemned the war as against basic standards of human conduct, McGinley argued that the NATO states should have recognized Serbian COs' selective objection to the war. UNHCR estimated that from 15,000-20,000 of those who fled were draft evaders, and McGinley argues that this weakened Milosevic's military strength and assisted NATO. However, many European nations denied asylum to people in this group, at most granting temporary protection. [\[FN86\]](#)

C. The United States

In contrast, we may consider the case of *Vujisic v. INS* from the U.S. Court of Appeals for the Seventh Circuit, concerning a soldier who fled Yugoslavia in 1991 rather than re-enter the army and fight what he considered to be an unjust civil war against his countrymen. [\[FN87\]](#) The court cited paragraph 171 of the UNHCR Handbook and noted that:

The international community, including the United States, severely condemned the Serbian military actions in the Balkan republics and the strategy of genocide that went with it. Vujisic refused to participate, [and his] desertion from and persecution by a military force condemned by the international community can rightly be considered to be caused *358 by his opposition to the political and nationalistic policies of the Yugoslav government. [\[FN88\]](#)

In the end, the court granted protection because the international community shared Vujisic's support of the Slovenians' right of self-determination.

D. The United Nations

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Within the U.N., condemnation may be issued by a variety of actors: the Security Council, the Secretary-General, the UNHCR, Special Rapporteurs and Experts, the Commission on Human Rights, and others. Such condemnations have been issued in response to specific incidents (ranging from terrorist acts in a variety of nations, to ethnic cleansing in the Balkans, to attacks and killings of human rights defenders, government leaders, journalists, and political activists), or in response to general issues (such as racism or the use of child soldiers). [\[FN89\]](#) Kevin Kuzas argues that international condemnation is a difficult standard to meet because the U.N. Charter is vague in its support of independence and self-determination principles. [\[FN90\]](#) As a result, Kuzas argues, civil or internal wars are less likely to receive international condemnation than are full-scale wars of aggression between two sovereign states. [\[FN91\]](#)

For example, in 2001, the U.N. Commission on Human Rights issued resolution 2001/24 on the Situation in the Republic of Chechnya of the Russian Federation, which:

***359** Strongly condemns the continued use of disproportionate and indiscriminate force by Russian military forces, federal servicemen and State agents, including attacks against civilians and other breaches of international law as well as serious violations of human rights, such as forced disappearances, extrajudicial, summary and arbitrary executions, torture and other inhuman and degrading treatment, and calls upon the Government of the Russian Federation to comply with its international human rights and humanitarian law obligations in its operations against Chechen fighters and to take all measures to protect the civilian population [\[FN92\]](#)

However, the U.N. Commission on Human Rights seemed to have adopted a less aggressive position by April 2003 when, despite continuing to "expres[s] its deep concern" with respect to these violations, [\[FN93\]](#) it acknowledged "the right of the Government to defend its territorial integrity and fight against terrorism." [\[FN94\]](#)

E. NGOs

Because of the forces restraining governments and international organizations, we may be inclined to look for condemnatory language from NGOs, such as Amnesty International or Human Rights Watch. Indeed, the Federal Court of Canada counseled the Immigration and Refugee Board to take just such an approach in *Ciric*, a case involving a selective objector from Yugoslavia:

***360** The Board may take some comfort in the fact that the United Nations was not quick off the mark in condemning the violations by all sides. It must be remembered that this world organization, intent on maintaining peace, must act of necessity slowly and carefully if it is to remain the honest broker in any conflict. Fortunately, respected organizations like Amnesty International, Helsinki Watch and ICRC, are able to move quickly, study sufficiently and make pronouncements. And all did so here which surely the Board should have seen as condemnation by the world community. The atrocities committed were immediately abhorrent to the world community, eventually leading to a more public position by the United Nations. Basic human rights were violated through woundings, killings, torture, imprisonment and all clearly condemned by the world community. The Board, it is agreed, was aware of all of this sickening activity, and by down-playing it, treated the evidence before them in a capricious, perverse manner. [\[FN95\]](#)

Amnesty International has issued numerous condemnations. Examples include condemnations of the following: the killing of civilians in Palestinian areas and suicide bomb attacks in Israel; [\[FN96\]](#) the Zimbabwean policy of shooting troublemakers; [\[FN97\]](#) Colombian guerrilla attacks on civilians; [\[FN98\]](#) the arrest of East Timor conference participants; [\[FN99\]](#) the Chinese crackdown in Tibet; [\[FN100\]](#) and Peru's detention of innocent prisoners. [\[FN101\]](#)

However, Human Rights Watch appears to be the leader in condemnations. Review of Human Rights Watch press releases revealed over 600 condemnations addressing a wide span of topics such as: Pentagon lobbying on the International Criminal Court; [\[FN102\]](#) Yugoslav obstruction of war crimes investigations; [\[FN103\]](#) attacks on Burmese refugee camps; [\[FN104\]](#) the detention practices of ***361** the INS; [\[FN105\]](#) the inaction of the U.N. Security Council in the face of evidence of crimes against humanity in the Democratic Republic of the Congo; [\[FN106\]](#) violence by security forces in Kosovo; [\[FN107\]](#) and the use of cluster bombs by NATO in Yugoslavia.

[FN108] One point of criticism is that the large volume of condemnations (although confirming the lamentable state of the world) may diminish the value of each individual condemnation.

F. The United Kingdom

The requirement of international condemnation was addressed in *Krotov v. Secretary of State for the Home Department*. [FN109] Krotov, a Russian citizen, was drafted by the Russian Army and sent to Grozny to participate in the Chechen war. [FN110] He deserted and claimed asylum, citing grounds for selective objection: "I do not object to fighting for my country say, in the situation of the Second World War as opposed to one in which I am required to be sent into action in Chechnya and kill innocent civilians and destroy property in a reprehensible manner." [FN111]

He was rejected by the Immigration Appeal Tribunal which noted that the Chechen conflict had not been internationally condemned either as to aims or methods. [FN112] Krotov appealed, stating that the UNHCR Handbook paragraph 171 required only that the international community had condemned the type of military action with which the individual did not wish to be associated as being contrary to basic rules of human conduct, because condemnation of a particular action might be made or withheld on the basis of political expediency. [FN113] Krotov cited the Immigration Appeal Tribunal in *Foughali v. Secretary of State for the Home Department* for the following proposition:

*362 The question whether a conflict is or is not internationally condemned may cast light on the Convention issue, but it is not the underlying issue. To make it so would be to interpolate into the text of the Refugee Convention definition of refugee an additional requirement of international condemnation. When assessing risk on the basis of serious human rights violations outside the context of military service cases, decision-makers do not hinge their decisions on whether or not these violations have also been internationally condemned, although such condemnation may be part of the evidence. It would be illogical to behave differently in relation to an overlapping field of public international law governed by the same fundamental norms and values. [FN114]

In the Court of Appeal, Lord Justice Potter (the author of the lead judgment) turned to a prior judgment in *B v. Secretary of State for the Home Department* for guidance in interpreting paragraph 171 of the UNHCR Handbook. The *B v. Secretary of State for the Home Department* opinion asserted that the test laid out in paragraph 171 of the UNHCR Handbook is one which is:

[B]ased directly on international law [and] is also required by the need to give the Refugee Convention a contemporary definition based on the very considerable developments in international humanitarian law since 1979 Thus whilst "international condemnation" is serviceable for descriptive purposes, it does not define the category. Strictly speaking international condemnation is only one indicator--albeit a highly relevant one--of whether the armed conflict involved is/would be contrary to international law. [FN115]

Lord Justice Potter held that the tribunal had erred in considering international condemnation of a specific military action or campaign to be a prerequisite for a successful assertion by an applicant for asylum that punishment for his refusal to participate would amount to persecution for the *363 purpose of achieving refugee status. [FN116]

Karen Musalo calls for rectification of focus to the international legal standards as opposed to political characterization of the opposition--thereby lifting the objection to transcendental values: "Proof that the military action contravenes human rights norms transforms the objection from one based on mere political disagreement to one based on international standards, which requires abstention from participation in acts of genocide and other gross violations of human rights." [FN117] The notion of international condemnation is subject to political influence and thus forms an improper legal standard. The identification of "acts of genocide and other gross violations of human rights" as the standard of measuring the legitimacy of a conscientious objection circumscribes this right to the point where it is too difficult for a CO to obtain protection.

III. STANDARD OF PROOF

One of the most problematic issues pertaining to these claims is that of the standard of proof. In conscientious

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objector cases, the standard of proof has been elaborated via the development of court-martial and criminal law norms. Article 1(f) of the 1951 Convention relating to the Status of Refugees includes clauses which exclude from recognition as a refugee those persons for whom "there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes." [FN118] Hence, there is a direct linkage between refugee law, humanitarian law, international criminal law, and general international public law. The principle is that persons seeking to avoid complicity in international crimes should be granted international protection. This becomes convoluted in policy and practice, as the individual's interest in removing himself from the field of wrongful conduct directly conflicts with the state of origin's interest in maintaining recognition of the legitimacy of its military engagement.

A. Proof of a State's Intent to Persecute

UNHCR first tackled standard of proof issues as they pertain to COs in its amicus curiae brief to the U.S. Court of Appeals for the Ninth Circuit addressing the case *Canas-Segovia v. INS*. [FN119] In its brief, the UNHCR argued *364 that international protection had wrongly been denied in part due to the application of an intent standard, namely that El Salvador did not intend to persecute anyone via conscription. [FN120] As the language of the conscription law is neutral, the immigration judge and Board of Immigration Appeals deemed that there was no nexus to a protection ground. [FN121] The UNHCR argued that this intent standard was derived from criminal law and wrongly applied within the context of refugee law, as the adjudicator is not required to establish the guilt of the persecutor by reference to higher criminal law standards, but rather determine the well-foundedness of the fear of persecution using a lower standard of proof. [FN122] The UNHCR further elaborated on this issue in its amicus curiae brief in *Sepe*:

[T]he absence of specific discussion about the words "for reasons of" in the travaux préparatoires and in the early commentators, indicates that in employing this phrase, the drafters of the 1951 Convention sought to do no more than provide a factual nexus between the persecution suffered and one of the enumerated 1951 Convention grounds; it was to form part of a single test and not to become the subject of separate analysis. For this reason, it is inappropriate and potentially dangerous to seek to import into the definition of a refugee, via "for reasons of," notions from other areas of law which would impose an additional and restrictive requirement on a claimant; namely to have to establish the motivation of the State or State official for the persecutory actions or the failure to protect an individual from the actions of others: Such an additional requirement would restrict the protection offered by the 1951 Convention in a way not contemplated by its drafters and contrary to its very object and purpose. This extra requirement would significantly increase the evidentiary burden borne by the asylum applicant and would run contrary to well established understandings about procedural standards. [FN123]

Karen Musalo explains that "the rationale underlying the general rule that prosecution and punishment of conscientious objectors can constitute persecution is that to punish an individual for adhering to religion or belief is *365 tantamount to persecuting him for these beliefs." [FN124] One may consider a review of the Canadian practice, which notes that "where military actions violate international standards, the claimant might be forced into association with wrongdoing" and thus constitute a serious harm amounting to persecution. [FN125] This is an analysis which places emphasis on the effect of the conscription -- the harm is a result of violation of the person's conscience and/or human dignity.

B. Proof of Likelihood of Forced Commission of Illegal Acts

The high standard of proof has been maintained, but has merely shifted from assessing whether a state intended to persecute the applicant via conscription to assessing instead whether the applicant will be forced to participate in violations of international law. Immigration authorities tend to apply a strict interpretation which does not look solely at the nature of the conviction of the applicant or whether the military action is condemned by the international community as contrary to basic rules of human conduct. In determining whether military service can be persecutory, immigration authorities seek to assess whether soldiers would be required to engage in inhuman conduct. This is the standard utilized by the U.S. Board of Immigration Appeals. The Norwegian Immigration

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Appeals Board reviews whether the applicant has a "real risk" of participating in illegal conduct. The U.K. Immigration Appeals Tribunal examines whether the individual "is likely to have to perform military service in a way that would involve taking or being closely involved in actions offending the basic rules of human conduct." [\[FN126\]](#)

Writing for the House of Lords in *Sepet*, Lord Bingham of Cornhill reframes the standard by lowering the probability to "might require" but simultaneously also raising the frame of reference to manifestly illegal acts:

There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to *366 serve would earn grossly excessive or disproportionate punishment [\[FN127\]](#)

Nevertheless, in *Sepet*, Lord Hoffman stated that "there is no reasonable likelihood that the applicants would have been required to engage in military action contrary to basic rules of human conduct, whether against Kurds or anyone else." [\[FN128\]](#) He noted that objection to war crimes would be legitimate, but he did not consider this to be the circumstance in this particular case, thereby underscoring the strict standard.

In *Krotov*, Lord Justice Potter sought to offer a concrete test which would remove language pertaining to condemnation and instead redirect the focus of analysis to the relevant legal standards pertaining to conflicts:

(a) that the level and nature of the conflict, and the attitude of the relevant governmental authority towards it, has reached a position where combatants are or may be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognized by the international community, (b) that they will be punished for refusing to do so and (c) that disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict, then it should find that a Convention ground has been established. [\[FN129\]](#)

In this manner, there is harmonization of the standards utilized within refugee determination with those applicable to humanitarian law. However, this is a limiting standard because it requires the applicant to demonstrate that soldiers "are or may be required on a sufficiently widespread basis" to contradict humanitarian norms. It takes the focus away from the applicant's conscience and creates a standard which is hard to prove.

Because the purpose of refugee law is to provide international protection, the standard of proof should be lower than that used in penal or civil suits. [\[FN130\]](#) Paragraph 171 of the UNHCR Handbook only refers to a military action "which is condemned by the international community as contrary to basic rules of human conduct," [\[FN131\]](#) and there is no mention of a "sufficiently *367 widespread basis." In other words, international law is characterized as a frame of reference for the development of a reaction based on conscience. Hence, it is possible to accept a broad interpretation of this clause as being met by provision of reports confirming the existence of violations of humanitarian norms, without having to establish certain justiciability for prosecution. Indeed, Musalo points out that the UNHCR Handbook does not require proof of personal participation in human rights violations or abuses; the CO "need only show that he sincerely 'does not wish to be associated' with this type of activity." [\[FN132\]](#) The restriction of recognition to internationally condemned conflicts narrows the scope of protection, but if the military is violating humanitarian norms or human rights principles then the CO would have a right to asylum. [\[FN133\]](#)

Unfortunately, adjudicators appear to have misinterpreted the term "association with" as requiring examination of the likelihood of participation in atrocities, thereby focusing on the extent to which such action is widespread. [\[FN134\]](#) This view is also reflected among some theorists. Terje Einarsen states:

If the applicant's motive for refusal to participate in an armed organization is precisely to avoid participation in international crimes, one should obviously require substantial juridical foundation to interpret the 1951 Convention in such a way as to determine the applicant is not a refugee and should be given back to the persecutors. [\[FN135\]](#)

Nevertheless, Einarsen requires a "real and present risk of participation." [\[FN136\]](#)

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States and regional bodies have struggled to apply a consistent standard of proof in cases involving conscientious objection. The European Union has experienced a type of schizophrenia regarding its position on COs. On the one hand, members were encouraged by the Council of Europe Parliamentary Assembly to adopt national legislation recognizing the right of conscientious objection as derived from the fundamental rights of the individual in states of democratic rule of law as guaranteed in Article 10 of the ECHR. [\[FN137\]](#) *368 On the other hand, the Council of the European Union adopted a Directive in April 2004 that provides a narrow acceptance of conscientious objection as grounds for asylum where the applicant has suffered "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" [\[FN138\]](#) Hence, where an individual cannot establish that undertaking military service would include war crimes or other serious crimes, a CO is unlikely to receive protection. What is remarkable is that this wording passed without much debate whatsoever. [\[FN139\]](#)

In reviewing refugee claims of selective objectors, Australian tribunals have applied a standard of review derived from Kuzas' elaboration on paragraph 170 of the UNHCR handbook. [\[FN140\]](#) Under this standard, a reviewer must consider:

- a) Where the conduct of hostilities is "contrary to the basic rules of human conduct;" although specific condemnation by the international community of the conduct of hostilities may be helpful, it is not necessary because the rules applicable to the methods and means of warfare are well-established;
- b) "Where the government in question is unwilling or unable to control those individuals or groups engaged in the offending conduct;" and
- c) Where the applicant "can show a reasonable possibility that he will be personally forced to participate in such conduct, directly or *369 indirectly, or that he will be punished for refusing or avoiding military service." [\[FN141\]](#)

This approach suggests that the proper analysis requires assessment of whether the acts which would or might be committed are contrary to basic rules of human conduct (referring to the core humanitarian norms defined in international humanitarian law). This standard is worrisome for the same reason as other attempts to create a rule of application: the focus is not on the applicant's interest (addressing his conscience per se), but rather on external criteria pertaining to the conflict and the actions of the state of origin in relation to the rules of engagement. Nevertheless, the standard of proof is lowered in that the applicant must show a "reasonable possibility" that he will be forced to participate in illegal conduct -- this participation may be indirect, and he is not required to prove that he would be forced to commit atrocities or manifestly illegal acts.

The key concern is that a soldier's morality may be affected at a threshold which is lower than that required for the prosecution of war crimes. The standards offered by the EU and by national adjudicators' minimum standards (with the exception of the Australian Refugee Review Tribunal) appear too high. Mark Osiel presents the notion of a soldier's "internal ideal of martial honour: always cause the least degree of lawful collateral damage to civilians, consistent with your military objectives," and he argues that this notion addresses a greater span of actions than only those deemed manifestly illegal. [\[FN142\]](#) The cases processed under military law addressing a soldier's responsibility for implementing illegal orders tend to involve obvious atrocities, thereby leaving a large gray area of acts which remain unsanctioned, irrespective of the moral objections of the soldiers witnessing such actions. [\[FN143\]](#) Soldiers are not held responsible for acts not characterized as manifestly illegal, and they are assumed not to have the knowledge of the illegality of an order below this level. This presumption seeks to protect them but actually renders them more vulnerable to non-recognition of the validity of their voices of dissent. Adjudicators may presume that due to the low *370 likelihood of criminal prosecution for war crimes there is no reason to uphold the applicant's claim of conscientious objection.

The presentation of CO claims for asylum by professional soldiers is an attempt by them to act upon their duty to refuse illegal orders and thereby uphold international standards pertaining to humanitarian and human rights. In some cases this may apply to acts beyond those deemed to be manifestly illegal and instead address unnecessary collateral damage. State institutions tend to prefer to uphold the legality of military actions. Hence, soldiers are denied consideration of their subjective morality when the focus is on manifestly illegal acts. [\[FN144\]](#) In a

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court-martial, there is a presumption that orders are lawful, unless demonstrated otherwise. [\[FN145\]](#) Soldiers have a duty to obey all lawful orders. [\[FN146\]](#) Should the order be illegal, the soldier has a duty to disobey. However, subordinates have the burden of proof to demonstrate the illegality of the order. [\[FN147\]](#) In practice, this is extremely difficult because there is a tendency to only recognize "manifestly illegal" acts, for example atrocities, as meriting disobedience, leaving a broad category of less obvious situations undefined. [\[FN148\]](#) Osiel notes that "obedience even to lawful orders in combat often evokes revulsion." [\[FN149\]](#)

C. Proof of Violation of Jus ad Bellum and Jus in Bello

One may consider the Hinzman case, which involved an American deserter who objected to the invasion of Iraq and filed for asylum in Canada. In an interview, Hinzman stated, "I left the army to avoid participating in the war and occupation in Iraq, because I don't feel that it was legal according to international standards, and I thought that if I participated I would be complicit in a criminal enterprise." [\[FN150\]](#) The Canadian Immigration and Refugee Board ruled that it would not consider evidence that U.S. military action in Iraq is illegal due to lack of authorization by the U.N. Charter or U.N. Resolution. [\[FN151\]](#) The Board ruled in this manner as a result of its view that this question was "not relevant to the question of whether it is 'the type of *371 military action' which 'is condemned by the international community, as contrary to basic rules of human conduct' within the meaning of paragraph 171 of the [UNHCR] Handbook on Procedures and Criteria for Determining Refugee Status" [\[FN152\]](#) The CORAM [\[FN153\]](#) further noted that its "authority does not include making judgments about US foreign policy, including the legality or the wisdom of the US government's decision to authorize its military to enter Iraq." [\[FN154\]](#)

Thus, although jus ad bellum formed the crux of Hinzman's claim, it was characterized as irrelevant. This forced Hinzman's lawyer to focus on proving violations of jus in bello and to argue that Hinzman should not be forced to become a war criminal. Hinzman reveals how the judge employed statements and reports which indicated the U.S. Army's intent to combat infringement of humanitarian law by its soldiers in order to demonstrate that Hinzman had neither established that he would actually be forced to engage in illegal conduct nor that violations were widespread enough. The CORAM stated that "one can be guided, in part, by the meaning of war crimes and crimes against humanity, in trying to assess whether the military action is contrary to basic rules of human conduct." [\[FN155\]](#) The CORAM cited Krotov [\[FN156\]](#) and concluded that Hinzman failed to show "that the US has, either as a matter of deliberate policy or official indifference, required or allowed its combatants to engage in widespread actions in violation of humanitarian law." [\[FN157\]](#) The CORAM did cite a report by Human Rights Watch that highlighted a U.S. Military pattern of "overaggressive tactics, indiscriminate shooting in residential areas and quick reliance on lethal force" and noted that "an atmosphere of impunity" had been created. [\[FN158\]](#) Yet the reports stated that the U.S. Army was taking steps to address these problems. [\[FN159\]](#) Hence, the CORAM determined that Hinzman "failed to establish, that if deployed to Iraq he would have engaged, been associated with, or been complicit in military action condemned by the international community as contrary to basic rules of human conduct." [\[FN160\]](#) The CORAM grimly concluded:

While loss of life, and in particular innocent civilian lives, should be minimized at all times, it is regrettably virtually impossible to eliminate loss of civilian life during times of armed conflict. Unfortunately, there *372 will always be the collateral damage associated with the "fog of war." [\[FN161\]](#)

In essence, the CORAM raised the standard of proof, rejecting human rights reports demonstrating violations of jus in bello, and refusing to consider at all the evidence pertaining to jus ad bellum. Most disturbingly, the entire analysis rendered discussion of Hinzman's own morality peripheral, as the focus was on the state's assessment of its own rules of engagement -- which prohibit manifestly illegal acts but leave unexamined the question of other acts which may actually violate Hinzman's morality. The CORAM deferred to a presumption of the objective legality of military operations (regardless of certain documented instances of illegal conduct), thereby denying recognition or even full discussion of Hinzman's subjective moral opposition to it.

On March 31, 2006, Hinzman's appeal was rejected. [\[FN162\]](#) Justice Mactavish of the Federal Court of Appeal addressed the issue of whether the Board made an error by deeming evidence of alleged violations of jus ad bel-

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lum to be irrelevant to the determination of whether the "type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to the basic rules of human norms," according to paragraph 171 of the UNHCR Handbook.

Hinzman cited the Federal Court of Appeal decision in *Al Masiri v. Canada*, [\[FN163\]](#) in which the objection of a Yemeni citizen to participation in Iraq's "non-defensive incursion into a foreign territory" (the invasion of Kuwait) was recognized as grounds for protection, because the military action violated international standards. [\[FN164\]](#) Justice Mactavish drew upon the principle of complicity derived from international criminal law to narrow the holding in *Al Masiri*. The court called for a reading of paragraph 171 of the UNHCR Handbook in light of the exclusion provisions of the Refugee Convention, which state that refugee protection is available to those who breach domestic laws of general application, where compliance with those laws would result in the individual breaching accepted international norms. [\[FN165\]](#) The court conceded that "refusal to be involved in the commission of a crime against peace could indeed potentially bring a senior member of government *373 or military within the ambit of paragraph 171." [\[FN166\]](#) Nevertheless, the court held that:

[A]s a mere foot soldier, Mr. Hinzman could not be held to account for any breach of international law committed by the United States in going to Iraq. As a result, in the circumstances of this case, 'the type of military' action that is relevant to Mr. Hinzman's claim, as that phrase is used in paragraph 171 of the Handbook, is 'on the ground' activities with which he would have been associated in Iraq. [\[FN167\]](#)

In other words, the assessment is of *jus in bello*, not *jus ad bellum*, because Hinzman cannot be held complicit in crimes against peace. [\[FN168\]](#)

This interpretation is discriminatory because it permits higher level commanders to raise conscientious objection grounded in *jus ad bellum*, but not regular soldiers. A soldier may hold himself morally responsible for his participation in a war of aggression, irrespective of whether or not he may be held liable under international law. While the legality of the war should serve as background for the primary assessment of Hinzman's conscientious objection, the court constricts the validity of the objection to a requirement of individual legal responsibility. This is an inappropriate amalgamation of international criminal law upon refugee law which infringes upon the right to conscience.

Justice Mactavish upheld the Board's finding that breaches of international humanitarian law by U.S. soldiers did not rise to the level of being either systematic or condoned by the state, and that Hinzman failed to prove that he would have been called upon to commit such breaches. The court concluded that, "[T]he issues raised by this application have not required me to pass judgment of the legality of the American-led military action in Iraq and no finding has been made in this regard." [\[FN169\]](#)

Similarly, the Norwegian Immigration Appeals Board rejected a series of asylum claims involving selective objectors (deserters and draft evaders) from Israel. [\[FN170\]](#) The Israeli applicants were opposed to military action in the Occupied Territories that they believed violated international law, specifically citing the aggressive nature of the action and attacks on civilians as points of concern. One applicant claimed to have been ordered to shoot *374 children with plastic bullets, [\[FN171\]](#) and another claimed that he was ordered to destroy the home of civilians not involved with opposition actions. [\[FN172\]](#) Most were originally nationals of Central or Eastern European countries who immigrated to Israel and claimed to suffer religious and ethnic discrimination. [\[FN173\]](#) In an echo of Muhammed Ali's famous claim, "I ain't got no quarrel with the Vietcong ... no Vietcong ever called me Nigger," they exhibited feelings of empathy for the Arabs who suffered similar discrimination. [\[FN174\]](#) Some had actually served in the armies of their birth states and affirmed their willingness to defend Israel, but maintained that the actions in the Occupied Territories were illegal and unjust. [\[FN175\]](#) The applicants claimed they were fearful of abuse and punishment (including detention, classification as psychologically handicapped, and restrictions on employment as well as on movement) by state and non-state actors if returned. [\[FN176\]](#) The Board noted that in spite of several U.N. Security Council Resolutions, including 242 (1967) and 338 (1978), criticizing the occupation by Israel and the ongoing controversy regarding the legitimacy of Israeli military actions there, it did not consider it necessary to determine whether this amounted to evidence of interna-

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tional condemnation of the action. [\[FN177\]](#) The reason given was that the applicants did not prove that they faced a "real risk" of participation in such actions. [\[FN178\]](#) The Board cited information from the Norwegian Embassy in Tel Aviv stating that alternative solutions are sought for objectors (including placement in other areas, non-combat placement), and that it seemed unlikely that soldiers indicating low levels of motivation would be sent to fight, as this would present a danger. [\[FN179\]](#) The Board also cited the principle of "black flag," under which a soldier must disobey an illegal order, in spite of the fact that a government report noted that this option is not advisable in practice. [\[FN180\]](#) A further point of criticism is that "black flag" is only considered an option for manifestly illegal orders, and hence is unlikely to apply to all situations opposed by the applicants.

D. Standards of Proof in U.S Military Law

The interpellation into CO adjudications of high standards of proof associated with international criminal law can be seen in the U.S. Military court-martial of Captain Yolanda M. Huet-Vaughn, who was convicted of desertion with intent to avoid hazardous duty and shirk important service *375 during the 1991 Gulf War. [\[FN181\]](#) Huet-Vaughn, a medical doctor who joined the Army Reserves, also belonged to an organization called Physicians for Social Responsibility. [\[FN182\]](#) She opposed the deployment of 350 nuclear weapons to the Gulf, noting that they were weapons of mass destruction outlawed by international law. [\[FN183\]](#) In support of her reasons for opposition, Huet-Vaughn cited her moral reservations, her ethical reservations as a physician, and the Nuremberg Principles. [\[FN184\]](#) She opposed what she deemed to be the illegal war plans of the United States to destroy Iraq's civilian infrastructure (e.g., electric power, sewage treatment, and water purification plants), which would result in the harm and death of civilians. [\[FN185\]](#) Although Huet-Vaughn proffered evidence about the medical conditions in Iraq, the military judge refused to allow it, noting "we're not going to litigate the morality or the legality of the war in Iraq." [\[FN186\]](#) The Court of Appeals for the Armed Forces ultimately held that Huet-Vaughn's effort to contest the legality of the decision to deploy military forces in the Persian Gulf was a non-justiciable political question. [\[FN187\]](#)

The military judge held that it is not a defense to intentionally quit one's unit in order to avoid hazardous duty "because of one's conscience, religion, personal philosophies, ethical or professional considerations" [\[FN188\]](#) The judge also held that the accused's belief that what she may have been required to do could have been in violation of international law was not an adequate defense. [\[FN189\]](#) The U.S. Court of Appeals for the Armed Forces affirmed, holding that her motive for protest was irrelevant. [\[FN190\]](#) Further, her moral and ethical beliefs were irrelevant because they could not constitute a defense to desertion or failure to obey an otherwise lawful order. [\[FN191\]](#) The Court of Appeals upheld the judge's exclusion of evidence of alleged crimes being committed by the U.S. military and other federal officials. [\[FN192\]](#)

Most importantly, the court held that the "'Nuremberg defense' applie[d] only to individual acts committed in wartime[, but] it does not apply to the Government's decision to wage war." [\[FN193\]](#) Furthermore, "The duty to disobey an unlawful order applies only to 'a positive act that constitutes a crime' that *376 is 'so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.'" [\[FN194\]](#) The court noted "CPT Huet-Vaughn tendered no evidence that she was individually ordered to commit a 'positive act' that would be a war crime." [\[FN195\]](#) Adjudicators assessing the asylum claims of deserters mirror this reasoning in order to deny protection. Applicants are expected to prove that they would be forced to commit war crimes, a difficult endeavor when the majority of morally questionable military actions fall within a large area lacking codification or may even be deemed to be technically legal according to the rules of engagement.

One may argue that, irrespective of the lack of a soldier's juridical liability for participation in an illegal war or for commission of questionable but not manifestly illegal acts, he may hold himself morally accountable and seek to uphold the standards in international law via desertion. Consider the court-martial of Navy Petty Officer Pablo Paredes, who refused to board an assault ship bound for the Persian Gulf in December 2004 because he believed the war in Iraq to be illegal. [\[FN196\]](#) The hearing included expert testimony by Professor Marjorie

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Cohn, who explained that the use of force violates the U.N. Charter unless it is exercised in self-defense or with the U.N. Security Council's approval. [FN197] She supported Paredes's position that the invasion of Iraq was illegal because, she argued, it did not meet these U.N. Charter conditions. [FN198] Furthermore, she cited documented violations of jus in bello, including torture and inhumane treatment of prisoners. [FN199] Cohn stated that because the ship was bound to fight an illegal war, the "orders to board [the] ship were illegal, and [Paredes] had a duty to disobey." [FN200] On cross examination, she further testified that the interventions in Yugoslavia and Afghanistan were also illegal as neither was in self-defense, and they both lacked U.N. Security Council approval. [FN201] The Navy judge wrote, "I think that the government has successfully proved that any service member has reasonable cause to believe that the wars in Yugoslavia, Afghanistan and Iraq were illegal." [FN202] He found Paredes guilty of missing his ship's movement by design but dismissed the charge of unauthorized absence. [FN203]

Where asylum applicants cite humanitarian standards as grounds for protection, the application of a burden of proof that requires a showing of *377 violations of international law sufficient for international prosecution appears inappropriate. Rather, reference to international law serves as a framework for the individual's beliefs, and its invocation should serve this purpose, regardless of whether or not the action is justiciable. [FN204] Evidence pertaining to the legitimacy and scope of the military action, as well as the existence of war crimes, should not be denied full review by asylum judges. Such evidence helps to establish objective background evidence of grounds for a violation of conscience. Nevertheless, to require proof of widespread or systematic violations is to raise the standard too high. Every nation engaged in a military action will seek to deny intentional widespread violations of international humanitarian law. The asylum seeker should not be forced to present a standard of proof equivalent to international criminal law. The purpose of asylum law is to protect the applicant, and hence the standard of proof for violation of conscience should be lowered.

IV. CITIZEN-SOLDIER IDENTITY

I tan i epi tas

(Either come back with your shield, or on it.)

--Ancient Greek saying by Spartan mothers to their sons as they left for war

The difficulty faced by COs seeking asylum stems in part from the depth of cultural and political reliance that states have historically placed on the citizen-soldier. The Hinzman case discussed earlier in Part III is of particular interest because it raises issues pertaining to the changing social perception of the citizen-soldier. [FN205] From the time military forces were first established to the present, states have faced pacifist movements advocating recognition of the right of conscientious objection. In the modern period, efforts to temper the effect of actors promoting rejection of participation in military service may be measured by the processing of cases within courts and administrative agencies. The notion of the citizen-soldier as the symbolic guardian of the rights and freedoms of nations has been touted by regimes as varied as France during the 1793 levée en masse (and continuing on through the Franco-Prussian war in 1870 and both World Wars), the United States, and Russia in its protracted conflict in Chechnya. [FN206] The militarization of *378 civilian societies is presented as a sword that cuts both ways. [FN207] It heavily impacts the popular classes, and thus conscription is often deemed a "blood tax" or "economic conscription" on the poor and middle classes. [FN208]

The reduction or termination of conscription in many states can be linked to several key factors. One factor is the downsizing of armies in response to the emergence of disparate internal conflicts rather than international conflicts. Another factor is the trend towards investing in smaller professional units assisted by technologically innovative weaponry and intelligence gathering mechanisms. Further, social attitudes towards participation in the military are changing. In Spain, for example, seventy percent of all eligible conscripts in 2000 identified themselves as conscientious objectors, resulting in the government's immediate termination of conscription. [FN209] Despite the current trend of encouraging states to adopt recognition of CO legislation as part of "democratic militarization," the rejection of asylum claims by COs indicates a conservative approach that upholds public citizen-soldier duties at the expense of "private" conscience.

Consider the CORAM's disturbing assessment of the proposition that Hinzman's moral code was influenced by

the birth of his son:

When I asked Mr. Hinzman at the hearing of his claim whether Liam's birth had any influence on his decision to apply for non-combatant status, he replied that it did and that he was unwilling to kill babies. While I have no doubt this is so, I find that Liam's birth resulted in Mr. Hinzman rethinking his combatant status with the military, in the context of his role and responsibilities as a husband and father. [\[FN210\]](#)

The CORAM sought to discredit Hinzman's moral choice based on its link to his paternal identity. Whereas the link between a sense of ethics and the experience of motherhood has long been recognized by scholars and theorists, it seems discriminatory that a man's sense of justice be negated if its origins lie in fatherhood. [\[FN211\]](#) Is there anything more natural than an individual's *379 revelation of a duty of care towards others, in particular those most vulnerable, as a result of an assumption of responsibility over an infant? Rather than being delegitimized as a root of conscience, the paternal experience should be identified as a valid reason for moral transformation. According to Sarah Ruddick, the "maternal" experience is likely to be "nuanced and context-bound," hence one may argue that this would impel a person to respond to specific humanitarian violations (jus in bello) and specific contexts of war (jus ad bellum). [\[FN212\]](#) At issue are the consequences of such violations upon the person's conscience.

Hinzman has a right to be a selective objector. One cannot impose the scope of conscience on another. In Hinzman, the applicant explained his failure to make a new request for CO status upon deployment to Iraq because he knew that the definition of CO status in U.S. regulations did not "encompass opposition to a particular war, as opposed to war in any form" [\[FN213\]](#) The CORAM responded with a curious remark which appeared to chastise Hinzman for being honest by not presenting his objection as absolute in nature: "While he may be correct, it was open to him to frame his application as he saw fit." [\[FN214\]](#) In addition, the CORAM appeared to look negatively on the fact that Hinzman was willing to play a non-combatant role such as a cook or a medic because he would, by his own terms, be complicit in an illegal war, albeit not engaging directly in violence.

An inverse comparison to Hinzman is provided by *Prosecutor v. Erdemovic*, which involved a soldier who felt forced to participate in violence in order to stay alive for the sake of his wife and child. In *Erdemovic*, the judgment from the International Criminal Tribunal for the former Yugoslavia ("ICTY") negated duress as a complete defense to one's participation in a war crime or crime against humanity. [\[FN215\]](#) The case involved a soldier who participated in the execution of 1200 unarmed civilian Muslim men in the aftermath of the fall of Srebrenica. [\[FN216\]](#) The soldier offered the following explanation:

Your honor, I had to do this. If I had refused, I would have been killed altogether with the victims. When I refused, they told me: "If you are sorry for them, stand up, line up with them and we will kill you too." I am not sorry for myself but for my family, my wife and son who then *380 had nine months, and I could not refuse because then they would have killed me. That is all I wish to add. [\[FN217\]](#)

As pointed out by Sarah Tobias, this is the negative side of "mothering" instincts, whereby concern for one's own family results in neglect of the needs of others. [\[FN218\]](#) The Tribunal's rejection of duress as a defense requires consistency within the international community: soldiers should be provided with protection if they choose to flee when they do so in order to avoid participating in war crimes. The fact that many were denied protection reveals hypocrisy within the international community. The Tribunal's Appeals Chambers found that duress does not afford a complete defense to a soldier charged with a crime against humanity and/or war crime involving the killing of innocent human beings. [\[FN219\]](#) The negation of this defense indicates that soldiers should ensure that they are never placed in a situation of duress during humanitarian violations, and the best way to do so is desertion or draft evasion. Otherwise, the only option is to line up with the victims and be shot alongside them. If such is the perspective of the international community, then it is logical that the asylum policies should provide protection to those soldiers who flee. [\[FN220\]](#)

Pursuant to the UNHCR Handbook, paragraph 169, disproportionately severe punishment meted out to a deserter on account of race, religion, nationality, membership in a particular social group, or political opinion is a basis for the deserter to be given refugee status. [\[FN221\]](#) In Hinzman, the CORAM *381 considered the court-

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martial to be fair, independent and subject to due process. [FN222] However, the failure of the United States to recognize the legitimacy of selective objection, thereby resulting in prosecution and imprisonment, appears to be persecution (regardless of its severity) falling under UNHCR Handbook paragraph 170. In addition, Hinzman cited his fear of what could happen to him in prison as well as "the social stigma and economic consequences of being convicted of desertion and dishonorably discharged." [FN223] The CORAM noted that should Hinzman be subjected to a dishonorable discharge, he would not only have to forfeit federal education benefits, federal home loans, and job opportunities with the government, but he would also suffer potential discrimination from some employers, as well as social rejection within some parts of society. [FN224] Despite this, the CORAM concluded that:

[S]uch discrimination does not amount to persecution in that the discrimination does not lead to a consequence of a substantially prejudicial nature ... amounting to persecution or to cruel and unusual treatment or punishment. The treatment does not amount to a violation of a fundamental human right, and the harm is not serious. [FN225]

This assessment appears superficial; there is no explanatory discussion of the analysis that denial of access to federal assistance in the areas of education and shelter, as well as employment and social discrimination, will not create a serious harm to basic rights. Given Hinzman's lower socioeconomic status and his lack of higher education, it is precisely this type of exclusion and discrimination that will negatively affect both his well-being and that of his family. [FN226]

The state's imposition of a penalty ranging from imprisonment to denial of access to social benefits on account of his selective objection exhibit what Kathleen Kennedy identifies as "Patriotic Manhood" or a wartime construction of gender identity. [FN227] According to Kennedy, historically, "Patriotic men accepted military virtues as the core of citizenship and willingly sacrificed *382 their lives in defense of the nation. That sacrifice or potential sacrifice gave patriotic men unique access to the privileges of citizenship." [FN228] Kennedy characterizes the conscientious objection phenomena in World War I as one pursuing a gendered citizen identity composed of assertions of civil liberties, dissent, and rational thought over obedience to the state and engagement in irrational violence. [FN229] This perspective remains valid and can be applied in other contexts. COs are presented as brave men sacrificing themselves for their beliefs in prisons in Israel, Russia, Eritrea, and elsewhere. [FN230] Kennedy suggests that the conflict is that of competing citizen identities. [FN231] The state requires adherence to the law, thus the dissent presented by the objector is viewed by the state as irrational and subversive behavior, which in turn results in the objector's prosecution and the denial of the benefits of citizenship. More often than not, the administrative and judicial organs uphold the state's vision of citizenship and deny the claims of dissenters. Judges uphold the state's fear of losing its ability to raise an army; this is viewed as a fundamental interest on the part of the state, outweighing infringement on the individual's conscience. [FN232] Similar problems occur within the asylum systems assessing cases involving COs. [FN233]

*383 CONCLUSION

In an age in which war itself is viewed as an inescapable fact of human history, discussion is centered not so much on the legitimacy of war itself, but rather on the legitimacy of a particular action in a particular context. Human rights reports reveal layers of abuse ranging from the general impact on a nation to the specific harm against particular individuals and groups, including combatants themselves who rue the loss of their own humanity through participation or association with such actions. Should an asylum seeker not be recognized as retaining a right to express his conscience as to the scope and legitimacy of a particular war conducted in violation of international public law and/or humanitarian norms? Does this question not address issues provoking moral reflection and reaction beyond the limited categories of the laws of war? Does not one's moral repulsion from specific acts or specific wars (rather than all wars) merit an equal right to protection, especially if an individual risks persecution on account of this belief?

The foregoing review of cases involving COs who are deserters or draft evaders seeking asylum reveals the need for new guidelines. These should include:

1. Declaration that the central focus of the claim is the conscience of the individual applicant; assessment of

the military action is derivative.

2. Recognition of the standard of "association with" illegal armed conflict rather than "real or serious risk of participation" or "required on a specifically widespread basis" in systematic violations. "Association with" should not be interpreted as requiring personal liability for criminal prosecution for war crimes.

3. Identification of a low standard of proof relating to the applicant's belief (as understood within refugee law), leaving room for the adoption of human rights law standards that call for accepting conscientious objection claims to be accepted without further examination rather than examination of whether the military action may be prosecuted under international criminal law.

4. Clarification that a combination of reasons for fear of persecution (e.g., conscientious objection and ethnic identity) should not be deemed to weaken the asylum claim.

5. Recognition that opposition to organized or ordinary criminal activity by others in the context of a war may support a conscientious objection claim. A nexus may also be made to political opinion or social group (given the immutable characteristic of the knowledge of the illicit activity).

*384 6. Confirmation that past persecution on account of conscientious objection may be an indicator of a future risk of persecution.

7. Affirmation that the "nexus" test is met by examining the impact of a state's non-recognition of conscientious objection upon the applicant's right to freedom of conscience, irrespective of the non-discriminatory motivation of the state in punishing desertion or maintaining an army.

8. Statement that the severity of punishment is irrelevant where the person's conscience would be violated by performance of military service.

9. Verification that opposition to the targeting of particular ethnic groups can constitute valid conscientious objection to military service.

10. Reaffirmation of the relevance of international standards under human rights, humanitarian law, international criminal law, and general international public law in providing guidance for measuring the legitimacy of an armed conflict rather than political statements regarding condemnation.

11. Clarification that provision of asylum to COs cannot be characterized as requiring examination of political questions. Both jus ad bellum and jus in bello are issues of law.

12. Provision of a holistic view of the discriminatory treatment (including infringement of socio-economic rights) which could amount to persecution of COs.

13. Recognition that deserters and draft evaders have equal rights to consideration of their presentation of CO grounds for asylum claims. Such action should not be considered as exceptional.

14. Affirmation that professional soldiers, volunteers, and conscripts should have the right to file CO claims without time limits.

15. Recognition that conscientious objection on non-religious grounds, as well as selective objection, merits consideration as much as absolute objection to military service.

16. Identification of the interrelationship of conscientious objection with other human rights. Full review of CO claims to asylum requires consultation of sources within human rights, humanitarian law and refugee law.

[FN1]. Dr. Juris, Senior Research Fellow, Institute for Public & International Law, University of Oslo. J.D. & M.A., with honors, International Affairs, George Washington University. PhD, International Law, University of Oslo. I would like to extend my warmest thanks to Frances Nicholson, Anja Klug, and Professor Pierre Klein for their commentary and references. I am indebted to the Norwegian Board of Immigration Appeals for its provision of cases and the Norwegian Delegation to NATO for practical support.

[FN1]. Article 10 of the U.N. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms provides: "No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so." G.A. Res. 53/144, art. 10, U.N. Doc. A/RES/53/144 (Mar. 8, 1999).

[FN2]. It is noted by Emily Marcus that:

An individual seeking the right to be a conscientious objector is questioning the authority of the state and "as-

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sert[ing] the primacy of international law and morality over the self-interest of sovereign states." Recognizing conscientious objection as a human right would embody the philosophy, increasingly embraced in international law, that certain human rights are so fundamental that they deserve to be protected and promoted by the international community, even at the expense of traditional supranational deference to the domestic practices and policies of individual states.

Emily N. Marcus, [Conscientious Objection as an Emerging Human Right](#), 38 VA. J. INT'L L. 507, 511 (1998).

[FN3]. Mark R. von Sternberg argues that: "Claimants who refuse to contravene (humanitarian) norms present themselves as champions of the humane legal order codified in the law of Geneva. Their conscientious opposition to human rights violators, often undertaken at considerable risk, should receive appropriate treatment under the Refugee Convention." MARK R. VON STERNBERG, THE GROUNDS OF REFUGEE PROTECTION IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 149 (2002).

[FN4]. One may refer to the distinctions between crimes against peace and war crimes, as set forth in Article 6 of the 1945 Charter of the International Military Tribunal, Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. YORAM DINSTEIN & MALA TABORY, WAR CRIMES IN INTERNATIONAL LAW 1 (1996).

[FN5]. The U.N. Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state" U.N. Charter art. 2, para. 4. However, the U.N. Charter does recognize the Security Council's authority to call for the use of force to maintain peace and security. U.N. Charter art. 42. Furthermore, the Charter recognizes the right of individual or collective self-defense. U.N. Charter art. 51. The International Commission on Intervention and Sovereignty has issued guidelines for military intervention in order to halt large-scale loss of life due to state action, state neglect, or inability to act; or to address a failed state situation or large scale ethnic cleansing. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at http://www.idrc.ca/es/ev-9436-201-1-DO_TOPIC.html. The Commission further recommended the following precautionary principles to be adhered to when military force is utilized: right intention, last resort, proportional means and reasonable prospects. Id.

Article 7 of the Rome Statute of the International Criminal Court defines crimes against humanity as widespread or systematic attack directed against any civilian population, i.e., murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and grave sexual violence; persecution against a group on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law; enforced disappearance of persons; apartheid; and other inhumane acts causing great suffering or serious injury to mental or physical health. Rome Statute of the International Criminal Court art. 7, July 17, 1998, U.N. Doc. A/CONF.183/9, available at <http://www.un.org/law/icc/statute/romeofra.htm> [hereinafter Rome Statute].

[FN6]. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [6 U.S.T. 3516](#), 75 U.N.T.S. 287.

[FN7]. E.g., Rome Statute, supra note 5, at art. 8. Article 8 of the Rome Statute of the International Criminal Court also defines crimes against humanity as torture or inhumane treatment, including biological experiments, willful causation of great suffering, or serious injury to body or health; compelling a prisoner of war or other protected person to serve in the forces of a hostile power; willful deprivation of a prisoner of war or other protected person of the right to a fair trial; unlawful confinement; and taking of hostages. Id.

[FN8]. Soldiers may be held responsible for violations of jus in bello, irrespective of the legality of the war itself. See DINSTEIN & TABORY, supra note 4, at 2. The example of German Field Marshal Erwin Rommel refusing to execute POWs as ordered by Hitler is the classic example of maintenance of morality (now established

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jus in bello) within an illegitimate war. The converse example of humanitarian peacekeepers failing to protect civilians, or actively harming them, reveals violation of jus in bello within legitimate interventions. Consider the reports of sexual abuse by U.N. personnel in West Africa, Kosovo and the Democratic Republic of the Congo. See Great Lakes: Focus on Sexual Misconduct by UN Personnel, IRIN NEWS, July 23, 2004, available at <http://www.irinnews.org/print.asp?ReportID=42343>.

[FN9]. Note that, "[I]n practice, the threatening voice of the commanding officer, the risk of being punished and demoted, plus the fear of being perceived by friends and colleagues as disloyal, usually provides enough psychological pressure to keep a subordinate silent." Ted Van Baarda & Fred Van Iersel, *The Uneasy Relationship Between Conscience and Military Law: The Brahimi Report's Unresolved Dilemma*, 9 INT'L PEACEKEEPING 25, 35-36 (2002).

[FN10]. Lene Bomann-Larsen, *Licence to Kill? The Question of Just v. Unjust Combatants*, 3 J. MIL. ETHICS 142, 148 (2004).

[FN11]. *Id.* at 154.

[FN12]. *Id.* at 155.

[FN13]. Indeed, Nigel de Lee ruminates:

Where should the priority be? To the private interests of conscience; honour and comradeship? Or to the public duties to senior ranks, army and state? According to the conventional theory public obligations must override private and as the army is an instrument of the state, military interests must give way to political. But the state is only an instrument of civil society and beyond the state and nation is humanity as a whole. It is not difficult to understand why so many busy and perplexed officers take refuge in the doctrine of simple obedience to orders, solidarity and silence.

Nigel de Lee, *The Case of Colonel Hackworth*, 3 J. MIL. ETHICS 61, 64 (2004).

[FN14]. International Covenant on Civil and Political Rights art. 18, Dec. 19, 1966, 999 U.N.T.S. 171.

[FN15]. See European Convention on Human Rights art. 9, Nov. 4, 1950, 213 U.N.T.S. 221.

[FN16]. However, the European Convention on Human Rights permits the limitation of manifestation of belief under certain circumstances: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others." *Id.* at art. 9(2).

It should be noted that the European Court of Human Rights upheld a state restriction of the manifestation of religious belief in the form of proselytism of airmen by military officers of higher rank. It cited the hierarchical structure of military life which limited the ability of subordinates to rebuff pressure from above, as revealing a legitimate state interest in protecting them from proselytism. *Larissis et. al. v. Greece*, 1998-I Eur. Ct. H.R. 362.

[FN17]. E.g., *Conscientious Objection to Military Service*, Res. 2000/34, U.N. Hum. Rts. Comm., 60th mtg., U.N. Doc. E/CN.4/RES/2000/34 (Apr. 20, 2000); *Conscientious Objection to Military Service*, Res. 1998/77, U.N. Hum. Rts. Comm., 54th Sess., Supp. No. 3, 58th mtg., U.N. Doc. E/CN.4/1998/177 (Apr. 22, 1998); *Conscientious Objection to Military Service*, Res. 1995/83, U.N. Hum. Rts. Comm., 51st Sess., Supp. No. 4, 62d mtg., U.N. Doc. E/CN.4/1995/176 (Mar. 8, 1995).

[FN18]. The U.N. Human Rights Committee issued the following Comment addressing the right to conscientious objection as an exercise of the right to freedom of conscience:

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

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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 of 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.

U.N. Hum. Rts. Comm., General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion Under Article 18 of the International Covenant on Civil and Political Rights, ¶ 11, U.N. Doc CCPR/C/21/Rev.1/Add.4/ (Jul. 30, 1993), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed0](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed0).

[FN19]. Conscientious Objection to Military Service, Res. 1998/77, U.N. Hum. Rts. Comm., 54th Sess., Supp. No. 3, 58th mtg., U.N. Doc. E/CN.4/1998/177 (Apr. 22, 1998).

[FN20]. U.N. Econ. & Soc. Council, Report of the Office of the High Commissioner for Human Rights, Civil and Political Rights, Including the Question of Conscientious Objection to Military Service, U.N. Doc. E/CN.4/2004/55 (Feb. 16, 2004) [hereinafter ECOSOC].

[FN21]. MICHAEL F. NOONE, JR., *SELECTIVE CONSCIENTIOUS OBJECTION: ACCOMODATING CONSCIENCE AND SECURITY* 8 (Westview Press 1989).

[FN22]. The U.N. definition accepts both absolute and partial objection:

By conscience is meant genuine ethical convictions, which may be religious or humanist inspiration [One objection is] that it is wrong under all circumstances to kill (the pacifist objection), and the other that the use of force is justified in some circumstances but not in others, and that therefore it is necessary to object in those other cases (partial objection to military service).

Conscience on Trial: Refusal in the International War Resistance Movement, *WAR RESISTERS' INT'L*, available at <http://www.wri-irg.org/news/2004/israel0204-en.htm> (quoting The Secretary General, Question of Conscientious Objection to Military Service, ¶ 21, U.N. Doc. E/CN.4/Sub.2/1983/30 (June 27, 1983) (prepared by Eide & Mubanga-Chipoya)).

[FN23]. The former group often did not receive legal immigrant status in Canada and thus remained un-integrated within the society, often risking deportation. Whereas the latter group largely attained legal status and successfully pursued educational and other aspirations within the society. JAMES W. TOLLEFSON, *THE STRENGTH NOT TO FIGHT: CONSCIENTIOUS OBJECTORS OF THE VIETNAM WAR -- IN THEIR OWN WORDS* 165 (Brassey's, rev. ed. 2000). The UNHCR amicus brief in the *Sepet* case notes that, "It would be illogical to recognise a difference between desertion and a refusal to respond to call up for military service. Indeed the latter may be the best evidence of a consistent and principled opposition to such service." Brief for UNHCR (Nicholas Blake & Tim Eicke) as Amici Curiae Supporting Petitioner-Appellants ¶ 3.3, *Sepet v. Sec'y of the State for the Home Dep't*, [2003] UKHL 15 No. C/2777 & C/200/2794, 2003 1 W.L.R. 856 (2003) (No. 88-7444), available at <http://www.unhcr.ch/cgi-bin/txis/vtx/publ/opendoc.pdf?tbl=RSDLEGAL&id=3e5ba7f02&page=publ>. The brief states further that, "The fact of desertion may moreover be good evidence of a valid objection on political grounds (unwillingness to fight for opposed regime); desertion may also be evidence of a conscientious objection." *Id.* at ¶ 19 (quoting IRO Manual for Eligibility Officers, ch. II(F)).

[FN24]. See also UNCHR Res. 1998/77, ESCOR Supp. No. 3 at 253, U.N. Doc. E/CN.4/1998/77 (1998) (stating that "persons performing military service may develop conscientious objection").

[FN25]. QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *THE RIGHT TO CONSCIENTIOUS OBJECTION IN EUROPE: A REVIEW OF THE CURRENT SITUATION* at xii (2005), available at <http://www.quaker.org/qcea/coreport/coreport.pdf>.

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[FN26]. See Bart Horeman & Marc Stolwijk, *Refusing to Bear Arms: A World Survey of Conscript and Conscientious Objection to Military Service*, WAR RESISTERS' INT'L (1998) (updated 2005), available at <http://www.wri-irg.org/co/rtba/index.html>.

In the Netherlands, the Law on Conscientious Objection to Military Service of 27 September 1962 (Wet gewetensbezwaren militaire dienst, Stb. 370) applies to professional soldiers, and requires that the objection be "deeply held" but may not be selective. The application procedure is unknown, but past practice indicates honourable discharge. Selective objectors must seek regular discharge from the armed forces. *Id.*

Japan has no laws on point but past practice indicates the possibility of discharge on CO grounds at any time. *Id.* In the United States, Department of Defense Directive 1300.6 of August 20, 1971, permits military personnel who develop a conscientious objection to the military service to apply for reassignment to non combat duties or discharge from the Armed Forces. However, selective objection is not recognized. *Id.*

In the United Kingdom, the secret Instruction No. 6 (D/DM(A) 7//35MI(A)) entitled, "Retirement or Discharge on the Grounds of Conscience," applies to professional soldiers in the army. It recognizes religious, moral or political reasons of conscientious objection, including selective objection, and may result in honourable discharge. *Id.*

In Germany, the right to conscientious objection is included in Article 4(b) of the 1949 Constitution. Legal provisions are laid down in the 2003 Law on Conscientious Objection (Kriegsdienstverweigerungsgesetz), which replaced the previous 1983 Law on Conscientious Objection. The new Law on Conscientious Objection entered into force on November 1, 2003. Both religious and non-religious grounds for conscientious objection are legally recognized. According to Article 1 of Germany's Law on Conscientious Objection, CO status is to be granted to those who refuse military service for reasons of conscience as described in the Constitution. Article 4(b) of Germany's Constitution states that "no one shall be compelled to perform armed war service contrary to his conscience." There are no time limits for submitting CO applications in Germany and applications can thus be made before, during and after military service, by both serving conscripts and reservists. The right to conscientious objection also applies to professional soldiers. *Id.*

[FN27]. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶ 174 (1992), available at <http://www.hrea.org/learn/tutorials/refugees/Handbook/hbtoc.htm> [hereinafter UNHCR HANDBOOK].

[FN28]. UNHCR Handbook paragraph 174 calls for establishing the genuineness of the person's political, religious or moral convictions, or of his reasons of conscience via a "thorough investigation of his personality and background." *Id.* L.B. Schapiro argues that customary international practice provides protection for soldiers who desert due to conscientious objection:

Wars have often been fought over issues of principle. Desertion from the ranks of one belligerent may in such circumstances be an act ... of political faith, ... which not only weakens the moral case of the belligerent from which the desertion takes place but also strengthens the moral case of the belligerent to whom the deserter flees. To surrender a deserter in such circumstances may be ... an act of bad faith and akin to the surrender of the political refugee, (and) also and act of bad policy, since it may discourage others from doing the same in any future war.

Melysa H. Sperber, [John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces](#), 40 AM. CRIM. L. REV. 159, 199 n.113 (2003) (citing L.B. Schapiro, *Repatriation of Deserters*, 29 BRIT. Y.B. INT'L L. 310, 311 (1952)).

Further, Sperber states that the Third Geneva Convention is silent on the issue of treatment of deserters but that state practice is to exempt deserters from repatriation out of humanity and good faith. See Sperber, *supra* note 28, at 199; see also James P. Vandello, [Perspective of an Immigration Judge](#), 80 DENV. U. L. REV. 770, 775 (2003) (recalling that after the Gulf War, the United States granted visas to several hundred Iraqi deserters). The UNHCR noted that out of approximately 30,000 refugees that were in a camp near the Iraqi border, the majority were deserters who eventually received asylum abroad. *Iraq First UNHCR Repatriation Planned*, INTEGRATED REGIONAL INFORMATION NETWORKS, July 14, 2003, available at <http://www.internationalrefugees.org/>

[tp://www.reliefweb.int/rw/RWB.NSF/db900SID/ACOS-64CPMA?OpenDocument&rc=4&cc=irq](http://www.reliefweb.int/rw/RWB.NSF/db900SID/ACOS-64CPMA?OpenDocument&rc=4&cc=irq).

[FN29]. Convention Relating to the Status of Refugees art. 1, July, 28 1951, 189 U.N.T.S. 150, available at http://www.unhchr.ch/html/menu3/b/o_c_ref.htm.

[FN30]. See, e.g., [Ramos-Vasquez v. INS, 57 F.3d 857, 862 \(9th Cir. 1995\)](#); [Barraza-Rivera v. INS, 913 F.2d 1443, 1453 \(9th Cir. 1990\)](#).

[FN31]. GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 54-57 (2d ed. 1996); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 185 (2d ed. 1996); MARK R. VON STERNBERG, THE GROUNDS OF REFUGEE PROTECTION IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 149 (2002). Sternberg also makes a compelling argument for the relevance of the category of social group. *Id.* at 54-57.

[FN32]. GOODWIN-GILL, *supra* note 31, at 54-57.

[FN33]. 1 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW, 238 (1966).

[FN34]. UNHCR HANDBOOK, *supra* note 27, ¶ 171.

[FN35]. In [Welsh v. United States, 398 U.S. 333 \(1970\)](#), the U.S. Supreme Court upheld the right of conscientious objectors who were not members of an organized church to file claims for exemption from the draft:

What is necessary ... for a registrant's conscientious objection to all war to be "religious" ... is that this opposition to war stems from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by ... God" in traditionally religious persons. *Id.* at 339-40.

The Baltimore Expert Roundtable on Religion Based Refugee Claims, organized by UNHCR and the Church World Service, gathered in October 2002 to discuss religion-based refugee claims and issued conclusions characterizing religion as being constructed by beliefs, identity, or a way of life. UNHCR, BALTIMORE EXPERT ROUNDTABLE: SUMMARY CONCLUSIONS ON RELIGION-BASED REFUGEE CLAIMS, 2 (Feb. 2003), available at http://www.unhcr.bg/coi/files/baltimor_en.pdf. The roundtable members asserted that beliefs include theistic, non-theistic and atheistic beliefs, and that religion may be understood as "a set of convictions (values) about the divine or ultimate reality, or the spiritual destiny of humankind." *Id.*

[FN36]. It should be noted that there has been some recognition of selective objection. For example, the U.S. Military granted conscientious objector status to Islamic believers during the Persian Gulf War because Islam prohibits killing fellow Muslims, and the U.N. General Assembly has issued Resolution A/33/165 (1978), which upholds the right of individuals to object to serving in a military that condones apartheid. LEONARD M. HAMMER, THE INTERNATIONAL HUMAN RIGHT TO FREEDOM OF CONSCIENCE 216-17 (2001). Furthermore, the U.K. recognized a selective objector in *Adan v. Secretary of State for the Home Department*, [1997] 1 W.L.R. 1107. Similarly, Canada recognized a selective objector in *Zolfaghakhani v. Minister for Employment and Immigration*, [1993] 3 F.C. 540 and *Ciric v. Minister for Employment and Immigration*, [1994] 2 F.C. 65.

[FN37]. See Marcus, *supra* note 2, at 522. The U.N. Commission on Human Rights confirms this approach. See U.N. Comm'n on Human Rights, Report of High Comm'r, Civil and Political Rights, Including the Question of Conscientious Objection to Military Service, U.N. Doc. E/CN.4/2002/WP.2 (Mar. 14, 2002).

[FN38]. Joseph E. Capizzi, Selective Conscientious Objection in the United States, 38 J. CHURCH & STATE 339 (1996). Observe the argument made by the U.S. Department of Justice to identify the grounds for objection

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as falling outside the scope of religion:

It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad It is therefore our conclusion that registrant's claimed objections to participation in war insofar as they are based upon the teachings of the Nation of Islam, rest on grounds which primarily are political and racial.

[Clay v. United States, 403 U.S. 698, 702 \(1971\).](#)

The Government eventually conceded that the claim was indeed founded on the teachings of Islam. See *id.*

[FN39]. HAMMER, *supra* note 36, at 212-221 (citing The Secretary General, Question of Conscientious Objection to Military Service, ¶ 29, U.N. Doc. E/CN.4/Sub.2/1983/30 (June 27, 1983) (prepared by Eide & Mubanga-Chipoya)).

[FN40]. Note the musing of a Soviet soldier about an event in Afghanistan:

Only once something snapped inside of me and I was struck by the horror of what we were doing. We were combing through a village. You fling open the door and throw in a grenade in case there's a machine-gun waiting for you I threw the grenade, went in and saw women, two little boys and a baby in some kind of box making do for a cot. You have to find some kind of justification to stop yourself going mad.

JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* 53 (1999).

Hammer characterizes the opposition of Israeli soldiers to the bombing of civilian centers as opposition to the method of warfare rather than concern for a political cause: "Such instances relate to assertions of beliefs that merit protection on a scale equivalent to any other asserted conscientious or religious belief" HAMMER, *supra* note 36, at 215-16. See also R. Linn, *Moral Judgments of Israeli Soldiers in Lebanon*, in *SELECTIVE CONSCIENTIOUS OBJECTION ACCOMMODATING CONSCIENCE AND SECURITY* 129 (M. Noone ed., 1989).

[FN41]. [Gillette v. United States, 401 U.S. 437, 439 \(1971\).](#) Gillette did not object to a war of national defense or a U.N. peacekeeping mission. See *id.*

[FN42]. *Id.* at 441.

[FN43]. *Id.* at 458. The Supreme Court also noted: "Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen's duties that are the very heart of free government." *Id.* at 460. Additionally, the U.S. Military Selective Service Act, states:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code.

Military Selective Service Act of 1967, [50 U.S.C. app. 456\(j\) \(1964 ed., Supp. V\)](#). It should be noted that U.S. Supreme Court Justice Douglas, in a concurrence, commented that the differentiation between just and unjust wars may fall within the scope of religious belief:

"The jihad, therefore, may be defined as the litigation between Islam and polytheism; it is also a form of punishment to be inflicted upon Islam's enemies and the renegades from the faith. Thus in Islam, as in Western Christendom, the jihad is the *bellum justum*." The jihad is the Moslem's counterpart of the "just" war as it has been known in the West. Neither Clay nor Negre should be subject to punishment because he will not renounce the "truth" of the teaching of his respective church that wars indeed may exist which are just wars in which a Moslem or Catholic has a respective duty to participate. What Clay's testimony adds up to is that he believes only in war as sanctioned by the Koran, that is to say, a religious war against nonbelievers. All other wars are unjust. That is a matter of belief, of conscience, of religious principle. Both Clay and Negre were "by reason of religious training and belief" conscientiously opposed to participation in war of the character proscribed by their

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respective religions. That belief is a matter of conscience protected by the First Amendment which Congress has no power to qualify or dilute as it did in § 6(j) of the Military Selective Service Act of 1967, [50 U.S.C. App. 456\(j\) \(1964 ed., Supp. V\)](#), when it restricted the exemption to those "conscientiously opposed to participation in war in any form." For the reasons I stated in *Negre* and in [Gillette v. United States, 401 U.S. 437, 463 and 470](#), that construction puts Clay in a class honored by the First Amendment, even though those schooled in a different conception of "just" wars may find it quite irrational. [Clay v. United States, 403 U.S. 698, 709 \(1971\)](#) (quoting M. KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 59 (1955)).

[FN44]. H CJ 7622/02 Zonstien v. Judge Advocate-General [2002] (unreported decision), ¶ 4, available at <http://elyon1.court.gov.il/eng/home/index.html>.

[FN45]. Id.

[FN46]. Id. ¶ 3.

[FN47]. Id. ¶ 16.

[FN48]. Id.

[FN49]. Id.

[FN50]. See RRT Reference N02/44086 (Oct. 9, 2003), Australian Refugee Review Tribunal, available at <http://www.austlii.edu.au/au/cases/cth/rrt>.

[FN51]. Id.

[FN52]. Of interest, the Australian Refugee Review Tribunal case N02/44086 upheld the appeal of a selective objector, noting that the Israeli government had been excessive in its military action, going beyond what is necessary for the country's defense and that the number of selective objectors was insignificant, thereby leaving "no justification for disproportionately harsh treatment of those objecting to Israel's policy in relation to Palestine." Id.

[FN53]. See NAHLA VALJI & LEE ANNE DE LA HUNT, GENDER GUIDELINES FOR ASYLUM DETERMINATION (The University of Cape Town Legal Aid Clinic 1999), available at <http://www.web.net/ccr/safr.PDF> (confirming that asylum applications from women remained relatively stable at 34-39% of claims even after Canada implemented guidelines recognizing gender-related persecution).

[FN54]. [Sepet v. Sec'y of State for the Home Dep't, \[2001\] EWCA \(Civ\) 681, 2001 WL 513066 \(Eng.\)](#), aff'd, [2003] UKHL 15, 2003 1 W.L.R. 856.

[FN55]. [Sepet, EWCA \(Civ\) 681 ¶ 5](#).

[FN56]. [Sepet, EWCA \(Civ\) 681 ¶ 5](#).

[FN57]. Brief for UNHCR (Nicholas Blake & Tim Eicke) as Amici Curiae Supporting Petitioner-Appellants ¶ 1.1, [Sepet v. Sec'y of the State for the Home Dep't, \[2003\] UKHL 15 No. C/2777 & C/200/2794, 2003 1 W.L.R. 856 \(2003\) \(No. 88-7444\)](#) available at <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=RSDLEGAL&id=3e5ba7f02&page=publ> [hereinafter UNHCR amicus brief].

[FN58]. [Sepet, EWCA \(Civ\) 681 ¶ 8](#).

[FN59]. Id.

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[FN60]. *Id.* The U.K. Immigration Appeals Tribunal recognizes absolute conscientious objectors as "individuals who can demonstrate a deeply held and genuine belief that any form of military service would be against their genuine political, religious or moral convictions, or to valid reasons of conscience, sufficient to bring them within paragraph 170." *Id.* ¶ 12 (quoting *Sepet v. Sec'y of State for the Home Dep't*, [2000] Imm. A.R. 445, ¶ 50, *aff'd*, [2001] EWCA (Civ) 681, [2001 WL 513066 \(Eng.\)](#), *aff'd*, [2003] UKHL 15, 2003 1 W.L.R. 856). It defines partial objectors as those who have "some degree of objection," but does not link this objection to conscience. *Id.* (quoting *Sepet*, Imm. A.R. 445, ¶ 57). The IAT dismissed the validity of the applicants' partial objection as not meeting three tests: 1) what type of military service or military action is objected to and why the applicant is expected to hold a deeply held conviction, which itself is non-discriminatory; 2) whether the armed services in which the individual would have to serve are engaged in a type of military action condemned by the international community as contrary to basic rules of human conduct; and 3) whether the individual is likely to have to perform military service in a way that would involve taking or being closely involved in actions offending the basic rules of human conduct. See *id.* ¶¶ 13-14 (citing *Sepet*, Imm. A.R. 445, ¶¶ 61-62, 67, 75, & 87).

[FN61]. *Sepet*, Imm. A.R. 445.

[FN62]. However, the IAT actually highlighted objection to violations of *jus in bello* as being acceptable grounds for objection due to being "non-discriminatory," citing as examples the conviction against "killing children and non-combatants" or refusal "to engage in killing prisoners or torture." *Sepet*, EWCA (Civ) 681 ¶ 12-13 (quoting *Sepet*, Imm. A.R. 445, ¶¶ 60-61). This distinction appears weak and ignores the content of the statements explaining the grounds for objection which actually may be linked to international standards.

[FN63]. *Id.* ¶¶ 97-99. The Court of Appeal held that there was no right to conscientious objection. *Id.* ¶¶ 79, 84, 100. In contrast, the UNHCR amicus brief stated it had "for a long time recognized an emerging human right to conscientious objection which ... 'sufficiently crystallized' to form a basis for Convention protection." UNHCR amicus brief, *supra* note 57, ¶ 3.2.

[FN64]. *Sepet*, EWCA (Civ) 681 ¶ 61.

[FN65]. *Id.* ¶ 71. The other grounds include: "where the conditions of military service are themselves so harsh as to amount to persecution on the facts; [and] where the punishment in question is disproportionately harsh or severe." *Id.* ¶ 61. Lord Justice Laws states none of the grounds are present in these cases. *Id.* The Court of Appeal cites the Immigration Appeals Tribunal's identification of four exceptions to ground protection for asylum seekers refusing to perform military service: "a) persecution due to the conditions of life in the military service in question; b) persecution due to the repugnant nature of military duty likely to be performed; c) persecution due solely to principled objections (i.e., genuine political, religious, or moral convictions, or to valid reasons of conscience) conscience (para 170, 1979 UNHCR Handbook)); and d) persecution due to likely disproportionate punishment." *Id.* ¶ 52 (quoting *Sepet*, Imm. A.R. 445, ¶ 9).

[FN66]. *Id.* ¶ 69.

The UNHCR made a submission to the Court of Appeal of a document "Deserters and Persons Avoiding Military Service Originating From the Federal Republic of Yugoslavia in Countries of Asylum: Relevant Considerations" (Oct. 1, 1999), which noted:

Even if the military action in which the person is required to participate is generally conducted within the limits prescribed by the laws of wars, he/she may be regarded as a conscientious objector and, hence, qualify as a refugee, if he/she can establish that his/her moral, religious or political objections to participating in such action are so genuine, serious and profound that it would be morally wrong to require him/her to participate in such action. One case that may fall under this description is that of a member of an ethnic minority who, in a situation of internal conflict, may be required to participate in military action against his/her own ethnic community. *Sepet*, EWCA (Civ) 681 ¶ 206.

[FN67]. See *id.* ¶ 98.

[FN68]. *Sepet v. Sec'y of the State for the Home Dep't*, [2003] UKHL 15, 2003 1 W.L.R. 856.

[FN69]. See *Sepet*, [2003] UKHL 15 ¶ 8.

[FN70]. *Id.*

[FN71]. *Id.* In 2001, UNHCR issued a position paper that recommended consideration of refusal of military service on account of genuine beliefs or convictions of a religious, political, humanitarian or philosophical nature, or, for instance, in the case of internal conflict of an ethnic nature, on account of ethnic background. See UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention related to the Status of Refugees*, 20 (3) REFUGEE SURVEY QUARTERLY 83 (2001).

It should be noted that Article 6 of the Rome Statute of the International Criminal Court includes the notion of "ethnocide" within its understanding of genocide. Rome Statute, *supra* note 5, at art. 6. See also Hugo Storey & Rebecca Wallace, *War and Peace in Refugee Law Jurisprudence*, 95 (2) AM. J. INT'L LAW 349-365 (2001) (addressing targeting of ethnic groups in war as illegitimate).

[FN72]. See *French-bashing is on the rise as U.S. faces off over Iraq*, CNN.COM, Feb. 20, 2003, <http://www.cnn.com/2003/US/02/20/bashing.french.ap/>.

[FN73]. See, e.g., Anup Shah, *Criticisms of the U.S.*, GLOBALISSUES.ORG, June 26, 2002, available at <http://www.globalissues.org/Geopolitics/MiddleEast/Palestine/US.asp>.

[FN74]. Telephone interview with the Press Adviser of the Norwegian Ministry of Foreign Affairs' Press and Cultural Affairs and Information Department (Aug. 2003).

[FN75]. *Id.*

[FN76]. Press Release, Press Center of Norwegian Ministry of Foreign Affairs (on file with author).

[FN77]. Valerie Borey, *Special: Norway Responds to Terrorism in the U.S.*, SUITE101.COM, Sept. 12, 2001, http://www.suite101.com/article.cfm/norwegian_culture/79745. It is noteworthy that in the instances where Norway did issue formal condemnations, many of those condemnations were targeted at non-state actors rather than at states. See Norwegian Ministry of Foreign Affairs News, <http://odin.dep.no/ud/english/aktuelt/pressem/> (last visited Apr. 25, 2006). Condemnations aimed at non-state actors carry less political risk, but they are also of less use in CO adjudications, since the majority of COs are objecting to service in state militaries.

[FN78]. Press Release, United States Mission to the European Union, U.S. Ambassador Schnabel Joins EU in Commemorating Madrid Bomb Attacks (Mar. 11, 2004), available at <http://www.useu.be/About%20the%20Embassy/Ambassador/Speeches%20Schnabel/Mar1104SchnabelMadridBombingStatement.ht>.

[FN79]. Press Release, The White House, President Thanks Red Cross, DC Schoolchildren for Helping Russian Terror Victims (Sept. 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/09/20040924-2.html>.

[FN80]. Press Release, The White House, President Condemns Murder of Afghan Vice President (July 6, 2002), available at <http://www.whitehouse.gov/news/releases/2002/07/20020706-1.html>.

[FN81]. Press Release, The White House, Bush Condemns Assassination of Israeli Tourism Minister Zeevi (Oct. 17, 2001).

[FN82]. Unpublished case of the Norwegian Immigration Appeals Board (on file with the author).

[FN83]. *Id.*

[FN84]. *Id.* The Human Rights Committee under the Church of Norway issued a statement on September 28,

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1998, in which it called upon the Norwegian authorities to "concretize relevant U.N. Conventions and Resolutions into Norwegian refugee politics" by granting asylum to conscientious objectors and deserters, specifically noting that many were fleeing wars not legitimated by the international community. Statement of Human Rights Committee under the Church of Norway, Council on Ecumenical and International Relations, Persecution Based on Conscientious Objection til [sic] Military Service (1998), http://www.kirken.no/engelsk/engelsk_military.html.

[FN85]. Alexandra McGinley, The [Aftermath of the NATO Bombing: Approaches for Addressing the Problem of Serbian Conscientious Objectors](#), 23 FORDHAM INT'L L.J. 1448, 1496-97 (2000).

[FN86]. Amnesty International led a campaign calling upon NATO governments to recognize Serbian deserters and draft evaders as refugees, noting that many lacked durable protection or support from either national authorities or international agencies, in spite of NATO's encouragement for them to disobey orders. See AMNESTY INTERNATIONAL, FEDERAL REPUBLIC OF YUGOSLAVIA: THE FORGOTTEN RESISTERS -- THE PLIGHT OF CONSCIENTIOUS OBJECTORS TO MILITARY SERVICE AFTER THE CONFLICT IN KOSOVO (1999), available at <http://www.c3.hu/bocs/beke/aireport.htm>.

[FN87]. [Vujisic v. INS](#), 224 F.3d 578 (7th Cir. 2000). Vujisic was born in Slovenia and entered the Yugoslav army for one year of compulsory military service. He was discharged, but in 1991 the military abducted him in the night, detained him, and told him that he would be sent to fight in Slovenia. He was later beaten after the officers found out that he had been born in Slovenia. [Id. at 579-80](#). He fled, stating:

I have many Croatian, Muslim and Slovenian friends, and I do not believe in the ethnic cleansing being perpetrated against them in the former Republics of Yugoslavia. My complete inability to assist the Republic of Yugoslavia in this process as a soldier or otherwise will subject me to persecution and possible death if I wish to return to Yugoslavia The Federal Republic of Yugoslavia has committed many violations of human rights during the current war and has been sanctioned by the United Nations and I know that my human rights will be violated and I will face persecution if I am returned. I could not fight and would not fight against these Republics. I could not fight against friends and family who desired nothing but independence and freedom to perpetuate the traditions of their heritage under a democratic form of government, free from the dogma of communism. [Id. at 580](#).

[FN88]. [Id. at 581](#).

[FN89]. See, e.g., Press Release, United Nations Security Council, Security Council Condemns, 'In Strongest Terms,' Terrorist Attacks on United States (Sept. 12, 2001) (U.N. Doc. SC/7143), available at <http://www.un.org/News/Press/docs/2001/SC7143.doc.htm>; Press Release, United Nations Security Council, Security Council, in Presidential Statement, Strongly Condemns Inter-Ethnic Violence in Kosovo, Insists on Immediate Halt (Mar. 18, 2004) (U.N. Doc. SC/8030), available at <http://www.un.org/News/Press/docs/2004/sc8030.doc.htm>; G.A. Res. 47/121, U.N. Doc. A/RES/47/121 (Dec. 18, 1992) (General Assembly condemning Serbia and Montenegro for engaging in ethnic cleansing in the Republic of Bosnia and Herzegovina), available at <http://www.un.org/documents/ga/res/47/a47r121.htm>; Condemning Bloodshed, Annan Implores Israelis and Palestinians to Pursue Peace, U.N. NEWS SERVICE (U.N. News Centre, Geneva, Switz.) Jan. 29, 2004 (Secretary-General Annan condemning a terrorist bombing of a bus in Jerusalem and encouraging Israelis and Palestinians to settle their conflict peacefully), available at <http://www.un.org/apps/news/storyAr.asp?NewsID=9603&Cr=Palestin&Cr1=>; Press Release, United Nations Security Council, Security Council Reiterates Strong Condemnation of Use of Child Soldiers, Begins Consideration of Secretary-General's Plan of Action (Feb. 23, 2005) (U.N. Doc. SC/8319), available at <http://www.un.org/News/Press/docs/2005/sc8319.doc.htm>; Office of the United Nations High Commissioner for Human Rights, Reports Submitted to the 61st Session of the Commission on Human Rights that Refer to Iraq (cataloguing reports of human rights issues that have arisen in Iraq, including attacks on journalists and private security forces, as well as prisoner abuse at Abu-Ghraib Prison), <http://www.ohchr.org/english/countries/iq/sprocedures.htm>.

[FN90]. See Kevin J. Kuzas, Note, [Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?](#), 31 VA. J. INT'L L. 447, 469 (1991).

[FN91]. [Id. at 465.](#)

[FN92]. U.N. Comm'n H.R. Res. 2001/24, ¶ 3 (Apr. 20, 2001), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/bb42f0bbfeaa0419c1256a3b0022bb85?Opendocument>. U.N. Secretary-General Kofi Annan stated that "all humanity had a stake" in the fight against terrorism. Press Release, Secretary General Kofi Annan, Statement to the Security Council (Sept. 11, 2001), U.N. Doc. SG/SM/8377 SC/7501, available at <http://www.un.org/News/Press/docs/2002/sgsm8377.doc.htm>. This author argues that humanity also has a stake in preventing this fight from escalating into a larger threat against humanity.

[FN93]. Specifically, the U.N. Commission on Human Rights cited "reported ongoing violations of international human rights law and international humanitarian law in the Republic of Chechnya of the Russian Federation, including forced disappearances, extrajudicial, summary or arbitrary executions, torture, ill-treatment, arbitrary detentions, attacks against humanitarian workers, continued abuses and harassment at checkpoints and during sweep operations." U.N. Comm'n H.R., Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World: Situation of Human Rights in the Republic of Chechnya of the Russian Federation, ¶ 3, U.N. Doc. E/CN.4/2003/L.13 (Apr. 15, 2003), available at <http://www.hri.ca/fortherecord2003/documentation/commission/e-cn4-2003-113-rev1.htm>. Amnesty International also confirms looting, extortion, and arbitrary detention, as well as extrajudicial executions, disappearances, and torture, which it classifies as war crimes. Amnesty Int'l, Report 2003: Russia, available at http://www.amnestyusa.org/countries/russian_federation/document.do?id=FEFCE9D601C6ECE480256D2400379402.

[FN94]. U.N. Comm'n H.R., supra note 93. The U.N. Commission on Human Rights did, however, call upon the government "[t]o take urgently all necessary steps to stop and prevent violations of human rights and international humanitarian law and to ensure that all alleged violations perpetrated by, inter alia, members of the federal forces, federal servicemen and personnel of law enforcement agencies are investigated systematically, fully and promptly and are punished" *Id.* ¶ 7(a).

[FN95]. [Circ v. Minister for Employment and Immigration](#), [1994] 2 F.C. 65.

[FN96]. Amnesty Int'l, Israel: Amnesty International Condemns Killing of Civilians (Mar. 21, 1997), <http://web.amnesty.org/library/index/ENGMDE150151997>.

[FN97]. Amnesty Int'l, Zimbabwe: AI Condemns Stated Policy of Shooting "Troublemakers" and Looters (Jan. 22, 1998), <http://web.amnesty.org/library/index/ENGAFR460031998>.

[FN98]. Amnesty Int'l, Colombia: Amnesty International Condemns Guerrilla Group Pipeline Attack Leaving More Than 50 Civilians Dead (Oct. 22, 1998), <http://web.amnesty.org/library/index/ENGAMR230811998>.

[FN99]. Amnesty Int'l, Malaysia: Amnesty Condemns Intimidation and Arrest of East Timor Conference Participants (Nov. 11, 1996), <http://web.amnesty.org/library/index/ENGASA280121996>.

[FN100]. Amnesty Int'l, China: Amnesty International Condemns Violent Crackdown in Tibet (May 20, 1996), <http://web.amnesty.org/library/index/ENGASA170591996>.

[FN101]. Amnesty Int'l, Peru: Amnesty International Condemns the Intolerable Situation of Innocent Prisoners and Urges the Government to Release Them (May 13, 1996), <http://web.amnesty.org/library/index/ENGAMR460141996>.

[FN102]. Human Rights Watch, Human Rights Watch Condemns Pentagon Lobbying on the International Criminal Court (Apr. 14, 1998), <http://hrw.org/english/docs/1998/04/14/usint1086.htm>.

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[FN103]. Human Rights Watch, Human Rights Watch Condemns Yugoslav Obstruction of War Crimes Investigations (Oct. 9, 1998), <http://hrw.org/press98/oct/kosov09.htm>.

[FN104]. Human Rights Watch, Human Rights Watch Condemns Attack on Burmese Refugee Camp (Mar. 11, 1998), <http://hrw.org/english/docs/1998/03/11/burma1075.htm>.

[FN105]. Human Rights Watch, Human Rights Watch Condemns Detention Practices of INS (Sept. 9, 1998), <http://hrw.org/english/docs/1998/09/09/usdom1306.htm>.

[FN106]. Human Rights Watch, HRW Condemns Security Council's Inaction in Face of Evidence of Crimes Against Humanity in The Democratic Republic of the Congo (July 14, 1998), <http://hrw.org/english/docs/1998/07/14/congo1215.htm>.

[FN107]. Human Rights Watch, Human Rights Watch Condemns Violence by Security Forces in Kosovo (Mar. 3, 1998), <http://hrw.org/english/docs/1998/03/03/serbia5617.htm>.

[FN108]. Human Rights Watch, Ticking Time Bombs: NATO's Use of Cluster Munitions in Yugoslavia, 11 OVERVIEW OF HUMAN RIGHTS DEVELOPMENTS 6, available at <http://www.hrw.org/reports/1999/nato2/>.

[FN109]. Krotov v. Sec'y of the State for the Home Dep't, [2004] EWCA (Civ) 69, 2004 1 W.L.R. 1825 (Eng.).

[FN110]. *Id.*

[FN111]. *Id.* ¶ 2.

[FN112]. *Id.* ¶ 11.

[FN113]. *Id.* ¶ 9. Furthermore, Krotov had submitted condemnations by Human Rights Watch, Amnesty International, Physicians Against Torture, the Council of Europe, and the United States, but the Tribunal did not note them nor did it make "allowance for the fact that the international condemnation can occur in diplomatic language." *Id.* ¶ 16. Compare this approach to that taken in *Ciric v. Minister for Employment and Immigration*, in which the court held that the Board erred by ignoring evidence of international condemnation of atrocities in [Yugoslavia presented by Amnesty International, Helsinki Watch, and ICRC. Ciric v. Minister for Employment and Immigration, \[1994\] 2 F.C. 65.](#)

[FN114]. Krotov, [2004] EWCA (Civ) 69 ¶ 10.

[FN115]. *Id.* ¶ 26 (citing *B v. Sec'y of the State for the Home Dep't*, [2003] UKIAT 20, ¶¶ 47-48). Lord Justice Potter further cited to *B v. Secretary of the State for the Home Department Tribunal* for its test based on paragraph 171 of the UNHCR Handbook, which stated, "Where the military service to which he is called involves acts, with which he may be associated, which are contrary to basic rules of human conduct as defined by international law." *Id.* ¶ 29. Lord Justice Potter indicated, however, that he "would substitute the words 'in which he may be required to participate' for the words 'with which he may be associated.'" *Id.* ¶ 40. Lord Justice Potter also wrote that:

[T]o propound the test in terms of actions contrary to international law or humanitarian law norms applicable in time of war or armed conflict, is consistent with the overall framework of the Convention which contains at Article 1F an exclusion clause to the Convention framed upon that basis It can well be argued that just as an applicant for asylum will not be accorded refugee status if he has committed international crimes ... 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.

Id. ¶ 39.

[FN116]. *Id.* ¶ 51.

[FN117]. Karen Musalo, [Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men who Refuse to Bear Arms for Reasons of Conscience](#), 26 SAN DIEGO L. REV. 849, 857 (1989).

[FN118]. Convention Relating to the Status of Refugees art. 1(f), July, 28 1951, 189 U.N.T.S. 150, available at http://www.unhcr.ch/html/menu3/b/o_c_ref.htm.

[FN119]. Brief Amicus Curiae of the Office of the UNHCR for Refugees in Support of Petitioners, [Canas-Segovia v. INS](#), 902 F.2d 717 (9th Cir. 1990) (No. 88-7444).

[FN120]. Id. at 4-5 and 17-20.

[FN121]. Id. at 17.

[FN122]. Id. at 17-20. In contrast, courts of some other states look at the effects of a law requiring military service, instead of the intent behind it, thereby focusing on the interests affected rather than the lawmakers' motives as the key point of concern. Karen Musalo, Claims for Protection Based on Religion or Belief: Analysis and Proposed Conclusion, Legal and Protection Policy Research Series, UNHCR Department of International Protection 37 (2002), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3e5f6ad12>.

[FN123]. UNHCR amicus brief, supra note 57, ¶¶ 4.2-4.4. The UNHCR argued that while the intent of a piece of legislation may be neutral, the effect may nonetheless be discriminatory. Id. ¶ 4.6. Furthermore, the UNHCR argued, proof of motive of by a persecutor is not necessary. See id. ¶¶ 4.8-4.11.

[FN124]. Musalo, supra note 122, at 39.

[FN125]. LEGAL SERVICES IMMIGRATION AND REFUGEE LAW, INTERPRETATION OF THE CONVENTION REFUGEE DEFINITION IN THE CASE LAW § 9.3.6 (2002), http://www.irb-cisr.gc.ca/en/about/tribunals/rpd/crdef/index_e.htm (citing [Zolfagharkhani v. Canada](#), [1993] 3 F.C. 540, 555 (concerning an Iranian who objected to serving in the military after learning that his government sought to use chemical weapons against the Kurdish population)). The Canadian analysis further highlights the possibility that conscription activities which are illegal lack legitimacy under traditional perceptions of the exercise of state authority, and calls for review of the actual circumstances of deserters and conscientious objectors as opposed to the de jure penalties. Id; See also [Tagaga v. INS](#), 228 F.3d 1030, 1034 (9th Cir. 2000) (involving a Fijian officer granted asylum due to his imprisonment and the threat of court-martial against him on account of refusing to persecute Indo- Fijians).

[FN126]. *Sepev v. Sec'y of State for the Home Dep't*, [2001] EWCA (Civ) 681, ¶ 13 (Eng.), aff'd, [2003] UKHL 15, 2003 1 W.L.R. 856.

[FN127]. *Sepev v. Sec'y of State for the Home Dep't*, [2003] UKHL 15, ¶ 8.

[FN128]. Id. ¶ 26.

[FN129]. [Krotov](#), 2004 WL 62143 ¶ 51 (emphasis added).

[FN130]. See BRIAN GORLICK, COMMON BURDENS AND STANDARDS: LEGAL ELEMENTS IN ASSESSING CLAIMS TO REFUGEE STATUS, UNHCR NEW ISSUES IN REFUGEE RESEARCH, WORKING PAPER NO. 68, 2002. See also U.N. High Comm'r for Refugees, Note on Burden and Standard of Proof in Refugee Claims, Dec. 16, 1998; UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 196, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) ("[T]here may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.").

[FN131]. UNHCR HANDBOOK, *supra* note 27, ¶ 171.

[FN132]. Musalo, *supra* note 122, at 869 (citing UNHCR HANDBOOK, *supra* note 27, ¶ 171).

[FN133]. *Id.* (quoting a letter from former Deputy Representative of the UNHCR Joachim Henkel to Musalo (Jan. 30, 1986), in which he states that a U.N. resolution "is not an absolute prerequisite -- even though it is clearly most useful" in demonstrating "specific condemnation of that military action by the international community," but that one may instead rely on the fact that "the military action under consideration violates international humanitarian law ... or ... internationally recognized human rights").

[FN134]. *M.A. v. INS*, 858 F.2d 210, 218 (4th Cir. 1988).

[FN135]. TERJE EINARSEN, RETTEN TIL VERN 601 (2000) (translated by author from Norwegian original).

[FN136]. *Id.*

[FN137]. See, e.g., EUR. PARL. ASS., Exercise of the Right of Conscientious Objection to Military Service in Council of Europe Member States, 2001 Sess., Rec. No. 1518 (2001) (recognizing the right of permanent members of the armed forces to apply for conscientious objection and calling for the elimination of time limits for such filing during military service); EUR. COMM. MINISTERS, Regarding Conscientious Objection to Compulsory Military Service, 1987 Sess., Rec. No. R (87) 8 (1987) (setting forth minimum standards); EUR. PARL. ASS., On the Right of Conscientious Objection to Military Service, 29th Sess., Rec. No. 816 (1977); EUR. PARL. ASS., On the Right of Conscientious Objection, 18th Sess., Rec. No. 478 (1967); EUR. PARL. ASS., On the Right of Conscientious Objection, 18th Sess., Res. No. 337 (1967). The Charter of Fundamental Rights of the European Union recognizes the right of conscientious objection "in accordance with the national laws governing the exercise of this right" as forming part of the freedoms of thought, conscience and religion, but effectively grants states significant leeway as to interpretation of the scope of the right. Charter of Fundamental Rights of the European Union art. 10(2), Dec. 18, 2000, 2000 O.J. (C 364) 1.

[FN138]. Council Directive 2004/83/EC, On Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, art. 9(2)(e), 2004 O.J. (L 304) 12.

[FN139]. Both the UNHCR and ECRE criticized this wording as running counter to the standards contained within the UNHCR Handbook, which sets forth that punishment for draft evasion or desertion on account of deeply held moral, religious, and political convictions may be considered persecution. See U.N. Refugee Agency [UNHCR] Annotated Comments on the EC Council Directive 2004/83/EC, On Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12; European Council on Refugees and Exiles [ECRE], IN1/10/2004/ext/CN of Oct. 2004, Information Note on the Council Directive 2004/83/EC of 29 April 2004.

[FN140]. E.g., RRT Reference V95/03169 (Dec. 7, 1995), Australian Refugee Review Tribunal, available at <http://www.austlii.edu.au/au/cases/cth/rrt/>; RRT Reference V95/02912 (Aug. 24, 1994), Australian Refugee Review Tribunal, available at <http://www.austlii.edu.au/au/cases/cth/rrt/>; RRT Reference N94/02638 (Dec. 20, 1994), Australian Refugee Review Tribunal, available at <http://www.austlii.edu.au/au/cases/cth/rrt/>.

[FN141]. RRT Reference V95/03169 (Dec. 7, 1995), Australian Refugee Review Tribunal, available at <http://www.austlii.edu.au/au/cases/cth/rrt/> (citing Kevin J. Kuzas, Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?, 31 VA. J. INT'L L. 447, 472-73 (1991)) (emphasis added). But see RRT Reference N04/48879 (Aug. 31, 2004), Australian Refugee Review Tribunal, available at <http://www.austlii.edu.au/au/cases/cth/rrt/> (The case involved a Russian refugee applicant who did not wish to

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serve in the Russian Army because he did not want to participate in "the dirty war against Chechens." The judge noted that although "the international community had condemned abuses by Russian forces in Chechnya," the "conflict in Chechnya had not been condemned by the international community" and the judge "was not satisfied that [the applicant] would be forced or required to commit acts which would amount to war crimes if he were sent to perform his military service in Chechnya." (emphasis added).

[FN142]. MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR* 32 (1999).

[FN143]. *Id.* at 55.

[FN144]. See *id.* at 80.

[FN145]. Michael J. Davidson, 2 Staff Officer Responsibility for War Crimes, *COMBINED ARMS CENTER MILITARY REVIEW*, Mar.-Apr. 2001, <http://usacac.leavenworth.army.mil/CAC/milreview/English/MarApr01/david.htm>; see also JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, pt. IV, para. 14(c)(2)(a)(i) (2000), available at <http://www.jag.navy.mil/documents/mcm2000.pdf>.

[FN146]. E.g., JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, *supra* note 145, at pt. IV, para. 16(b)(1)(b).

[FN147]. See, e.g., *id.* at pt. IV, para. 14(c)(2)(a)(i); *id.* at pt. II, R.C.M. 916(d).

[FN148]. Davidson, *supra* note 145.

[FN149]. OSIEL, *supra* note 142, at 118.

[FN150]. Andrew Geoghegan, *The World Today: US Deserter Waits for Decision on Refugee Status*, ABC ONLINE, Dec. 9, 2004, available at <http://www.abc.net.au/worldtoday/content/2004/s1261672.htm>.

[FN151]. *Hinzman v. Immigration & Refugee Bd.*, File TA4-01429, 2005 Immigration and Refugee Board of Canada (Mar. 16, 2005), ¶ 10, available at http://www.irb-cisr.gc.ca/en/decisions/public/hinzman/hinzman_e.htm.

[FN152]. *Id.*

[FN153]. The term CORAM is used in Canadian appeal court judgments to indicate the panel of appeal judges before whom a case was heard.

[FN154]. *Hinzman*, File TA4-01429 ¶ 17. This mimics the American juridical policy of identifying non-justiciable "political questions" that would infringe on the mandate of the Executive Branch to pursue matters involving foreign policy. See, e.g., [Ange v. Bush, 752 F. Supp. 509 \(D.D.C. 1990\)](#).

[FN155]. *Hinzman*, File TA4-01429 ¶ 113 n. 62.

[FN156]. *Id.* ¶¶ 115-18.

[FN157]. *Id.* ¶ 121.

[FN158]. *Id.* ¶¶ 121, 131.

[FN159]. *Id.* ¶ 133.

[FN160]. *Id.* ¶ 121.

[\[FN161\]](#). Id. ¶ 137.

[\[FN162\]](#). *Hinzman v. The Minister of Citizenship and Immigration*, [2006] FC 420 (Mar. 31, 2006). The Court certified the following question: "When dealing with the 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 which must be made by the Refugee Division under paragraph 171 of the UNHCR Handbook?" Id.

[\[FN163\]](#). (MEI) [1995] F.C.J. 642.

[\[FN164\]](#). The court noted that military actions intended to violate basic human rights, actions in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory are thought by some to support an asylum claim on the grounds of conscientious objection. *Hinzman*, 2006 FC 420 (citing JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* (Toronto Butterworths 1991)).

[\[FN165\]](#). Id. ¶ 150.

[\[FN166\]](#). Id. ¶ 141.

[\[FN167\]](#). Id. ¶ 188.

[\[FN168\]](#). The court cited cases in which protection was granted or denied based on whether the applicant was at risk of participating in international crimes: [Zolfagharkhani v. Canada \(Minister of Employment and Immigration\)](#), [1993] 3 F.C. 540 (use of chemical weapons against Kurds, although the applicant was only a medic), *Diab v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1277 (crimes against humanity), and *Radosevic v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 74 (no risk of committing atrocities). The court also referred to both *Seppet* and *Krotov* from the United Kingdom.

[\[FN169\]](#). *Hinzman*, 2006 FC 420.

[\[FN170\]](#). Unpublished cases of the Norwegian Immigration Appeals Board (on file with the author).

[\[FN171\]](#). Id.

[\[FN172\]](#). Id.

[\[FN173\]](#). Id.

[\[FN174\]](#). Id.

[\[FN175\]](#). Id.

[\[FN176\]](#). Id.

[\[FN177\]](#). Id.

[\[FN178\]](#). Id.

[\[FN179\]](#). Id.

[\[FN180\]](#). Id.

[\[FN181\]](#). [United States v. Huet-Vaughn](#), 43 M.J. 105 (1995).

[\[FN182\]](#). Id. at 108.

[\[FN183\]](#). Id.

[\[FN184\]](#). Id. at 109-10.

[\[FN185\]](#). See id. at 110. Indeed, there were epidemics of gastroenteritis, cholera and typhoid. Together with malnutrition and malfunctioning hospitals (due to lack of electricity), this resulted in the child mortality rate more than doubling. RICHARD NORMAN, ETHICS, KILLING AND WAR 202 (1995).

[\[FN186\]](#). [Huet-Vaughn, 43 M.J. at 112.](#)

[\[FN187\]](#). Id. at 115.

[\[FN188\]](#). Id.

[\[FN189\]](#). Id. at 112.

[\[FN190\]](#). Id. at 114.

[\[FN191\]](#). Id. (citing JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, *supra* note 145, pt. IV, para. 14(c)(2)(a)(iii)).

[\[FN192\]](#). Id. at 114.

[\[FN193\]](#). Id.

[\[FN194\]](#). Id. (quoting *United States v. Calley*, 22 C.M.A. 534, 543 (1973)).

[\[FN195\]](#). Id. at 115.

[\[FN196\]](#). Marjorie Cohn, Navy Judge Finds War Protest Reasonable, TRUTHOUT, May 13, 2005, <http://www.catholicpeacefellowship.org/nextpage.asp?m=2284>.

[\[FN197\]](#). Id.

[\[FN198\]](#). Id.

[\[FN199\]](#). Id.

[\[FN200\]](#). Id.

[\[FN201\]](#). Id.

[\[FN202\]](#). Id.

[\[FN203\]](#). Id.

[\[FN204\]](#). See PAUL RAMSEY, THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY 135 (2000).

[\[FN205\]](#). See *Hinzman v. Immigration & Refugee Bd.*, File TA4-01429, 2005 Immigration and Refugee Board of Canada (Mar. 16, 2005), available at http://www.irb-cisr.gc.ca/en/decisions/public/hinzman/hinzman_e.htm.

[\[FN206\]](#). See John Horne, Defining the Enemy: War, Law and the Levée en Masse in Europe 1870-1945, in THE PEOPLE IN ARMS: MILITARY MYTH AND NATIONAL MOBILIZATION SINCE THE FRENCH REVOLUTION 200, 200-23 (Daniel Moran & Arthur Waldron eds., 2002); Kathleen Kennedy, Manhood and Subversion During World War I: The Cases of Eugene Debs and Alexander Berkman, 82 N.C. L. REV. 1661, 1661- 1703 (2004).

[\[FN207\]](#). See Horne, *supra* note 206, at 200-23; Kennedy, *supra* note 206, at 1661-1703.

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[FN208]. See Nicola Labanca, *Les Institutions Militaires de la Guerre Totale en Europe*, in *LE XXE SIECLE DES GUERRES* 89, (Pietro Causarano et al. eds., 2004). However, conscription is also seen as increasing the political participation of previously marginalized persons, such as minorities and women, both through advantages attained by the conscripted persons (economic benefits, access to educational opportunities, promotion within the system, etc.) and advantages attained by those who replace the conscripted persons in the work force.

[FN209]. QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *REFUSING TO BEAR ARMS: A WORLD-WIDE SURVEY OF CONSCRIPTION AND CONSCIENTIOUS OBJECTION TO MILITARY SERVICE: SPAIN* (2005), available at <http://wri-irg.org/co/rtba/spain.htm>. The U.S. Army is facing a similar difficulty in the recruitment of volunteer soldiers. See Tom Philpott, *Study Shows 41% Drop in Number of Black Army Recruits Since 2000*, *SPECIAL TO STARS AND STRIPES EUROPEAN EDITION*, Mar. 4, 2005, <http://www.estripes.com/article.asp?section=104&article=26657&archive=true>.

[FN210]. Hinzman, File TA4-01429 ¶ 86.

[FN211]. Sarah Tobias, *Toward a Feminist Ethic of War & Peace*, in *THE ETHICS OF WAR AND PEACE* 228, 235-38 (Terry Nardin ed., 1996) (citing Sarah Ruddick, *Preservative Love and Military Destruction: Some Reflections on Mothering and Peace*, in *MOTHERING* 250 (Joyce Trebilcot ed., 1983)) (stating that "men can be mothers").

[FN212]. Tobias, *supra* note 211, at 236.

[FN213]. Hinzman, File TA4-01429 ¶ 102.

[FN214]. *Id.* ¶ 102.

[FN215]. *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Appeals Chamber Judgment, ¶ 19 (Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-aj971007e.htm>.

[FN216]. *Id.* ¶ 1.

[FN217]. *Id.* ¶ 4.

[FN218]. Tobias, *supra* note 211, at 237. See also Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 *J. MIL. ETHICS* 3, 3-32 (Apr. 2005). Kasher and Yadlin propose a system of ranking minimum injury by the military that prioritizes national citizens and combatants above non-citizens not involved in terrorism and who are outside the control of the state. See also Bashshar Haydar, *The Ethics of Fighting Terror and the Priority of Citizens*, 4 *J. MIL. ETHICS* 52, 52-59 (Apr. 2005) (criticizing Kasher and Yadlin on this point).

[FN219]. *Erdemovic*, Case No. IT-96-22 ¶ 19.

[FN220]. Compare this with the acceptance of the defense of duress in *Minister of Citizenship & Immigration v. Asghedom*, [2001] 4 F.C. 972 (Can.), a case involving an Eritrean man who was forcibly recruited into the Ethiopian Army and performed duties such as standing guard while civilian homes were raided, pushing people onto trucks to take them to camps (where they were badly treated, tortured or killed), and burying dead bodies. The court found that the penalty for desertion was "an imminent, real and inevitable threat to the claimant's life if he deserted the army or disobeyed an order." It found that the law does not require a person to desert or disobey an order at the risk of his life. *Minister of Citizenship & Immigration v. Asghedom*, [2001] 4 F.C. 972 (Can.). *Asghedom* cited *Ramirez v. Canada*:

One must be particularly careful not to condemn automatically everyone engaged in conflict under conditions of war. Probably most combatants in most wars in human history have seen acts performed by their own side which they would normally find reprehensible but which they felt utterly powerless to stop, at least without serious risk to themselves. While the law may require a choice on the part of those ordered actually to perform in-

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ternational crimes, it does not demand the immediate benevolent intervention, at their own risk, of all those present at the site. Usually, law does not function at the level of heroism.

[Ramirez v. Canada, \[1992\] 2 F.C. 306.](#)

[FN221]. UNHCR HANDBOOK, *supra* note 27, ¶ 169.

[FN222]. See *Hinzman v. Immigration & Refugee Bd.*, File TA4-01429, 2005 Immigration and Refugee Board of Canada (Mar. 16, 2005), ¶¶ 60-61, available at http://www.irb-cisr.gc.ca/en/decisions/public/hinzman/hinzman_e.htm.

[FN223]. *Id.* ¶ 145.

[FN224]. *Id.* ¶ 168.

[FN225]. *Id.* ¶ 168.

[FN226]. The UNHCR Guidelines on International Protection note that:

[T]he 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.

UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention. ¶ 26, U.N. DOC. HCR/GIP/04/06 (Apr. 28, 2004).

[FN227]. Kennedy, *supra* note 206, at 1663, 1672-73.

[FN228]. *Id.* at 1673.

[FN229]. *Id.*

[FN230]. See Andreas Speck, Refusal in the international war resistance movement, WAR RESISTERS INTERNATIONAL, <http://www.wri-irg.org/co/refusal-context.htm> (last visited Oct. 10, 2005).

[FN231]. Kennedy, *supra* note 206, at 1673.

[FN232]. Michael J. Davidson asserts that it is unlikely that the United States will recognize selective objectors, even though such action would, "comport with our deep-rooted tradition of accommodating those ... with sincere moral or religious objections to participating in war" and would have the additional benefit of removing a "potentially disruptive member of a unit" to preserve its efficiency. The arguments against such recognition are the potential for abuse by persons who joined the army for economic or educational opportunities and who seek to avoid actual combat, the administrative burden of processing these claims, and the personnel shortage within the affected units. Michael J. Davidson, [War and the Doubtful Soldier, 19 NOTRE DAME J. L. ETHICS & PUB. POL'Y 91, 139 \(2005\)](#). Regarding the administrative burden, the U.N. Office of the High Commissioner for Human Rights identifies as "best practice" the Austrian policy of accepting the CO claim without further inquiry. ECOSOC, *supra* note 20, at 11. With respect to economic costs, consider the practices of Germany (which requires reimbursement by the CO for the cost of military courses that are of value in the civilian arena) or Poland (which calls upon CO soldiers to pay back costs of accommodation, board and uniform incurred during studies). WAR RESISTERS' INTERNATIONAL, REFUSING TO BEAR ARMS: A WORLD SURVEY OF CONSCRIPTION AND CONSCIENTIOUS OBJECTION TO MILITARY SERVICE, GERMANY COUNTRY REPORT (2005), <http://www.wri-irg.org/co/rtba/germany.htm>; Finally, the continued service of an unmotivated soldier poses its own dangers. One account tells of sabotage of ships and machinery by military personnel opposed to redeployment to Vietnam but who did not file as COs. GERALD R. GIOGLIO, DAYS OF DECISION: AN ORAL HISTORY OF CONSCIENTIOUS OBJECTORS IN THE MILITARY DURING THE VIETNAM WAR 186 (1989).

[\[FN233\]](#). For example, John Hagan describes the reasons for Canadian immigration officers resisting implementation of a liberalization policy touted by the Ministry of Immigration regarding American deserters: "At the time, 234 of the 353 immigration officers in Canada were military veterans. As such, they often had more in common culturally with the paramilitary RCMP, FBI and the American immigration officers than they did with their own ministerial superiors." John Hagan, [Narrowing the Gap by Widening the Conflict: Power Politics, Symbols of Sovereignty, and the American Vietnam War Resisters' Migration to Canada](#), 34 *LAW & SOC'Y REV.* 607, 618-19 (2000). Hagan cites Deputy Minister of Immigration Tom Kent, who noted that the immigration officers "tended to be ex-non-commissioned officer type veterans So there was a natural tendency, I think, to regard anybody of military age coming from the United States as probably a bad guy, ... who was dodging his civic responsibilities." [Id. at 619](#).

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