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ASYLUM FOR REFUSING TO FIGHT: CHARTING THE DEVELOPMENT TOWARDS THE RIGHT TO CONSCIENTIOUS OBJECTION

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Conscientious objection has had a complicated history, and its legal position within both international and domestic systems remains far from concrete. This paper examines the recognition of a 'right' to conscientious objection within these frameworks, and notes that recent progressive developments in the international realm have increasingly supported the idea of conscientious objection as a right, rather than just a facet of freedom of conscience. The paper moves into a consideration of the state of recognition afforded to conscientious objection when employed as a ground for asylum claims. The reasons behind individuals' decisions to leave their home country as a result of their objection to military service are explored. Relevant legislation and case law are also considered, and it is concluded that until conscientious objection is formally recognised as a right, rather than an emerging 'human rights norm', it will remain difficult for many conscientious objectors to gain protection outside their home country. The world is changing; conscription employed by fewer nations and the nature of war is shifting as a result of technological and political developments. It is vital that both the international community and domestic leaders permit their citizens the ability to refuse to engage in warfare, and that conscientious objection is formally incorporated into human rights legislation.

INTRODUCTION

Conscientious objection can refer to any situation where an individual chooses to 'follow the dictates of his conscience instead of the collective interest of society'.[1] One of the primary ways this manifests itself is the refusal to take part in military service. Historically, this form of conscientious objection has primarily been of a religious nature.[2] However, while people from many religious groups continue to object to military participation, philosophical, political and moral objections of a secular nature have also increased in prominence as time has progressed.

Absolute objectors, usually stemming from deeply held pacifist beliefs, refuse to take part in military service or any activity supporting militarised society.

[1] Marie-France Major, 'Conscientious objection and international law: A human right?' (1992) 24 JIL 349

[2] Fredrick L Brown, Stephen M Kohn, Michael D Kohn, 'Conscientious Objection: A Constitutional Right' (1985-1986) 21 New Eng. L. Rev. 569

However, for some the objection is not total, in which case objectors may carry out alternative civilian service,[3] provide medical care during conflicts,[4] or if objection is to personally bearing arms, serve in Non-Combatant Corps.[5]

Refusal to serve in a particular conflict, selective or partial objection, is a contentious issue globally.[6] Selective objection may be based on personal political views, the belief that the situation does not justify armed conflict or meet Just War criteria, or that it violates international standards.[7] Arguably, selective objection has gained in prominence following the two World Wars, perhaps as technological developments have permitted citizens greater knowledge of reasons behind certain conflicts, and perhaps as contemporary conflicts are less concerned with a total mobilisation against an aggressor, and instead have more dubious motivations. For example, 200,000[8] American men refused to serve in the Vietnam War due to its perceived illegality, 80,000 of whom sought refuge in Canada.[9]

Serving personnel may also desert for reasons of conscience, either due to a change in beliefs once enlisted, or on discovery that 'actions contrary to the basic rules of human conduct'[10] are being committed, and wishing to have no part in such activities. Numbers of service personnel deserting their positions are not insignificant: taking the USA as an example once more, 8,000 individuals deserted during the first three years of the Iraq War,[11] many of whom reported witnessing events they considered to be war crimes.

Looking at compulsory military service more broadly, there are moves away from the practice in some areas of Europe, the suspension of Germany's draft being one such example. Additionally, states are now expected to provide alternative service as part of their accession to the Council of Europe (CoE), although adherence to this criterion is far from perfect; Azerbaijan and Armenia continue to flout these terms following their respective accessions. Turkey will also have to alter its practice if its bid to join the EU is to be successful. However, recent referendums in both Austria and Switzerland contradict the trend away from compulsory service and secure, at least for now, the continuation of conscription in Europe.

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[3] Özgür H Çınar, 'A view on international implementation of the right to conscientious objection' in Ö Çınar and C Üsterci (eds), *Conscientious Objection: Resisting Militarised Society* (Zed Books, London 2009)

[4] Felicity Goodhall, *We Will Not Go to War: Conscientious Objection During the World Wars* (The History Press, Stroud 2010) 71, 202

[5] Ibid 137

[6] Gregory Foster, 'Selective Conscientious Objection' (2009) 46 Society 390

[7] Major (n 1)

[8] Özgür Çınar and Coşkun Üsterci, *Conscientious Objection: Resisting Militarised Society* (Zed Books, London 2009) 1

[9] Tom Fennell, Brenda Branswell and Chris Wood, 'Hell no, they won't go' (2000) 113 Maclean's 22

[10] United Nations High Commissioner for Refugees (UNHCR), 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (1979, reissued January 1992 and December 2011) HCR/IP/4/Eng/REV.1 (Handbook) para 171

[11] Çınar and Üsterci (n 8)

Difficulties generally only arise when states demand that an individual complete military service regardless of the individual's opinion on the conflict, or on violence generally. When a state insists on the participation of those opposed to military service, does so in a discriminatory manner, or exacts extremely severe punishments for refusal, individuals may feel no alternative but to leave their country and seek protection elsewhere.

This paper examines the current situation regarding the recognition of a legal right to conscientious objection. This is considered particularly in relation to asylum cases, where individuals seek protection outside their own country as a result of their home state's response to conscientious objection to military service. International legislation and case law is employed to track the development towards the recognition of a 'right' to conscientious objection, particularly for those seeking asylum. It appears that the increasingly political nature of immigration discourses presents a barrier preventing the developing recognition of conscientious objection from fully benefiting asylum cases. In particular, states and the international community resist recognising selective objection, regardless of the fact that both partial and absolute objectors base their objections on sincere beliefs. This reluctance is likely due to the comment selective objection makes on state policy or the legality of particular conflicts: states are unwilling to condemn the practice of other nations if it may have adverse effects on 'diplomatic and economic considerations'.[12] It is held here that states should uphold the standards they have recognised, regardless of political or strategic considerations. Further, it is recommended that conscientious objection be recognised as a human rig[ht,] and that this distinct right become incorporated into legally binding international human rights treaties,[13] rather than solely as an element of the freedom of conscience.

Before this analysis, it would be prudent to first reflect on relevant international instruments' guidance on conscientious objection, to gain a broader understanding of the situation faced by conscientious objectors today.

INTERNATIONAL LEGISLATION AND CASE LAW

The 1948 Universal Declaration of Human Rights (UDHR) does not mention conscientious objection explicitly but, in Article 18, recognises that 'everyone has the right to freedom of thought, conscience and religion'.[14] The 1976 International Covenant on Civil and Political Rights (ICCPR) contains a similarly worded sentiment, again in Article 18.[15] However, unlike the UDHR,

[12] Cecilia M Bailliet, 'Assessing Jus ad Bellum and Jus in Bello within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum' (2006) 20 Geo. Immigr. L.J. 337
[13] Major (n 1)
[14] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 18
[15] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 18

the ICCPR is legally binding on signatories. Comparable protections are repeated in regional provisions, such as the European Convention on Human Rights (ECHR),[16] the American Convention on Human Rights[17] and the African Charter on Human and Peoples' Rights.[18] Furthering this, the Charter of Fundamental Rights of the European Union[19] has become the first legally binding international human rights document to acknowledge conscientious objection as a distinct right; however, while it recognises conscientious objection, it does so only 'in accordance with the national laws governing the exercise of this right'.[20]

Globally there are movements towards formal recognition of conscientious objection as an expression of the freedoms described in the UDHR. For example, in 1987, the UN Commission on Human Rights requested that states recognise conscientious objection as a 'legitimate exercise of the right to freedom of thought, conscience and religion'.[21] In this context, conscientious objection may perhaps be thought of as an 'emerging human rights norm' rather than a recognised human right.[22] In a 1989 resolution[23] the Commission also referred to Article 3 of the UDHR as relevant to conscientious objection: that 'everyone has the right to life, liberty and security of person'.[24] These charter-based UN organs have put forward more explicit descriptions of conscientious objection, whilst legally binding treaties, including the ICCPR, remain more conservative.

Arguments against the use of the ICCPR to claim the right to conscientious objection include the exclusions to the prohibition of forced labour detailed in Article 8§3(c), namely 'any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors'.[25] This suggests that it remains the state's prerogative in deciding whether or not they will recognise conscientious objection. Within the European Union (EU) this deference to state sovereignty nullifies the power of the EU Charter of Fundamental Rights' formal recognition of conscientious objection. Where other derogable rights may be upheld more readily at regional and international levels if unjustifiably infringed upon domestically, it appears that conscientious objection is far more easily negated

[16] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 9
[17] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 12
[18] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 8
[19] Charter of Fundamental Rights of the European Union (adopted 18 December 2000, came into force 1 December 2009) OJ C 364/01 (EU Charter of Fundamental Rights) art 10
[20] Ibid art 10(2)
[21] United Nations Commission on Human Rights, 'Resolution 1987/46: Conscientious objection to military service' (10 March 1987) E/CN.4/RES/1987/46
[22] Karen Musalo, 'Conscientious objection as a basis for refugee status: protection for the fundamental right of freedom of thought, conscience and religion' (2007) 26 2 REF. SUR. Q 69
[23] United Nations Commission on Human Rights, 'Resolution 1989/59: Conscientious objection to military service' (8 March 1989) E/CN.4/RES/1989/59
[24] UDHR (n 14) art 3
[25] ICCPR (n 15) art 8§3(c)

under sovereign 'need'. This treatment would be absolutely incompatible with the non-derogable 'right to life' – why then should its counterpart, 'the right to refuse to kill', be afforded so little importance?

Furthermore, added to exclusions detailed in Article 8 of the ICCPR, Article 18 of the ICCPR places limits on the rights in question, those that 'are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.[26] Therefore, states may argue that during periods of national emergency it is permissible to deny conscientious objection. The Human Rights Committee (HRC), which observes the implementation of the ICCPR, stated in 1985 that the ICCPR did not recognise the right to conscientious objection.[27] However, in 1993 they found that while the ICCPR 'does not explicitly refer to a right to conscientious objection', this right can successfully be derived 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'.[28]

Issues surrounding selective objection are becoming increasingly prominent in discussions, yet both states and the international community remain notably less inclined to recognise selective objection relative to absolute objection.[29] An exception to this is the 1978 UN General Assembly (UNGA) resolution recognising 'the right of all persons to refuse service in military or police forces which are used to enforce apartheid'.[30] In addition to recognising the validity of refusal to serve under these conditions, the resolution also recommended granting asylum to individuals in this position.[31]

These recommendations raise the issue of refusal to serve due to the illegality of the particular conflict, or the methods employed. The 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, set out standards for the Nuremberg Trials. These standards related to the recognition of war crimes, crimes against peace and crimes against humanity. The provisions in the charter put upon individuals a personal duty to refuse to commit such crimes; 'obedience to orders' can only be claimed as a legitimate defence in an extremely limited set of circumstances.[32] Here we uncover a conflict between the US system and the Nuremberg Principles as, although these principles are stated in the US Army manual, the USA continues to recognise only absolute objectors.[33]

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[26] Ibid art 18§3
[27] Musalo (n 22)
[28] UN Human Rights Committee (HRC), 'General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)' (30 July 1993) CCPR/C/21/Rev.1/Add.4, para 11
[29] Hitomi Takemura, 'Disobeying Manifestly Illegal Orders' (2006) 18 Peace Review 533
[30] United Nations General Assembly, 'Status of persons refusing service in military or police forces used to enforce apartheid' (20 December 1978) A/RES/33/165, para 1
[31] Ibid para 2
[32] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 UNTS 280 (8 August 1945) art 8
[33] Staughton Lynd, 'Someday They'll Have a War and Nobody Will Come' (2011) 36 Peace & Change 156

While selective objection continues to be a debated field, absolute objection can present states with a different set of challenges. In countries that recognise conscientious objection claimants may be required to do alternative civilian service. This is not optional and refusal is regularly met with punishment. In a 1966 European Commission for Human Rights decision, *Grandrath v Germany*, a Jehovah's Witness minister was not exempted from alternative service as there was considered to be no right to exemption.[34] The Commission (now the European Court of Human Rights, ECtHR) interprets the ECHR, which in Article 4§3(b) contains similar exemptions to forced labour as the ICCPR,[35] and thereby arguably does not force states to recognise conscientious objection and denies the right to exemption from alternative service.

The CoE stated in 2001 that alternative service should be of 'a clearly civilian nature, which should be neither deterrent nor punitive in character'.[36] If alternative service is excessively long it places too great a constraint on the right to freely choose one's occupation, which is a right designated in the European Social Charter (ESC).[37] *Foin v France* provides a test: that while alternative service may often be longer, decisions must be reached through analysis of 'reasonable and objective criteria'.[38] The HRC[39] and ECtHR also request that states do not repeatedly punish conscientious objectors. In *Ülke v Turkey,* the ECtHR found that Turkey had violated Article 3 of the ECHR in subjecting the claimant to repeated detentions.[40] Further, in *Thlimmenos v Greece,* a Jehovah's Witness refused to serve and was sentenced to a custodial sentence for his refusal. His sentencing left him with a criminal record and, under Greek rules; he was therefore unable to practice accountancy. The ECtHR found this punishment disproportionate as conscientious objection had no bearing on his ability to be an accountant, and he had already served his sentence.[41]

Two recent cases mark significant developments in international jurisprudence towards the recognition of a right to conscientious objection. The first, *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, is a HRC case from 2007 concerning two Jehovah's Witnesses.[42] Rather than allowing Article 8§3(c) of the ICCPR to prevent Article 18 from granting protection to conscientious objectors, the Committee declared that Article 8 does not recognise nor deny the right to conscientious objection, and therefore Article 18 should be considered

[34] Council of Europe: European Court of Human Rights, 'Conscientious Objection' (7 July 2011)
[35] ECHR (n 16) art 4§3(b)
[36] Council of Europe Parliamentary Assembly, 'Recommendation 1518: Exercise of the right of conscientious objection to military service in Council of Europe member states' (23 May 2001) Doc. 8809, art 5(iv)
[37] European Social Charter (revised) (adopted 3 May 1996, came into force 1 July 1999) ETS 163 (ESC) Part II art 1§ 2
[38] *Foin v France* Comm no 666/1995, UN Doc CCPR/C/D/666/1995 (HRC, 9 November 1999) para 10.3
[39] UN Human Rights Committee (HRC), 'General Comment No. 32: Article 14 (Right to equality before courts and tribunals and to fair trial)' (23 August 2007) CCPR/C/GC/32, paras 55, 56
[40] *Ülke v Turkey* App no 39437/98 (ECtHR, 24 January 2006) para 63
[41] *Thlimmenos v Greece* App no 34369/97 (ECtHR, 6 April 2000) para 47
[42] *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea* Comm nos 1321/2004 and 1322/2004, UN Doc CCPR/C/88/D/1321-1322/2004 (HRC, 23 January 2007)

independently.[43] The HRC thereby found for the first time a right to conscientious objection under Article 18. More recently, in 2011 the ECtHR, which has previously been criticised for a restrictive attitude to conscientious objection,[44] found in *Bayatyan v Armenia* that Article 9 of the ECHR can be considered independently of Article 4§3(b), which itself does not recognise or deny conscientious objection,[45] thereby again recognising the right to conscientious objection.

Despite recent positive developments, for some the situation reaches such severity that fleeing their country of origin and seeking protection elsewhere becomes the only viable option. When this occurs, a different set of international guidelines, instruments, and legislation is activated.

INTERNATIONAL LEGISLATION REGARDING REFUGEES

The UN Convention Relating to the Status of Refugees (the Refugee Convention) was developed in 1951, shortly after the Second World War, and was primarily concerned with protecting those facing persecution in Europe following the war[46] - Article 1 refers to 'events occurring before 1 January 1951'.[47] In 1967, a protocol to the Convention was adopted which removed these limitations, and following these amendments the Refugee Convention now defines a refugee as a person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it'.[48] It is important to consider the original purpose and wording of the Refugee Convention, as these specifics affect the ability of conscientious objection to be incorporated under this instrument's protections.

Conscientious objection was not explicitly mentioned in the UN refugee materials until the UN High Commissioner for Refugees (UNHCR) published the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the Handbook) in 1979. The Handbook clarifies that individuals are not considered refugees if their reason for draft evasion or desertion is simply a dislike of military service[49] and allows that, while fear of punishment for evasion

[43] Ibid para 8.2
[44] Geoff Gilbert, 'Is Europe Living Up to Its Obligations to Refugees?' (2004) 15 EJIL 963
[45] *Bayatyan v Armenia* App no 23459/03 (ECtHR 7 July 2011) paras 100, 109
[46] Gilbert (n 44)
[47] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1 A (2)
[48] Ibid; Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol)
[49] Handbook (n 10) para 168

does not necessarily fulfil the criteria of the Refugee Convention, it does not exclude a claim.[50] Refugee status may be awarded if the military service required would force the claimant to act 'contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience'[51] or if the claimant 'would suffer disproportionately severe punishment' for one of the grounds in Article 1 of the Refugee Convention.[52]

Paragraph 171 of the Handbook goes on to assert guidelines for selective objection, stating that punishment for evading a conflict 'condemned by the international community as contrary to basic rules of human conduct' may amount to persecution.[53] Many selective objectors base their asylum claim on this article, but its specific wording has proven challenging.

As individuals today seek asylum for a wider variety of reasons than the Refugee Convention originally imagined, and planned for, and because there is no tribunal to monitor the Convention's implementation, different interpretations exist. As a result, in 2004 the EU developed a Qualification Directive intended to 'lay down minimum standards for the qualification of third country nationals ... and the content of the protection granted'.[54] However, it is argued that not only do EU countries hold conservative approaches to asylum claims, but that 'harmonization' may mean aligning practice to the further detriment of asylum seekers.[55] The use of a narrowed interpretation of the circumstances qualifying conscientious objectors for refugee status[56] counteracts the progression towards recognition of the right to conscientious objection by limiting possibilities for asylum claims.

SEEKING ASYLUM DUE TO CONSCIENTIOUS OBJECTION

As previously alluded to, successful asylum claims are far more likely to be made by those who oppose all violence, or by those refusing to take part in internationally condemned conflicts.[57] Courts assess whether a claimant's conviction is sincere, if military service conflicts with that conviction, and whether there is an alternative service provided compatible with the claimant's beliefs that is not punitive.[58] Courts must also decide whether punishment for

[50] Ibid para 167
[51] Ibid para 170
[52] Ibid para 169
[53] Ibid para 171
[54] European Union, 'Council Directive 2004/83/EC of 29 April 2004 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' (30 September 2004) OJL 304/12
[55] Gilbert (n 44)
[56] Hitomi Takemura, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders* (Springer, Berlin 2009) 132
[57] Kevin J Kuzas, 'Asylum for unrecognized conscientious-objectors to military service - is there a right not to fight' (1991) 31 Va. J. Int'l L 447
[58] Takemura (n 56) 122

evasion is disproportionately severe, or if the conditions of service are so poor that they themselves amount to persecution.[59] There must be a link established to the Refugee Convention grounds, which most claimants find through religious or political beliefs,[60] although some Australian cases, *RRT Case No. 1009727* for example, have found this link via the 'particular social group' criteria.[61] If a civil alternative is provided there will generally be no case for granting asylum, unless this service also goes against the claimant's principles, is punitive, or if the claimant would likely be subjected to violence or discrimination because of his or her refusal.[62]

Looking back to 1984, in the case of *Matkov v SSHD* the Immigration Appeal Tribunal found the claimant would be punished for evading a law of general application, which could not amount to persecution if the law was not applied discriminatorily and the conflict was legally carried out.[63] At this time, reasons for refusal were not considered relevant.

However, this case may be interpreted differently today as the UNHCR published guidelines on prosecution and persecution in 2004 stating that, *inter alia*, if a law of general application affects different groups differently then it can be seen as persecutory.[64] While it is clear that religious and secular pacifists will be affected by a universal law differently, this can also apply to political opinion, as refusing to bear arms is arguably a political act. As such, a universal law separates out those who hold this political opinion from the general population.[65]

The USA adopts an approach whereby a claimant can only be accepted as a refugee if they have experienced discrimination due to one of the grounds set out in the Refugee Convention. When applied to conscientious objection asylum cases the result is similar to the thinking of *Matkov*: the intent of the state was not persecutory, but was simply enacting of a law of general application. As previously stated, the USA also requires conscientious objectors to be absolute objectors. This stipulation applies an unreasonable barrier to many claimants, and has been criticised by commentators on asylum law.[66]

Canada takes a different approach to the USA, and looks instead to whether either the intent *or* the effects of conscription could be considered persecutory.

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[59] Hélène Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law' (2006) 55 ICLQ 161
[60] Takemura (n 56) 122
[61] *RRT Case No. 1009727* [2011] RRTA 142 (RRTA) para 90
[62] Derek Brett, *Military Recruitment and Conscientious Objection: A Thematic Global Survey* (Conscience and Peace Tax International, Leuven 2005)
[63] *Matkov v Secretary of State for the Home Department* [1984] Appeal no TH/106300/83 (3331) (AIT/IAA)
[64] United Nations High Commissioner for Refugees, 'Guidelines On International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees' (28 April 2004) HCR/GIP/04/06, para 26
[65] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed. Oxford University Press, Oxford 2007) 111
[66] Musalo (n 22)

Zolfagharkhani v Canada became a precedent case in this respect.[67] The claimant was an Iranian national/citizen who deserted after learning that Iran intended to use chemical weapons against Kurds in Iran. The primary reason given for the initial rejection of his claim was on the grounds that he was to serve as a paramedic, and would therefore not be a combatant.[68] However, on appeal, it was held that as the use of chemical weapons goes against international customary law, and due to its extreme abhorrence, punishment for refusing to participate in any role could be seen as persecution.[69] Additionally, the claimant was ordered to treat not just Iranian soldiers but also Kurds, in order for Kurds to be questioned by Iranian officials. If he had agreed to carry out this treatment, he would arguably have become personally liable for the methods of warfare Iran was adopting. Committing crimes of this nature would exclude him from the possibility of being considered a refugee, so it was decided that his refusal instead warranted protection, and his claim was approved.[70] Here, the Canadian court has put weight on the gravity of the actions refused, and has considered both what it would mean for the claimant if he had taken part, and if he were to be punished for his desertion. This fuller, more intelligent, consideration of the case ultimately guaranteed protections for an individual who refused to be involved with the use of chemical weapons, something abhorrent and contrary to international law.

In 2005 New Zealand removed its 'intent to persecute' requirement. Instead it was necessary to demonstrate that a 'convention-protected ground was a 'contributing cause' to the risk of being persecuted'.[71] New Zealand now prefers a human rights approach to refugee claims. For example, in *Refugee Appeal No. 75378,* the court considered whether conscientious objection is protected under any right stipulated in international human rights instruments, including the UDHR and ICCPR.[72] Numerous provisions within the ICCPR were considered in relation to the conflict in question (Turkish action against Kurds) and the court found that no one should be forced to do military service if there exists a likelihood that they would be required to commit acts contrary to standards in the ICCPR or the Geneva Conventions.[73] In addition, they found that the limitations to Article 18 detailed in Article 8 do not permit state interference with an individual's right to conscientious objection.[74] This decision pre-dates the case of *Yeo-Bum Yoon and Myung-Jin Choi,* but is compatible in its jurisprudence.

Another contentious issue in determining whether conscientious objectors should be afforded refugee protection is that of excessive punishment. This was raised in a UK case, *Zaitz v SSHD,* dating from 2000. This case concerned a Polish man who fled to England while his nine month sentence for conscientious

[67] *Zolfagharkhani v Canada (Minister of Employment and Immigration)* [1993] 3 F.C. 540 (CA)
[68] Ibid Part I section 4.0
[69] Ibid Part III
[70] Ibid Part I section 4.0
[71] Musalo (n 22)
[72] *Refugee Appeal No. 75378* [2005] No 75378/05 (RSAA) para 46
[73] Musalo (n 22)
[74] *Refugee Appeal No. 75378* (n 68) para 98

objection was delayed.[75] The representative for the Secretary of State felt that this sentence was not excessively punitive and therefore moved to reject the claim. However, the disproportionate sentence stipulation, noted in Paragraph 169 of the Handbook, was found to only come into consideration when claimants have no link to a Convention ground. As this claimant was denied the right to conscientious objection, the court rendered the length of sentence irrelevant, and accordingly the appeal was allowed.

Three years following *Zaitz* saw the case of *Sepet and Bulbul v SSHD*, Turkish men of Kurdish origin who did not wish to serve in the Turkish army as they believed they would be required to commit human rights abuses against Kurds.[76] The case was heard by the UK House of Lords, who ultimately dismissed the appeals. The reasoning of the House was that these men would not be punished for Convention grounds but for failing to obey a universal rule, and that the punishment was neither excessive nor discriminatory.[77] As it was decided that their objections were political in nature the Lords looked to Paragraph 171 of the UNHCR Handbook, but felt this did not support their claim as there was no international condemnation of the Turkish action towards Kurds.[78] They referred to various international human rights instruments including the UNGA General Comment 22, the ICCPR and the Charter of Fundamental Rights of the EU, but found them either lacking in legal force or not explicitly confirming the rights to conscientious objection.[79] They also referred to respected academics in the field, Hathaway and Goodwin-Gill, who discussed conscientious objection as an emerging international norm, but not a recognised right[80] - although Goodwin-Gill goes on to argue that conscientious objection should be protected as an expression of freedom of conscience. Comparing this analysis to *Matkov,* it appears that UK jurisprudence had advanced little in twenty years.

The following year, however, the important case of *Krotov v SSHD* altered UK jurisprudence in a more progressive direction.[81] The claimant was a Russian citizen who deserted from the Chechen War due to widespread human rights abuses in the conflict. The Court of Appeal acknowledged, in line with *Foughali v SSHD*, that international condemnation should not be the ultimate reason for considering punishment for refusal as persecution, and with *VB v SSHD*, that relying on international condemnation would render decisions of the courts dependent on international politics.[82] The court instead felt that a test should be applied that interpreted the Refugee Convention on fundamental norms from international human rights law. The court looked at whether the actions within the conflict went against accepted standards, and whether the punishment the claimant feared came under the remit of the Refugee Convention.[83] In particular,

[75] *Zaitz v Secretary of State for the Home Department* [2000] IATRF 99/0760/4 (CA)
[76] *Sepet (FC) and Another (FC) v Secretary of State for the Home Department* [2003] UKHL 15 (HL)
[77] Ibid paras 26, 27
[78] Musalo (n 22)
[79] *Sepet (FC) and Another (FC) v SSHD* (n 74) paras 10, 13, 15
[80] Ibid para 19
[81] *Krotov v Secretary of State for the Home Department* [2004] EWCA Civ 69 (CA)
[82] Ibid paras 10, 22-25, 41
[83] Musalo (n 22)

it looked to Article 3 of the 1949 Geneva Conventions and whether crimes listed within the Convention were being committed on a systematic basis, as if punishment for refusal could be considered persecution.[84] In this case, the court ruled that as human rights breaches were so widespread, there was a significant likelihood of the claimant's personal participation, and therefore that Krotov was entitled to protection. When compared to the precedent case *Sepet,* it arguably demonstrates the importance of judicial review in investigating human rights violations,[85] but with the UK government implementing restrictions on access to judicial reviews it will become increasingly difficult for applicants to utilise this potentially crucial mechanism.[86]

BE (Iran) v SSHD,[87] a case of an Iranian national/citizen who deserted during peace time, has also demonstrated the applicability of international norms in asylum cases, as the UK Court of Appeal referred to Article 7 of the ICCPR in their judgement.[88] The court found the claimant was entitled to protection based on his refusal to commit gross violations of human rights, while the case's previous hearings had concluded that these arguments, those of *Krotov*, were not applicable in peace time. This reversal of opinion arguably reflects a growing willingness to consider international human rights provisions in cases of this kind, as well as a broadening of the range of situations in which their application might be considered viable.

In *Lebedev v Canada,* the issue of international condemnation was raised again.[89] The court recognised that there may be instances where 'political expediency' stops UN and member states formally condemning breaches of international standards. As an antidote to this, the court felt it appropriate to consider credible non-governmental sources in tandem. International condemnation is a valid indication of widespread human rights violations but it should not be the only requirement.[90] This development improves, at least in Canada, the ability of the courts to consider the claimant's situation free from the restraints of political considerations and affiliations, which may have, at times, put the claimant at an unfair disadvantage.

In recent years, a number of American citizens have sought asylum in Canada after deserting from the Iraq War. *Hinzman v Canada* was the first and most well-known of these cases.[91] In his claim, Hinzman highlighted the illegality of the war, having not been sanctioned by the UN Security Council,[92] and stated that he had witnessed war crimes. This case put Canada in a difficult position as

[84] *Krotov v SSHD* (n 81) paras 34, 37
[85] Takemura (n 56) 125-127
[86] Ministry of Justice [United Kingdom], 'Reform of Judicial Review: the Government response' (2013) <https://consult.justice.gov.uk/digital-communications/judicial-review-reform/results/judicial-review-response.pdf> accessed 15 July 2013
[87] *BE (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 540 (CA)
[88] Ibid paras 34-35
[89] *Lebedev v Canada (Minister of Citizenship and Immigration)* [2007] FC 728, [2008] 2 F.C.R. 585 (FC)
[90] Ibid para 70
[91] *Hinzman v Canada (Citizenship and Immigration)* [2007] FCA 171 (FCA)
[92] Musalo (n 22)

they had to balance the risk of offending America against domestic opposition to the war.[93] The argument of prosecution versus persecution was raised: Hinzman would be punished for desertion, and because this punishment was universally applied, and not disproportionately severe, it could not be considered persecution. However, as previously discussed, any punishment for refusing to take part in an illegal war can amount to persecution. Canada avoided this debate by deciding that the legality of a war could not be questioned by a foot soldier.[94] This ruling therefore supposes that only senior personnel can claim refugee status, which goes against international law, including the Nuremberg Principles. The court also referred to Paragraph 171 of the Handbook and interpreted it as referring to actions 'on the ground' only, rendering the legitimacy of the war irrelevant.[95] Hinzman argued that regardless of the legality of the initial decision to go to war, the acts committed on the ground amounted to widespread human rights violations. However, the Federal Court of Appeal decided there was insufficient evidence to suggest breaches of international law were systematic or permitted by the state.[96] Perhaps in doing so the court took a more conservative approach than in *Zolfagharkhani* from a desire to maintain positive relationships with the USA, which, if so, appears to confirm the impact of 'political expediency' noted in *Lebedev*. If this is the case, it implies that despite identifying this problem, Canadian courts are struggling to apply its logic accordingly; Canada would benefit from clarification on this matter in the near future, as clearly it is of the utmost importance that asylum cases are judged on their merits, and not on their political implications.

CONCLUSION

It is right that we are witnessing an increased recognition of conscientious objection to military service, as it raises issues of the deepest conscience: killing fellow humans.[97] As the right to life may be considered the most fundamental human right, it seems logical to afford the refusal to kill with the same importance.[98] Further, while Article 3 of the UDHR provides for *inalienable* rights to life and liberty, compulsory service not only contradicts these provisions by forcibly transferring these fundamental rights into the hands of the state,[99] but also forces conscripts to trust the state with the discretion and responsibility to uphold these rights. As Bröckling says of conscientious objectors, 'the distress they cause stems from the fact that each and every

[93] Alisa Solomon, 'War Resisters Go North' (2005) 280 The Nation 4
[94] *Hinzman v Canada* (n 87) para 33
[95] Ibid para 26
[96] Ibid para 33
[97] Musalo (n 22)
[98] Major (n 1)
[99] Andrew Fiala, *Public War, Private Conscience: The Ethics of Political Violence* (Continuum, London 2010) 145

conscientious objector questions the sovereign right of States to decide on the lives and deaths of its citizens'.[100]

The ability to protect conscientious objection through protection of the fundamental right of freedom of thought, conscience and religion is of course a welcome development, but it does not go far enough. Conscientious objection should be recognised as a human rig[ht,] and this distinct right must become incorporated into legally binding international human rights treaties,[101] rather than solely as an element of the freedom of conscience. Currently, conscientious objection cannot be enforced through resolutions, guidelines and recommendations, nor does it hold the status of other human rights. *Sepet* demonstrates that, despite recognition of conscientious objection's status as a 'norm', courts will continue to avoid acknowledging conscientious objection as a right until it is enshrined in a legally binding document. While the Charter of Fundamental Rights of the European Union may have begun this process, it permits states the ability to override its provisions for conscientious objection, thereby neutralising its power.

Increased acknowledgement of conscientious objection demonstrates underlying changes in how we view the state and the individual; in some areas of life (though certainly not all) there are increasing restrictions over what the state can demand of its citizens, as greater emphasis is placed on individual rights over duties. This changing relationship between citizens and state is furthered by a shift in the relationship between states and war - conflicts are driven less by necessity, such as defence against a rogue state, and more by choices[102] based on issues such as politics or natural resources.

This move away from war as normative, combined with a greater understanding of citizens to the motivations behind conflicts, will no doubt increase levels of conscientious objection, particularly partial objection. Cases such as *Lebedev* demonstrate recognition of the impact of politics, and a desire by some to minimise such interference, but in *Hinzman* we are left again questioning the court's priorities. It is perverse that states agree to these standards in theory but allow politics and immigration concerns to overshadow their application, in complete contradiction of the spirit of the conventions they have ratified. The international community should now focus on implementation of the responsibilities they have formally recognised. This extends to the issues around the lack of recognition of selective objection, which must be addressed and rectified.

Evolving opinions of conscientious objection within the international community affect the way asylum cases are interpreted. It may be too early to judge the full impact of *Bayatyan*, but it is already being successfully cited and applied in further ECtHR decisions. Unfortunately for those seeking asylum

[100] Ulrich Bröckling, 'Sand in the wheels? Conscientious objection at the turn of the twenty-first century' in Ö Çınar and C Üsterci (eds), *Conscientious Objection: Resisting Militarised Society* (Zed Books, London 2009)
[101] Major (n 1)
[102] Foster (n 6)

based on conscientious objection, many countries err from the UNHCR's recommendations, and instead implement 'overly formalistic analyses'[103] leading to limitations in protection offered. The human rights-based approach in New Zealand seems to most fully consider international norms in conscientious objection asylum cases, and fellow UN member states would do well to follow this lead.

The increasingly political nature of immigration discourses presents an additional barrier for the potential of *Bayatyan* to positively influence asylum cases. As states face growing pressure from their electorates to curb immigration, it becomes increasingly challenging for those seeking asylum to gain protection. This may be especially so for conscientious objectors due to debates over the Refugee Convention's applicability to these cases; it is easier for courts to refute a claim based on conscientious objection than claims which explicitly engage the provisions in Article 1 of the Refugee Convention.

These changes are all occurring alongside developments in the nature of warfare, as now 'absolute war does not need absolute mobilisation of a society'.[104] As technology develops the need for a smaller, well-trained professional force increases. However, while this increased reliance on technology is extremely prevalent in Western countries, it may be some time before some developing nations consider the move to professional armies. Additionally, Western countries may see an increase of desertion and partial objection among their professional personnel, such as IT professionals involved in drone strikes.

Not enough importance is afforded to the right not to kill, or an individual's right to self-determination. States have the responsibility to protect themselves against aggressors, but with conscientious objectors playing a minor role in numbers of recruits, it appears that in countries where conscientious objection is not recognised, that those refusing to fight are being punished for their disobedience. In this millennium of human rights, where individual rights and freedoms are increasingly triumphed, it is only fitting that this should extend to conscientious objection. Despite recent progressive shifts, the situation continues to demand attention, as until the right to conscientious objection is globally recognised some will be denied the ability to express their beliefs, and some of those will continue to be forced to seek protection as refugees.

[103] Musalo (n 22)
[104] Bröckling (n 100)