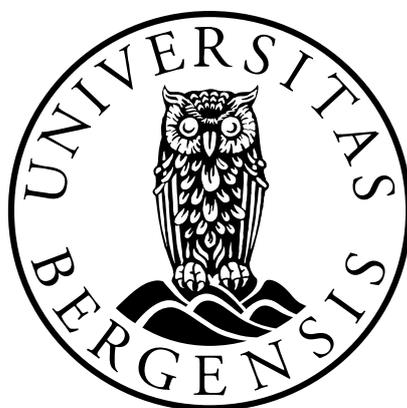


Under What Circumstances May Conscientious Objection to Military Service be a Ground for Refugee Status?

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1 Introduction

1.1 Topic and research question

The topic for this thesis is conscientious objection to military service as grounds for refugee status.

The research question is ‘Under what circumstances may conscientious objection to military service be a ground for refugee status?’

This thesis will conduct a critical and comparative analysis of the regulation of conscientious objection to military service as grounds for refugee status in the Refugee Convention,¹ the recommendations from the Office of the United Nations High Commissioner for Refugees (UNHCR) in the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention (hereinafter the Handbook),² and UNHCR’s Guidelines on International Protection No 10: Claims to Refugee Status related to Military Service within the context of art 1(A)2 of the 1951 Convention (hereinafter the Guidelines on Military Service),³ and EU’s Qualification Directive.⁴

The objective of this thesis is to assess whether these instruments are harmonized in their regulation of conscientious objection as grounds for refugee status or whether there are any discrepancies between them. To reach this goal, a critical and comparative analysis of the abovementioned instruments is essential.

It is a general rule that sovereign States have the right to raise and maintain military forces. This rule can be derived from a state’s right to self-defence under both the UN

¹ *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

² UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3

³ UNHCR, *Guidelines on International Protection No 10: Claims to Refugee Status related to Military Service within the context of art 1(A)2 of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 3 Dec 2013, HCR/GIP/13/10 Corr. 1, 12 Nov. 2014

⁴ EC Directive 2011/95 of 13 December 2011

Charter and customary international law.⁵ It entails a right for the state to require their citizens, under certain conditions,⁶ to undertake compulsory military service. This service does not contradict the prohibition of compulsory labour.⁷

It is undisputed that whether or not to kill another human being is one of the most fundamental moral choices a person can make. When participation in military service confronts the individual with that possibility, it raises profound questions of conscience. The right to require citizens to perform military service may therefore come in conflict with the freedom to assert one's conscience – when there is no alternative civil service, a conscientious objector is forced to either participate in the violence he is opposed to, or to suffer the sanction for refusing. Hence, refusal to serve may be the only way out of his moral dilemma.

Several states exercise a right to prosecute or otherwise punish those who refuse to serve – an intrinsic right all states have. Risking prosecution, the conscientious objector may have no other choice than to flee his home country and seek protection abroad.

The question is whether a deserter or draft evader, in exercising his right to freedom of conscience, can base his claim to refugee status in his conscientious objection to military service.

As will be illustrated in this thesis, international refugee law recognizes that violation of the right to exercise freedom of conscience may give rise to refugee status, consequently confirming that the interests of the individual in some cases can outweigh the interests of the state.

⁵See UN Charter art. 51 and ICJ case *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, paras. 187-201

⁶ See Guidelines para 6: 'In general, for military recruitment and service to be justified, it needs to fulfil certain criteria: prescribed by law, implemented in a way that is not arbitrary or discriminatory, the functions and discipline of the recruits must be based on military needs and plans, and be challengeable in a court of law'.

⁷ See ICCPR art. 8(3)(2)(ii) which makes an exception from the prohibition of compulsory labour for 'any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors'. See also Guidelines para. 2.4

The treatment of conscientious objectors within international refugee law borders on many other areas of international public law including human rights law, humanitarian law and to some extent international criminal law. Whereas dynamic features are common traits of both human rights law and refugee law, the conscientious objector also challenges some common perceptions within these areas of law. A right to conscientious objection introduces a new dimension to the traditional citizen-state relationship by making a state's decision about national security subordinate to the beliefs and convictions of the individual citizen.

1.2 Conscientious objection

1.2.1 Core definitions

Conscientious objection refers to an objection to military service based on an internal conviction of what is morally right or wrong.⁸ The refusal 'derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives'.⁹ That is to say, the objector must hold a genuine moral conviction – he cannot claim conscientious objection on grounds of fear of death or the fact that he thinks war is stupid, ineffective or counterproductive. The objector must believe that either a particular war or war in general is morally wrong and that participating in war would go against his or her conscience.

Conscientious objectors can present themselves as draft evaders who seek to avoid upcoming conscription, or as deserters who have abandoned their military posts without permission. Deserters and draft evaders acting according to their conscience are exhibiting their knowledge about the injustice of war and seek to identify themselves as different from the rest by voicing moral objection.¹⁰

⁸ Cecilia M. Bailliet, 'Assessing *Jus ad Bellum* and *Jus in Bello* Within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum', *Georgetown Immigration Law Journal*, 20 (2005-06), 342

⁹ UN Commission on Human Rights, *Conscientious objection to military service*, 22 April 1998, E/CN.4/RES/1998/77,

¹⁰ *Supra* note 8, p.340

While some countries accept total exemption from service for conscientious objectors,¹¹ many countries have introduced alternative civil service for those who seek status as a conscientious objector, hereby recognizing the right of the individual to refuse to partake in the military due to his personal convictions. Notwithstanding, it is not only the availability of alternative service that can affect the question of protection for conscientious objectors, but also the nature and duration of this service.

We distinguish between pacifists who object to all use of armed force or participation in war in any form ('total conscientious objectors'), mostly represented by members of religious pacifist groups such as Jehovah's Witnesses or Quakers, and those who believe 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" ('selective conscientious objectors').¹² As will be illustrated in section 3.4, there has been a lack of willingness by multiple states to recognize selective objectors as refugees.

The material scope of the term 'conscientious objection' has received little attention, and unfortunately, as a result, the term appears as a victim of ambiguous use in legal writings concerning refugee protection. Evidently, several legal instruments apply a broad definition of 'conscientious objection' to encompass situations that can be somewhat outside the core of a conscientious belief, such as objecting to a military action that violates international law or humanitarian law. An objection of this character *could* be linked to a conscientious belief in some manner, but does not necessarily reflect an objection linked to a specific violation of a conscientious belief.

The preference of such external assessment is presumably an outcome of the fact that many states are hesitant to recognize a broad range of conscientious objectors, partly because it can prove difficult to discern whether or not the conviction of the individual is a truthful representation of his or her moral beliefs. Furthermore, the recognition of conscientious objectors has proven to be a politically sensitive issue. One example is the Vietnam War, where over 470 000 Americans applied for

¹¹See *inter alia* Prop. 10L (2011-2012) where the Norwegian government announced that alternative service for conscientious objectors will end, meaning that conscientious objectors will simply be exempted from military service.

¹²UN Conscientious Objection to Military Service, E/CN.4/Sub.2/1983/30/Rev.1, 1985 ("Eide and Mubanga-Chipoya report") para. 21

conscientious objector status.¹³ Amongst the 300 000 who got their claims rejected was boxer Muhammad Ali. His rejection was later overturned, as the Supreme Court concluded that his objection was indeed founded on the teachings of Islam.¹⁴

In this thesis I will argue that, despite possible administrative challenges or political reservations, refugee law practitioners should not solely base their assessments on external factors. As far as possible, they should include an assessment of the objector's convictions. For the purpose of this thesis I will apply a broad definition of "conscientious objection" in order to encompass the various uses of the term in the relevant instruments.

1.2.2 Conscientious objection and human rights

In determining refugee protection for conscientious objectors, questions have risen as to what extent the 'right' to refuse to do military service due to reasons of conscience is a recognized human right. This question is, as will be illustrated in section 3.1, essential in relation to 'persecution' by means of the Refugee Convention.

As of today there is no international human rights instrument that explicitly recognizes conscientious objection to military service as a human right.¹⁵ Yet, it is evident that there is an increasing trend of acknowledging that the right to freedom of conscience encompasses a right to conscientious objection. The Human Rights Committee (HRC) has come to consider the right to conscientious objection to military service as 'inherent' to the right to freedom of conscience codified in article 18(1) of the ICCPR,¹⁶ stressing that this is a 'far reaching and profound right'.¹⁷

In regards to refugee protection, Goodwin-Gill, a leading scholar within international refugee law, dismisses the need to constitute conscientious objection to military

¹³ "Conscientious Objectors." Dictionary of American History. 2003. Retrieved November 27, 2015 from Encyclopedia.com: <http://www.encyclopedia.com/doc/1G2-3401800995.html>

¹⁴ See *Clay v. United States*, 403 U.S. 698,702 (1971)

¹⁵ Guy. S. Goodwin-Gill and Jane McAdam. *The Refugee in International Law*. 3rd ed. (Oxford: Oxford University Press, 2007), 105

¹⁶ See *inter alia Atasoy and Sarkut v. Turkey*, CCPR/C/99/D/1853-1854/2008 or *Jong-nam Kim et al. v. The Republic of Korea* CCPR/C/106/D/1786-2008

¹⁷ Human Rights Committee General Comment No. 22: "The right to freedom of thought, conscience and religion" (Art. 18) CCPR/C/21/Rev.1/Add.4 of 30 July 1993

service as an independent human right. He points to the UK-case, *Sepet*, where Lord Bingham found it ‘necessary to investigate whether the treatment which the applicants reasonably fear would infringe a recognized human right’.¹⁸ The Lord answered the question in the negative, as the right he wanted but failed to find was the human right to conscientious objection, rather than the freedom of conscience itself. According to Goodwin-Gill, it is neither correct nor required by the Convention to establish that the right to conscientious objection exists as a recognized fundamental human right, *before* it can form the basis for refugee status.¹⁹

In conclusion, there is no need to hunt for the “lesser” right of objection to military service. The legitimacy of conscientious objection as grounds for asylum does not depend on its prior recognition as an individual human right. It is sufficient for the applicant to have a well-founded fear of being persecuted for his efforts to assert his right to conscience.

1.3 Methodology and Sources

This thesis will conduct an analysis *de lege lata* of the international instruments currently regulating conscientious objection, starting off with scrutiny of the authoritative weight of the applicable legal sources.

The sources relevant for determining the refugee status of conscientious objectors to military service are mainly the instruments subject to analysis in this thesis. In addition, legal writings and case law will serve as contributing factors. The topic of refugee status for conscientious objectors is quite modestly covered, and as some of the instruments presented in this thesis were published fairly recently, legal scholars have yet to conduct a comparative analysis.

Article 38 of the Statute of the International Court of Justice (ICJ) identifies the generally recognized sources of international law, listing ‘international conventions’, ‘international custom’ and ‘general principles of law’ as the formal primary sources.

¹⁸*Sepet v. Secretary of State for the Home Department*, [2003] UKHL 15, para. 9

¹⁹*Supra* note 15, p.114

In addition, judicial decisions and teachings are recognized as secondary sources of international law.

The Refugee Convention, which was drawn up as a post-WWII legal framework binding upon the parties to it, constitutes a primary source of international law. Hence, the Refugee Convention will be interpreted in accordance with the general principles for interpretation of international treaties found in VCLT Article 31(1).²⁰ Article 31(1) provides that conventions ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

As for EU’s Qualification Directive, a ‘directive’ is a legislative act that sets out aims that must be achieved by the Member States, often in the forms of minimum standards.²¹ The Court of Justice of the European Union’s (CJEU) approach to interpretation of Community law derives from the principles of the VCLT. In addition the ‘spirit, the general scheme and the wording’ have to be taken into account,²² opening for a more teleological approach.

The methodology recognized in public international law will be applied, more specifically, the ‘soft positivist’ approach. This theory of international law recognizes the need for other sources, *in addition* to the formal sources of international law, as a result of the growing importance of other actors than states.²³

1.3.1 The Handbook and Guidelines as soft law instruments

Seeing as neither the UNHCR’s Handbook nor Guidelines fall under any of the sources of international law listed in article 38, they are regarded as ‘soft law’ instruments.

²⁰ The 1969 Vienna Convention on the Law of Treaties

²¹ Nigel Foster, *Foster on EU Law*. 4th ed. (Oxford: Oxford University Press, 2013), 99

²² *Van Gend en Loos v. Netherlands Inland Revenue Administration*, Case 26/62 [1963]

²³ Bruno Simma and Andreas Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’, *American Journal of International Law*, 3 (1999), 306

While there is no generally accepted definition of the term ‘soft law’, it can be said to represent a form of non-binding normative framework in which existing norms from other sources are consolidated within a single document.²⁴

In the dynamic area that is refugee law, an advantage with soft law instruments is that they are flexible and often easier to amend than binding treaties. Furthermore, their non-binding form can make it easier to reach agreement between States, hence soft law can be effective when no agreement on a treaty is possible (which in international refugee law often is due to sovereignty concerns). Thus, soft law can progressively provide clear and authoritative guidelines in given areas, without the need to negotiate and unanimously agree on new binding norms.

Despite the possibility of the UNHCR’s Handbook and Guidelines providing authoritative guidance to states, their non-binding nature implies that States have no obligations to implement the norms found in these instruments. Yet, they fill important gaps that were left in the wake of the vague Refugee Convention, leading states to seek guidance in them in *inter alia* questions of protection for conscientious objectors. The ‘soft positivist’ approach stresses that ‘soft law is an important device for the attribution of meaning to rules and for the perception of legal change’.²⁵

As will be illustrated in the following, both the Handbook and the Guidelines are used as instruments for the interpretation of the Refugee Convention as a primary source. Article 32 of the VCLT provides for such supplementary means of interpretation only when the treaty’s meaning cannot be discerned by applying the rules set out in article 31.

1.4 Overview of thesis

The thesis elaborates on the instruments in refugee law regulating conscientious objection through a brief presentation and a discussion on their authoritative weight (section 2). Then follows a comparison of the instruments with the conditions set out

²⁴ Alexander Betts, ‘Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Irregular Migrants’, *International Journal of Refugee Law* 22, no.2 (2010), 223.

²⁵ *Supra* note 23, p.308

in the Refugee Convention as a starting point (section 3), starting with the requirement of a human rights violation amounting to persecution (section 3.1). Special attention is paid to the Convention ground ‘political opinion’ (section 3.4) and the problematic tendency to apply paragraph 171 of the Handbook in order to reject the claims of conscientious objectors, before moving on to two central topics of discussion (section 4) necessary to provide concluding reflections on the refugee status for conscientious objectors (section 5).

2 An introduction to and analysis of the sources in international refugee law regulating conscientious objection

In order to conduct a comparative analysis of the applicable sources in section 3, it is necessary to further explore the authoritative weight of the different sources, as well as the relationships between them. A natural starting point for any discussion on refugee status is the Refugee Convention.

2.1 The Refugee Convention

The Refugee Convention is an important human rights instrument. This is confirmed by the reference to the UDHR and the UN Charter in its Preamble.²⁶ Historically the objective of the Convention was to prevent refugees who had lost the protection of their State of origin from becoming legal non-persons without the opportunity to exercise their rights and freedoms.²⁷ Accordingly, the Refugee Convention may be viewed as one of the first human rights treaties securing the rights for an especially vulnerable group of persons, namely refugees.²⁸

According to article 1A(2), which provides the principle basis for establishing a person’s refugee status, the term ‘refugee’ applies to any person who

²⁶ See Recital 1

²⁷ Andreas Zimmermann, Ed. *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol - A Commentary*. (Oxford: Oxford University Press, 2011), 232

²⁸ *Ibid.* p.233

'...owing to 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

When determining whether an individual is a refugee, the States Party to the Convention are bound by the criteria set out here. Refugee status does not arise as the result of a formal recognition by UNHCR or a State authority; refugee status is achieved as soon as the definition in article 1A(2) is fulfilled.²⁹ The refugee definition, like human rights instruments in general, is part of a living instrument and hence must be interpreted both in the light of developments in international law since its adoption in 1951, as well as change in global circumstances.³⁰ Today, over 60 years later, it still serves as the primary instrument for the protection of refugees worldwide.

This refugee definition was deliberately kept brief and simple. Its lack of detail, whilst ensuring needed flexibility, has left it up to each contracting State to further define its terms, causing considerable variations. The legal instruments explored in this thesis all seek to add more detail to this definition. It is noteworthy that the ICJ is competent to rule on disputes concerning the content of the Refugee Convention,³¹ but it has never been called upon to do so, as only states, not individuals or organizations, can bring cases before it.³²

The Convention provides little further guidance on the question of protection for conscientious objectors. Yet, if we apply the contextual interpretation provided in VCLT article 31 and look to the exclusion clause in article 1F of the Refugee Convention, this gives us a starting point. Article 1F excludes perpetrators of *inter alia* crimes against peace and war crimes from protection under the Convention. It would be a contradiction if a person was not given the possibility, through seeking

²⁹ Confirmed in 'the Handbook' para. 28

³⁰ *Supra* note 27, p.299

³¹ Cf. article 38

³² See article 34(1) Statute of the ICJ

protection as a conscientious objector, to avoid taking part in acts that would lead to exclusion. If not, he may be forced to participate in atrocities that will later exclude him from refugee protection. This implies that the international community should provide protection for those who object to taking part in war crimes and crimes against peace. Yet, exclusively operating with a link to the exclusion clause as a condition for protection sets a high threshold, as will be illustrated through the comparison of the Refugee Convention and EU's Qualification Directive.

2.2 UNCHR's Handbook

Lacking an international court to provide authoritative statements on the content and interpretation of the Refugee Convention, practitioners were left with many unanswered questions. Member States of UNHCR's Executive Committee therefore explicitly requested the UNHCR to 'consider the possibility of issuing - for the guidance of Governments - a handbook relating to procedures and criteria for determining refugee status'.³³

As a result the UNHCR published the Handbook in 1979.³⁴ In addition to providing a clause-by-clause interpretation of the refugee definition, it includes guidance on special cases such as conscientious objection. According to its foreword, the objective of the Handbook is to 'guide government officials, judges, practitioners, as well as UNHCR staff applying the refugee definition', *inter alia* in hope that this will 'help resolve variations in interpretation'.

UNHCR's Handbook has an entire section devoted to 'Deserters and other persons avoiding military service',³⁵ confirming that desertion or draft evasion 'does not [...] exclude a person from being a refugee'.³⁶ In paragraph 170 the Handbook acknowledges that 'valid reasons of conscience' can be the 'sole ground for a claim to

³³ UN High Commissioner for Refugees (UNHCR), *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, para. g), available at: <http://www.refworld.org/docid/3ae68c6e4.html> [accessed 15 September 2015]

³⁴ The Handbook was re-issued in 2011 - *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3

³⁵ Paras. 167-174

³⁶ Para. 167

refugee status'. It further opens for protection were the deserter or draft evader faces disproportionately severe or discriminatory punishment.³⁷ Throughout this thesis the content of this section and the interrelationships between its paragraphs will be further explored.

The Handbook has been introduced as a soft law instrument, but as debated by scholars, the question of its authoritative weight remains somewhat unclear.³⁸

State practice clearly shows a lack of uniformity regarding the status of the Handbook. In *Sepe*, it was described as 'an important source of guidance',³⁹ while Canadian courts have regarded the Handbook as having 'highly persuasive authority'.⁴⁰ The Norwegian Supreme Court has gone from deeming the status of the Handbook 'unnecessary' to explore further,⁴¹ to stating that 'considerable significance' should be attached to it.⁴² Still, scholars have questioned its authoritative status by highlighting that 'it remains true, at least in Australian courts, that [...] greater weight is generally accorded to the decisions of other common law courts and learned commentators'.⁴³

Courts have claimed that taking into account UNHCR's positions falls under the States Parties duties to co-operate with the UNHCR under article 35 of the Refugee Convention. According to its Statute the UNHCR has a generally worded responsibility of supervising the application of the Convention's provisions and proposing amendments thereto.⁴⁴ This has been taken as a sign that the States agree that UNHCR's positions should not be dismissed as irrelevant, but regarded as authoritative statements whose disregard requires justification.⁴⁵ According to

³⁷ Para. 169

³⁸ Satvinder Singh Juss, ed. *Contemporary Issues in Refugee Law* (Cheltenham: Edward Elgar, 2013), 38

³⁹ *Supra* note 18, para. 12

⁴⁰ *Chan v Canada* [1995] 3 SCR 395 (Canada) p.620

⁴¹ Rt-1991-586, p.539

⁴² Rt-2012-139, para 50

⁴³ Anthony M. North and Joyce Chia "Towards convergence in the interpretation of the Refugee Convention: A proposal of the establishment of an International Judicial Commission for Refugees" in *The UNHCR and the Supervision of International Refugee Law*, ed. J. Simeon (Cambridge: Cambridge University Press, 2013), 236

⁴⁴ UNGA Res 428(V) (14 December 1950), Subpara. 8 a)

⁴⁵ Walter Kälin, "Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond" in *Refugee Protection in International Law - UNHCR's global consultations on*

Einarsen, the fact that it was UNHCR's Executive Committee that initiated the process strengthens the Handbook's authoritative status.⁴⁶

Still, the UNHCR has been reluctant to portray the Handbook as more of a definite guide, stating that they are 'fully aware of the shortcomings' and that it is 'not possible to encompass every situation in which a person may apply for refugee status'.⁴⁷ This may cause ambiguity as to whether the rules must be taken into account or if they can be ignored at a state's convenience. Stressing its non-exhaustive character might seem appropriate in a dynamic field like refugee law, but one might also argue that this explicit statement has limited the willingness to view the Handbook as an authoritative text.

In conclusion, despite the fact that it was written at the request of Member States, practice clearly shows that the authority of the Handbook is not unequivocally accepted. At best, the Handbook can be said to have persuasive authority, cf. the abovementioned case law. Undoubtedly, the objective of the Handbook, to 'provide an important reference' is still met. It clearly supplements and elucidates the Refugee Convention by elaborating on the criteria for determining refugee status through addressing emerging issues such as conscientious objection.

In the end, regardless of its status, positions such as the Handbook might just be one of the most influential means for the UNCHR to contribute to the development of international refugee law. As we shall see, it is frequently cited by courts in relation to questions of conscientious objection.

2.3 UNHCR's Guidelines on Military Service

In 2000 the UNHCR convened the Global Consultations on International Protection with a goal of achieving greater clarity and coherence in interpretation of the Refugee Convention. As Volker Türk, Director of International Protection at UNHCR noted,

international protection ed. Erika Feller et. al (Cambridge: Cambridge University Press, 2003), 627

⁴⁶ Terje Einarsen, *Retten til vern som flyktning* (Bergen: Cicero Publisher, 2000), 75

⁴⁷ Para. 221

the purpose of the consultations was to ‘take stock of the state of law and practice [...], to consolidate the various positions taken and to develop concrete recommendations [...] to achieve more consistent understandings of these various interpretive issues’.⁴⁸ Ultimately, the UNHCR recognized that since issuing the Handbook, further clarifications were needed.

Following these consultations, UNHCR started issuing Guidelines on International Protection, pursuant to UNHCR’s abovementioned supervisory role.⁴⁹ In 2013, the UNHCR published its tenth set of Guidelines, the Guidelines on Military Service. In light of the diverging developments in the practice of States, these Guidelines aim to ‘facilitate a consistent and principled application of the refugee definition’.⁵⁰ In his introductory note to the guidelines, Türk proclaims that they intend to ‘explain the legal framework for the determination of claims to refugee status of those seeking to avoid military service – whether for reasons of conscience, or because of other reasons’.⁵¹

It has been established that the Handbook has persuasive authority, but is not unequivocally accepted. What about the Guidelines?

Considering that the Guidelines on Military Service were published as recently as in 2013 it has proven a challenge to determine how and to what extent legal advisors have applied them. Despite their short life span these Guidelines have been the subject of criticism, particularly from Goodwin-Gill.

In a note to the Guidelines on Military Service from 2015, Türk and Edwards, both employed at the UNHCR, stress that the Guidelines ‘provide a legal authoritative interpretation’ of article 1(A)2.⁵² This introductory note was published in reply to

⁴⁸ Volker Türk, ‘Introductory Note to UNHCR Guidelines on International Protection’, *International Journal of Refugee Law* 15 (2003), 303

⁴⁹ Erika Feller, Volker Türk and Frances Nicholson eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge, Cambridge University Press, 2003), 9

⁵⁰ ‘The Guidelines on Military Service’, para. 1

⁵¹ Volker Türk and Alice Edwards, ‘Introductory Note to Guidelines on International Protection No. 10 on Claims to Refugee Status related to Military Service’, *International Journal of Refugee Law* 27 (2015), 167

⁵² *Ibid.* p.166

Goodwin-Gill stating that the Guidelines on Military Service were ‘a work in progress’, illustrating several examples of ‘basic errors of citation, substance and presentation’.⁵³ He expressed that ‘if the guidelines are to be treated as authoritative [...] then the methodology needs very careful consideration’,⁵⁴ a clear indication that Goodwin-Gill finds that the methodology is not satisfactory. Not only does he point out several examples where the Guidelines cite wrong sources, he also stresses that the UNHCR needs to ‘recognize and closely analyse and understand [...] the reasoning and approaches of national and international courts’.⁵⁵ He therefore criticizes the lack of practitioners in the drafting process.⁵⁶ Türk responds that consultations were held with ‘many stakeholders’, including ‘academics [...] relevant international organizations’ and ‘UNHCR staff’.⁵⁷ It is a word against word situation.

In a subsequent article examining whether the eleven Guidelines reflect a global character, Bailliet finds a clear bias in favour of citation of common law jurisdictions, and no citations from the developing world.⁵⁸ In relation to the Guidelines on Military Service she notes that in addition to citations from the European Court of Human Rights (ECtHR), only two UK cases are cited. No other national jurisprudence is mentioned. The Guidelines do mention article 9(2)(e) of the Qualification Directive, but only briefly in a footnote. These findings are certainly not in correspondence with Türk’s proclamation of the purpose of the Guidelines: ‘taking stock of the state of law and practice [...] to achieve more consistent understandings’.⁵⁹

In my opinion, the findings are rather alarming. I must agree with Bailliet that as long as the Guidelines mostly cite common law cases and have no references to cases from the developing world, they cannot be said to reflect universal standards. This lack of universality removes the Guidelines from its *de lege lata* goal, indicating a lower authoritative weight than sought out by the UNHCR.

⁵³ Guy S Goodwin-Gill, ‘*The Dynamic of International Refugee Law*’, *International Journal of Refugee Law* 25 (2014), 658

⁵⁴*Ibid.* p.657

⁵⁵*Ibid.* pp.657-659

⁵⁶*Ibid.* p.658

⁵⁷*Supra* note 51, p. 171

⁵⁸ Cecilia M. Bailliet, ‘National Case Law as a Generator of International Refugee Law: Rectifying an Imbalance Within UNHCR Guidelines on International Protection’, *Emory International Law Review* 29 (2015), 2063

⁵⁹*Supra* note 48

2.4 EU's Qualification Directive

When adopted in April 2004, as an important factor in the work towards a Common European Asylum System (CEAS), the Qualification Directive⁶⁰ was the first supranational instrument binding on EU Member States,⁶¹ outlining 'minimum standards' for who should receive 'international protection'.⁶² The Directive was recast in 2011 in order 'to address the deficiencies identified [...] and to ensure higher and more harmonized standards of protection'.⁶³ In the following, when referring to the Qualification Directive, I refer to the recast Directive.⁶⁴

Article 9(2) of the Qualification Directive provides a non-exhaustive list⁶⁵ of acts amounting to persecution 'within the meaning of Article 1A of the Geneva Convention'.

That Member States and EU institutions are bound to comply with international law on asylum when they adopt or apply EU asylum law is apparent from the principle of *pacta sunt servanda* - that states must keep to their agreements.⁶⁶ And indeed, the Qualification Directive expresses that it is 'based on the full and inclusive application' of the Refugee Convention.⁶⁷ Evidently the objective of the Directive has not been to substitute the refugee definition, but to provide interpretive guidance to a vague definition and to 'guide the competent national bodies of Member States in the application of the Geneva Convention'.⁶⁸

Yet, several actors have questioned whether the Qualification Directive actually respects the Refugee Convention to the degree that is claimed in the recitals. ECRE (European Council on Refugees and Exiles) and the UNHCR have stated that parts of

⁶⁰ EC Directive 2004/83 of 29 April 2004

⁶¹ Except for Great Britain, Ireland and Denmark, *ibid.* Recital 50-52

⁶² 'international protection' introduces 'subsidiary protection' for those who fall outside the provisions of the Convention

⁶³ COM (2009) 551 final - 2009/0164 (COD), p.5

⁶⁴ EC Directive 2011/95 of 13 December 2011

⁶⁵ Cf. '*inter alia*'

⁶⁶ Hemme Battjes, *European asylum law and international law* (Leiden: M. Nijhoff, 2006), 59

⁶⁷ Recital 5

⁶⁸ Recital 23

the Directive does not ‘adequately reflect the 1951 Refugee Convention’.⁶⁹ This view is clearly mirrored throughout UNCHR’s Annotated Comments,⁷⁰ as well as by several legal scholars.⁷¹ It should be noted that Directive makes no mention of any of UNHCR’s recommendations.

According to article 9(2)(e) ‘*prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2)*’ can amount to an act of persecution within the meaning of the Refugee Convention. The grounds for exclusion in article 12(2) include crimes against peace, war crimes, crimes against humanity, serious non-political crimes and acts contrary to the purposes and principles of the UN.

In other words, the Qualification Directive limits refugee status to extreme circumstances where the individual would be required to commit war crimes or other serious crimes as part of their military service. This limitation clearly goes against the views of UNHCR on granting refugee status where military service is contrary to ‘genuine political, religious or moral convictions or to valid reasons of conscience’.⁷²

2.5 Conclusion

There are elements in the abovementioned instruments that may lead us to question their authoritative weight. If a legal practitioner is faced with a question of which interpretative guide to apply (provided that he is bound by the Qualification Directive), he might take into consideration the legal authority of the applicable instruments. As will be illustrated in the following, which instrument is chosen may be essential to whether or not protection is provided to the conscientious objector.

⁶⁹ *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive*, p. 3 available at: <http://www.ecre.org/topics/areas-of-work/protection-in-europe/148.html>

⁷⁰ *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*, 28 January 2005

⁷¹ See *inter alia* Hugo Storey, ‘EU Refugee Qualification Directive: A Brave New World’ *International Journal of Refugee Law* 20 (2008), 7-13

⁷² See ‘Handbook’, para. 170

3 A comparative analysis of conscientious objection as a ground for refugee status in UNHCR's recommendations and in the EU Qualification Directive

Will a deserter or draft evader who objects to military service for valid reasons of conscience receive protection under the Refugee Convention? The answer to whether or not the objector has a legitimate claim to refugee status can only be found by examining the Convention itself with interpretative guidance from the Qualification Directive and UNHCR's Handbook and Guidelines.

The following sections will therefore explore some of the major differences between the Qualification Directive and UNCHR's Handbook and Guidelines, using the Refugee Convention and 'a well-founded fear of persecution', the core of the refugee definition, as the starting point.

3.1 Persecution

To fall within the refugee definition in article 1(A)2 of the Refugee Convention, the objector has to have a well-founded fear of 'being persecuted'.

Even though persecution is the key element in determining refugee status, the term is not defined in the Convention or in any other international instrument. Yet, as shown in section 2.4, the Qualification Directive has made the biggest attempt at specifying the term by providing a non-exhaustive list of acts of persecution.

The ordinary meaning of 'persecuted', interpreted in light of the object and purpose of article 1(A)2, suggests that there must be a sufficiently severe violation of human rights.

The connection to human rights is confirmed in the *travaux préparatoires* stating that ‘any meaning that has to be given to the concept of persecution must take into account the existing general human rights standards’.⁷³

This human rights approach is further upheld in the Qualification Directive’s definition of an act of persecution in article 9(1) as a severe violation of ‘basic human rights’. The Directive does not define the term ‘basic’ human rights. Yet in referencing the non-derogable rights in Article 15(2) of the European Convention on Human Rights (ECHR), article 9(1) indicates that right to life, prohibition from torture and slavery and the right to no punishment without law, are rights that ‘in particular’ constitute ‘basic’ rights.

In connecting persecution to the constantly evolving human rights, we make sure that the persecutory acts evolve in line with this area of law, thus ensuring a dynamic refugee law. Still, it is clear that the drafters of the Qualification Directive and the Refugee Convention did not intend to include every violation of human rights.

According to Goodwin-Gill, whether an act amounts to persecution requires an assessment of complex factors such as the nature of the freedom threatened, the nature and the severity of the restriction and the likelihood of the restriction eventuating in the specific case.⁷⁴ The Qualification Directive has reaffirmed that the nature and severity has to be taken into account.⁷⁵

The following subsection will explore the material scope of persecution and nature and severity of the freedom threatened more specifically related to conscientious objection.

⁷³ UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, available at: <http://www.refworld.org/docid/53e1dd114.html> [accessed 14 October 2015]

⁷⁴ *Supra* note 15, p.92

⁷⁵ Article 9(1) states that the persecution ‘must be sufficiently serious by their nature or repetition as to constitute a severe violation’

3.1.1 Can service in the military *in itself* constitute persecution within the meaning of article 1(A)2?

As illustrated above, whether or not an act amounts to persecution depends on the nature and severity of the freedom threatened.

As a matter of principle, any human rights violation may lead to refugee status.⁷⁶ Yet, as illustrated by the Directive's referral to non-derogable rights, certain human rights are of such nature that they more easily substantiate a refugee claim. As established in section 1.2.2, conscientious objection to military service is yet to be recognized as an independent human right. Still, it is evident that being forced to bear arms against one's conscience can amount to a violation of the right to freedom of conscience provided by article 18(1) of the ICCPR.

The question is whether or not freedom of conscience is of a sufficiently qualified nature.

Article 4(2) of the ICCPR states that article 18(1) cannot be derogated from, even in time of public emergency. This indicates that freedom of conscience is of a fundamental character. The fundamental nature of the freedom of conscience might suggest that any measure connected with the military service compelling an individual to act contrary to his or her sincerely held belief, amounts to persecution. That service in itself can amount to persecution is supported by the Handbook stating that 'performance' in military service may be a ground for claiming refugee status.⁷⁷ In addition, the Guidelines reaffirm that 'conscription' may amount to persecution.⁷⁸

As a starting point, there is no indication that the Refugee Convention and the Qualification Directive don't express the same views on the freedom of conscience being of a sufficiently qualified nature. Still, it has been implied by Goodwin-Gill that when applying this human rights approach, it should be taken into consideration whether or not the right in question is absolute.⁷⁹

⁷⁶ *Supra* note 27, p.354

⁷⁷ 'Handbook', para. 170

⁷⁸ 'Guidelines on Military Service', para. 17

⁷⁹ *Supra* note 15, p.103

There are different views on whether a right to conscientious objection inherent to the freedom of conscience is absolute or if this right can be subject to limitations.

ICCPR article 18(3) opens for limitations in the freedom to manifest one's conscience provided that the limitations are 'prescribed by law' and are 'necessary' to 'protect public safety'. Provided that the three cumulative requirements are met, a state could justify limitations in the freedom of conscience, and hence justify the application of a law on compulsory military service. In stating that the restrictions in 18(3) 'must not impair the very essence of the right in question',⁸⁰ the UN Human Rights Committee sets a high threshold for limiting the right of freedom of conscience, giving it the character of an absolute right. This development is confirmed in the Guidelines.⁸¹

The ECtHR on the other hand has been hesitant in treating conscientious objection to military service as an absolute right. In *Bayatyan*⁸² the Court expressed that the limitations in article 9(2) of the ECHR (reflecting ICCPR article 18(3)), could be applied provided that such interference was 'prescribed by law' and 'necessary in a democratic society'.⁸³ In other words, within the European context states retain a margin of appreciation in deciding whether and to what extent interference in the freedom of conscience is 'necessary' in cases of conscientious objection. In not viewing the freedom of conscience as an absolute right, European States therefore have more room to argue that the freedom violated is not of a sufficient nature.⁸⁴

Even though a violation of freedom of conscience due to military service, in principle, may lead to refugee status, the severity of the violation is of crucial importance.

As for the required severity of the human rights violation, neither the wording of article 1(A)2 or its object and purpose provide clear answers. The Qualification Directive has sought clarification by stating that the relevant act must be 'sufficiently

⁸⁰ *Yeo-Bum Yoon & Myung-Jin Choi v. Republic of Korea*, CCPR/C/88/D/1321-1322/2004, para. 8.3

⁸¹ 'Guidelines on Military Service', para. 10

⁸² *Bayatyan v. Armenia* (GC) (Application no. 23459/03), para 110

⁸³ *Ibid.* para 112

⁸⁴ Confirmed by Goodwin-Gill, *supra* note 53, p.660

serious by their nature or repetition’ as to constitute a ‘severe’ violation of basic human rights.⁸⁵ To determine whether the violation is ‘severe’, the CJEU has expressed that account must be taken of the ‘intrinsic severity as well as the severity of [the] consequences’ of the acts concerned, including the ‘measures and sanctions adopted’ against the applicant.⁸⁶

This raises the following question - when a person is compelled to do military service contrary to his sincerely held belief, at what point, if ever, is his freedom of conscience violated in such a severe way that the service in itself amounts to persecution?

The answer relies on a case-by-case assessment where *inter alia* the intensity of the acts and their duration are important factors.⁸⁷ This indicates that the longer the military service, the more likely it is to be found a ‘severe’ violation of the freedom of conscience.

Whether military service amounts to persecution within these instruments also depends on the availability of alternative service. If the objector does not avail himself to an available alternative service that is compatible with his reasons for objection and not of a punitive nature, he will not be heard with a claim of persecution on grounds of violation of freedom of conscience.

In conclusion, when finding that there is a sufficiently severe violation of freedom of conscience, States are free to recognize conscientious objection to military service *in itself* as a sufficient ground for refugee status. As literature and case law have yet to address this issue, it is difficult to conclude on the threshold for granting protection for conscientious objectors on these grounds. Moreover it is challenging to provide a definite answer to whether or not the possibility of limitations actually raises the threshold in the Qualification Directive.

⁸⁵ Art. 9(1)(a)

⁸⁶Joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, [2012], paras. 65-6

⁸⁷ As indicated by ‘nature or repetition’ in article 9(1) of the Directive.

3.1.2 Can punishment or prosecution of a conscientious objector amount to persecution?

When claiming a well-founded fear of ‘being persecuted’, conscientious objectors most often base their claims on fear of prosecution or other forms of punishment. As shown in section 1.1, desertion or draft-evasion is often considered a criminal offense resulting in prosecution or punishment. This leads us to the question of when such prosecution or punishment amounts to persecution within the meaning of the Refugee Convention.

The undisputed starting point is that punishment or prosecution for desertion or draft evasion does not amount to prosecution for the purpose of article 1(A)2. The argument is that the government is merely enforcing a law of general application; hence there is no nexus between the punishment and one of the Convention grounds.⁸⁸ For conscientious objectors this is explicitly confirmed by UNHCR’s Handbook stating that ‘fear of prosecution and punishment for desertion or draft evasion does not, in itself, constitute well-founded fear of persecution under the definition’.⁸⁹

To regard all prosecution as persecution would infringe on the State’s right to regulate their own governance through a system of law. The objective of the Convention is not to assist fugitives from justice. Hence, persons fleeing from what must be perceived as lawful punishment are not normally refugees.⁹⁰ As a result, applications for refugee status will often be denied on the grounds that the applicant is not in fear of persecution, but prosecution under a law of general application, in our case a law on conscription.

Yet, there are exceptions where prosecution or punishment may amount to persecution within the meaning of article 1(A)2.

Relevant requirements are presented in UNHCR’s recommendations, acknowledging that ‘disproportionate or arbitrary punishment’⁹¹ or ‘disproportionately severe

⁸⁸ ‘Handbook’ para. 169

⁸⁹ *Ibid.* para. 167

⁹⁰ *Ibid.* para. 56

⁹¹ ‘Guidelines on Military Service’, para. 18

punishment’⁹² of a conscientious objector may amount to persecution. This is mirrored by the wording ‘disproportionate or discriminatory’ in article 9(2)(c) and (d) of the Directive, which after a contextual approach also applies to punishment or prosecution of conscientious objectors after 9(2)(e).

Again, whether punishment or prosecution of the objector amounts to persecution must be determined on a case-by-case basis. According to Goodwin-Gill this assessment will depend on the object and purpose of the law, the precise motivation of the individual who breaches such law, the “interest” which such individual asserts and the nature and extent of the punishment.⁹³

As Goodwin-Gill notes, ‘disproportionate punishment cannot turn a non-Convention persecution into a Convention persecution’.⁹⁴ Even if a disproportionate punishment of a conscientious objector is presumed to be discriminatory, there must, as section 3.3 will illustrate, be a link to one of the Convention grounds.

In other words, in order to be granted protection, a conscientious objector also has to meet the additional requirements set out in article 1(A)2.

3.2 ‘well-founded fear’

To qualify for refugee status under the Refugee Convention, the objector needs to demonstrate a ‘well-founded fear’ of being persecuted.

The wording ‘well-founded’ suggests that the objector can be granted protection only in situations where the respective risk level is conceived high enough.

The Refugee Convention does not address the question of what degree of risk is necessary in order to determine the existence of a ‘well-founded’ fear. According to the Handbook, the applicant must establish a ‘reasonable degree’ of likelihood that continued stay in his or her country of origin would have lead/would lead to renewed

⁹² ‘Handbook’ para. 169

⁹³*Supra* note 15, p.115

⁹⁴*Ibid.*

persecution.⁹⁵ For the fear to be considered ‘well-founded’ a person has to either have been a victim of persecution or must show good reason why he fears persecution.⁹⁶ Evidently, ‘well-founded fear of being persecuted’ does not require actual persecution to have taken place. The ordinary meaning of ‘fear’ implies that it is sufficient that the objector would be exposed to a risk of persecution that would materialize upon return. Yet, former harassment might be seen as a significant indicator that the objector might become a victim of persecution if he or she returns. Article 4(4) of the Qualification Directive has reaffirmed that previous persecution ‘is a serious indication’ of the applicant’s well-founded fear of persecution.

According to UNHCR’s Handbook, ‘fear’ ‘contains both a subjective and an objective element’.⁹⁷ Accordingly, the fear must be ‘reasonable’,⁹⁸ a subjective assessment that must take into account the applicant’s personality.⁹⁹ The credibility of the applicant’s fear must then be evaluated against objective information on the conditions in the country of origin. This duality is also present in the Guidelines on Military Service, which considers both the ‘personal experience of the applicant’ and ‘experiences of others similarly situated’.¹⁰⁰ Clearly, the UNHCR is sticking to its subjective-objective approach in relation to conscientious objection.

Several scholars have been sceptical to this subjective-objective approach. They claim that it may lead to denial of refugee status because the applicant is not subjectively fearful, is not able to express his fear, or simply, because the decision-makers cannot identify the fear.¹⁰¹ It is argued that proving the subjective element causes great practical challenges, and that in requiring it, the applicant could be denied protection despite a real risk of persecution.

⁹⁵ ‘Handbook’, para. 42

⁹⁶ Ad Hoc Committee on Statelessness and Related Problems, UN Docs E/1618 and E/AC.32/5 (1950), p.39

⁹⁷ ‘Handbook’, para. 38

⁹⁸ *Ibid.* para. 41

⁹⁹ *Ibid.* para. 40

¹⁰⁰ ‘Guidelines on Military Service’, para. 13

¹⁰¹ See e.g. James Hathaway et. al., *The Law of Refugee Status*, 2nd ed. (Cambridge: Cambridge University Press, 2014), 96 and *Supra* note 27, p.339

Hence, recent academic writings favour a purely objective approach.¹⁰² They often build on Grahl-Madsen who early on stated ‘the adjective ‘well-founded’ suggests that [...] his claim should be measured with a more objective yardstick’.¹⁰³ They further stress that this objective risk assessment in no way excludes taking the person’s individual situation into consideration, and note that this approach is already implemented by courts in France, New Zealand, Australia and the UK.

In conclusion, despite the apparent development towards a more objective approach, the UNHCR in its 2013 Guidelines on Military Service choose to uphold its subjective-objective approach. The Qualification Directive does not further elaborate on its chosen approach.

3.3 ‘for reasons of’

Article 1(A)2 requires that the objector’s fear of being persecuted is linked to one or more of the five enumerated Convention grounds. This requirement entails that the persecution must have a discriminatory element – the persecution must be for reasons of ‘race, religion, nationality, membership of a particular social group or political opinion’. Furthermore, it centres the refugee definition around systematic violations by excluding arbitrary victims of war, violence etc.

The need for such a restriction becomes clear when realizing that the global asylum capacity cannot accommodate all those who claim refuge based simply on the risk of serious harm. It has been claimed that the ‘for reasons of’-requirement in some jurisdictions has become the most important reason for denying refugee status.¹⁰⁴ This has also been the case for some conscientious objectors.

The ordinary meaning of ‘for reasons of’ implies that it is only those who can demonstrate the existence of a link between one of the five grounds and their flight that can be granted protection under the Refugee Convention.

¹⁰² *Ibid.*

¹⁰³ *Supra* note 27, p.340

¹⁰⁴ UNHCR, *Claims for Protection Based on Religion or Belief: Analysis and Proposed Conclusions*, December 2002, PPLA/2002/01, p. vii

There is an on-going debate about what is necessary in order to establish the required causal link. Due to the lack of interpretative guidance in article 1(A)2, courts have applied standards of causation from other areas of law *inter alia* the strict ‘but for’-standard from tort law.¹⁰⁵ Some scholars have adopted a so-called ‘contributing cause’-approach, stressing that ‘the Convention ground need not be the sole, or even the dominant cause of the risk of being persecuted. It need only be a contributing factor’ provided it is not ‘remote to the point of irrelevance’.¹⁰⁶ The Guidelines on Military service have opted for this latter approach.¹⁰⁷

The Qualification Directive article 9(3) relaxes the requirements of causal nexus by simply requiring a ‘connection’, implying a lower threshold than the ‘contributing cause’-test applied by UNHCR. Legal scholars confirm that the ‘most appropriate understanding [of the Directive] seems to be that, while it is necessary for a ‘connection’ to be established, this does not require [...] a strict causal link’.¹⁰⁸

The different approaches to the nexus requirement have been particularly apparent in conscientious objection cases. U.S courts have interpreted ‘for reasons of’ to require proof of the prosecutor’s motivation in order to satisfy the nexus requirement. *Canas-Segovina* clearly illustrates this. The court ruled that it was not persecution to punish a Jehovah’s Witness for refusing to perform military service, seeing as the government’s intent was to raise an army, not to persecute the applicant for his religion or belief.¹⁰⁹

The US’ approach has been broadly criticized for being overly formalistic on the grounds that the overall purpose of the Refugee Convention is to provide protection to those in need, not to identify the intention of the persecutor. The subjective motivation of the persecutor should not be the deciding factor in whether or not there exists a risk of being persecuted. The UNHCR has argued that this intent-standard

¹⁰⁵ *Supra* note 27, p.372

¹⁰⁶ University of Michigan Law School, ‘International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground’, *Michigan Journal of International Law* 23 (2002), para. 13,

¹⁰⁷ Para. 47

¹⁰⁸ Steve Peers, ed. *EU Immigration and Asylum Law Text and Commentary*, 2nd rev. ed., Vol. 3, (Leiden: Brill Nijhoff, 2012), 110

¹⁰⁹ *INS v. Canas-Segovia*, 970 F.2d 599 (9th Cir. 1992)

derived from criminal law is wrongly applied in refugee law. They stress that it is inappropriate and potentially dangerous to import notions from other areas of law that raise the applicant's evidentiary burden.¹¹⁰

The Guidelines on Military Service confirm that the persecutor's intent is not decisive. Yet, they specify that the intent 'can' be a relevant factor in establishing the causal link between the objector's fear of persecution and one of the convention grounds.¹¹¹

There is no indication in legal writings or case law that intent is a relevant factor in the Qualification Directive.

In conclusion, the Refugee Convention and UNHCR's Guidelines seemingly set out higher nexus-requirements than the Qualification Directive.

3.4 A link to 'political opinion'

As 'political opinion' is the Convention ground most often applied by courts in relation to conscientious objection, the following presentation will be restricted to this ground (whilst still recognizing that both 'religion' and 'membership of a particular social group' could also be relevant grounds for conscientious objectors).

Traditionally, questions of protection for deserters and draft-evaders have been linked to 'political opinion'.¹¹² Courts have ruled on a liberal interpretation of this term to include 'any opinion or any matter in which machinery of state, government and policy may be engaged'.¹¹³ It is generally accepted that the term also covers an imputed political opinion.¹¹⁴

¹¹⁰ *UNHCR intervention before the House of Lords in the case of Yasin Sepet and Erdem Bulbul (Appellants) v. the Secretary of State for the Home Department (Respondent)*, 8 January 2003, para. 4.2-4.4 available at: <http://www.refworld.org/docid/3e5ba7f02.html> [accessed 26 September 2015]

¹¹¹ 'Guidelines on Military Service', para. 48

¹¹² *Supra* note 8, p.345

¹¹³ *Attorney General v. Ward* [1993] 2 S.C.R. 689, p.34

¹¹⁴ Confirmed in paragraph 52 of the Guidelines and article 10(2) of the Qualification Directive.

It has long been agreed upon by legal scholars such as Hathaway, Sternberg and Goodwin-Gill that this is the most relevant category for conscientious objectors. Goodwin-Gill has proclaimed that ‘refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of State authority’.¹¹⁵ He has even gone as far as to claim that the link to a Convention ground can only be through ‘political opinion’.¹¹⁶ Even though there could be political aspects to a claim of conscience, one might argue that ‘political opinion’ alone does not sufficiently address matters of conscience.

The starting point is that objectors can be granted asylum through a link to ‘political opinion’. Still, adjudicators have often sought to limit the recognition of selective conscientious objectors through labelling claims of conscientious objection as ‘political’ rather than a matter of conscience.

A thorough review of relevant legal instruments has given no indication of grounds in international refugee law for differentiating between those who object to all military actions and those who object to specific wars, indicating that selective objectors should have an equal right to protection, as confirmed by Guidelines.¹¹⁷

Still, opponents of selective objection are convinced that most of those who claim such status do not really object to the war in question on grounds of conscience but on grounds of politics. Hence, claims are categorized as ‘political’ in order to refuse protection to selective objectors. Hereby, adjudicators prevent the recognition of ‘new’ rights, an argument often based in the fear of accommodating for a flow of claims for refugee status.

The clearest example of this practice is US case law, where selective objectors have, more often than not, been denied protection. The argument is that selective objection is merely a political conviction related to that one war, hence it must be viewed as a political objection, not one of conscience. In *Gillette*, which concerned an American soldier who objected to the Vietnam War on grounds of ‘fundamental principles of

¹¹⁵ *Supra* note 15, p.111

¹¹⁶ *Ibid.* p. 115

¹¹⁷ See para. 8

conscience’; the court bluntly rejected the legitimacy of selective objection, through characterizing it as ‘conscientious objection of indeterminate scope’.¹¹⁸

This “misuse” of the Convention ground ‘political opinion’ to withhold protection for selective objectors is rendered possible by paragraph 171 of UNHCR’s Handbook, which places a limit on political justifications that can serve as basis for objection.¹¹⁹ As will be illustrated below, selective objection seems to have been removed from the realm of conscience, instead relying on paragraph 171’s external assessment of the legality of military action. One clear example of this is *Sepet* where the Court of Appeal stated that to place the individual’s conscience over the legitimate interests of the state is a ‘political decision’.¹²⁰ The refusal was later upheld by the House of Lords, which found that the one of the grounds for denying protection was that the applicants did not have a ‘rooted objection to all military service’.¹²¹

To further understand this reasoning, it is important to acknowledge the role paragraph 171 of the Handbook has played in denying selective objectors status as refugees.

3.4.1 The central role of paragraph 171 of the Handbook

Seeing as the Handbook is meant to guide legal practitioners in applying the refugee definition, we must, like many have done before us, look to paragraph 171 when determining refugee status for conscientious objectors where claims are linked to ‘political opinion’.

To fully understand the status of conscientious objectors under the Refugee Convention, a thorough assessment of paragraph 171 of the Handbook is crucial. Its importance as a legal source becomes apparent through a review of central case law which all address paragraph 171.¹²² *Sepet* states that paragraph 170 ‘appears to be

¹¹⁸ *Gillette v United States*, 401 U.S. 437 (1971), para 437,439

¹¹⁹ *Supra* note 8, p.346

¹²⁰ *Yasin Sepet, Erdem Bulbul v. Secretary of State for the Home Department*, C/2777; C/2000/2794, paras. 71 and 98

¹²¹ *Supra* note 18, para. 8

¹²² See *Sepet*, *Supra* note 18, *Krotov*, *Supra* note 127 and *Hinzman*, *Supra* note 132

qualified by paragraph 171',¹²³ suggesting that 171 constitutes the basis for the assessment of whether or not the objector has a valid claim for protection. In the following it will be illustrated why this view is problematic.

Paragraph 171 starts off by stating that, despite its genuineness, not every conviction will constitute a sufficient reason for claiming refugee status after desertion or draft evasion. Its reference to 'political justification' implies that the paragraph intends to serve as an interpretative guide relating to cases of conscientious objection that the courts link to a political opinion. It goes on to make the following statement:

'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.'

To get an understanding of paragraph 171 it is essential to look closer at the conditions it sets out for conscientious objectors.

3.4.1.1 'condemned by the international community'

The ordinary meaning of 'condemned by the international community' suggests the need for some sort of public international disapproval. But what is the 'international community', and who speaks for it? Several cases, particularly from the US, have interpreted this to require a UN resolution condemning the military action,¹²⁴ a requirement later rejected by national courts.

Still, case law shows that traditionally, the threshold for 'condemned by the international community' has been set high. In *Sepet* the claims of two Kurdish asylum seekers analysed under paragraph 171 were denied on the basis of a failure to show international condemnation of Turkish military action against the Kurds. Similarly, the Norwegian Appeals Board rejected the application of a Russian

¹²³ *Supra* note 18, para 12

¹²⁴ See i.e. *M.A v INS*, 899 F.2d 304, 313 (4th Circ. 1990)

selective objector on grounds that the Russian military action in Chechnya had neither been condemned by the international community, nor by the Norwegian state.¹²⁵

The problem with promoting ‘international condemnation’ as a condition for protection for conscientious objectors is that the decision to voice such condemnation is often coloured by diplomatic and economic considerations. National governments are hesitant to adopt condemnatory language in fear of affecting their bilateral relations. Because statements are often made in private meetings it has been questioned whether it is appropriate to expect an asylum determination to be contingent on the non-condemnatory language used by diplomats.¹²⁶ Relying on a condemnation that is dependent on political influence may therefore set an improper threshold for conscientious objectors.

However, in recent developments in *Krotov*, the requirement of explicit international condemnation was seemingly abandoned. The Court concluded that instead of official announcements, it should be determined whether or not the military action was systematically in contradiction with core humanitarian norms, drawing on *inter alia* findings of reports by NGOs and the Human Rights Council.¹²⁷ The New Zealand Refugee Status Appeals Authority (RSAA) followed up this view by stressing that ‘what is happening on the ground as to observance of the laws of war by parties to the conflict is key’.¹²⁸ Still, the RSAA points out that condemnation by an international body would ‘be relevant to the inquiry’.

In conclusion, recent case law suggests that explicit condemnation is not a mandatory, but a relevant factor within the meaning of para. 171. This view is supported by the Guidelines on Military Service. They proclaim that in determining the legality of a conflict ‘condemnation by the international community is strong evidence, but not essential for finding that the use of force is in violation of international law’.¹²⁹

¹²⁵ *Supra* note 8, p.356

¹²⁶ *Ibid.*

¹²⁷ *Krotov v. Secretary of State for the Home Department* [2004] 1 WLR 1825 [2004] EWCA Civ 69, para 16, 26

¹²⁸ RSAA, *Refugee Appeal No. 73578*, 19 Oct. 2005, para. 87.

¹²⁹ Para. 24

This shift away from requiring international condemnation is mirrored in the Qualification Directive, which makes no mention of condemnation as a relevant factor. Instead, the Directive views the military action in light of a humanitarian law and human rights framework, evidently shifting the focus from the political characterization that comes with a condemnation and over to emphasized focus on international legal standards.

3.4.1.2 ‘type of military action... contrary to basic rules of human conduct’

In times of armed conflict there are primarily two concepts of international law that are applicable: *jus ad bellum* relates to the rules on legality of the use of force as set forth in the UN Charter, while *jus in bello* regulates the means and methods of warfare. Liability for violations of *jus ad bellum* is usually attached to high-ranking members of the government or military, while both soldiers and civilians may be held liable for violations of *jus in bello* (commonly known as ‘war crimes’). This distinction has been of significance when determining whether a conscientious objector has acted contrary to ‘basic rules of human conduct’, the reason being that there has been a reluctance to consider evidence of violations of *jus ad bellum* as relevant for determining refugee status.

A question therefor arises as to whether *jus ad bellum* is relevant in the objector’s claim for protection.

Reading the Handbook alone it is unclear whether these “basic rules of human conduct” include both *jus in bello* and *jus ad bellum*. However, the more recent Guidelines have confirmed that the term refers to both concepts.¹³⁰ Despite this recognition of *jus ad bellum*, case law has suggested that only higher-level commanders can base their claims for protection in violations of *jus ad bellum*.

The issue was raised in *Hinzman*, which concerned an American soldier who had deserted the U.S Army upon deployment to Iraq due to strong moral objections to the war. He believed that the American-led military action in the country was illegal

¹³⁰ Para. 21

according to international standards, indicating a conviction based on violations of *jus ad bellum*. When filing for asylum in Canada, he argued that it would place too heavy a burden on him to also have to demonstrate his involvement in a war crime.

The Immigration and Refugee Board ruled that violations of *jus ad bellum* were ‘not relevant’ in determining acts “contrary to basic rules of human conduct”.¹³¹ Upon judicial review, the Federal Court expressed that ‘the question of whether the American-led military intervention in Iraq is in fact illegal is not before the court’.¹³² Seeing as violations of *jus ad bellum* had been described as ‘leadership crimes’, it was only those with the power to plan, prepare, initiate and wage wars that were culpable.¹³³ As a ‘mere foot soldier’, Hinzman ‘could not be held to account for any breach of international law committed by the United States’. Only ‘on the ground activities’ which he would have been associated with were relevant with regards to paragraph 171.¹³⁴ Because Hinzman as a soldier could not be held complicit in crimes against peace, the Court concluded that the assessment related to violations of *jus in bello* and not *jus ad bellum*. When he could not demonstrate his involvement in a war crime his appeal was rejected.

This decision has been characterized as discriminatory seeing as it prevents “ordinary” soldiers from claiming conscientious objection grounded in *jus ad bellum*.¹³⁵ Furthermore, Bailliet notes that it is unfortunate that the standard of proof for conscientious objection is raised through questioning liability under international criminal law – a conscientious objector may hold himself morally responsible for his actions, regardless of whether or not he may be liable for them under international law.¹³⁶

The Guidelines on Military Service seemingly reject the view that only high-level commanders can base their claims in *jus ad bellum*. They stress that in a conflict considered to be in violation of *jus ad bellum*, it is not necessary that the applicant is

¹³¹ *Hinzman v Immigration and Refugee Board*, File TA4-01429, Immigration and Refugee Board of Canada (16 March 2005) para. 10

¹³² *Hinzman v. Canada (Minister of Citizenship and Immigration)* 2006 FC 420, para.5

¹³³ *Ibid.* para 142

¹³⁴ *Ibid.* para. 188

¹³⁵ *Supra* note 8, p.373

¹³⁶ *Ibid.*

‘at risk of incurring individual criminal responsibility’.¹³⁷ Evidently, the Guidelines lower the threshold on this point, allowing all soldiers, regardless of rank, to claim conscientious objection grounded in *jus ad bellum*.

In referencing the exclusion clause in article 12(2), which mentions both ‘war crimes’ and ‘crimes against peace’ the Qualification Directive makes it clear that both violations of *jus in bello* and *jus ad bellum* can give grounds for protection.

The Directive does not explicitly state whether it follows the *Hinzman*-case in excluding those in a lower position of authority from basing their claims in violations of *jus ad bellum*. To find the answer, we must look to the latest developments regarding the content and interpretation of article 9(2)(e) in *Shepherd*, a preliminary ruling in the Court of Justice of the European Union (CJEU) from February 2015.¹³⁸ The case concerned an American soldier trained as a helicopter maintenance mechanic. He left the army upon being ordered to Iraq on grounds that he considered the war to be illegal. Shepherd applied for asylum in Germany claiming that in refusing to perform military service he risked criminal prosecution in the US. The German Court requested a preliminary ruling on the interpretation of *inter alia* article 9(2)(e) of the 2004 Qualification Directive. The CJEU states in relation to violations of *jus in bello* that in adopting article 9(2)(e) the EU ‘did not mean to restrict its scope to certain personnel [...] on the basis, *inter alia*, of their rank in the military hierarchy’. It further states that article 9(2)(e) covers ‘all military personnel, including therefore, logistical or support staff’.¹³⁹ Despite coming as a response to a question related to *jus in bello*, the fact that the Court confirms that article 9(2)(e) covers “all military personnel” must be interpreted to mean that also those in a lower position in the military can base claims for protection in violations of *jus ad bellum*.

It is the prevailing view today that interpretations in preliminary rulings bind the national courts of all EU Member States.¹⁴⁰ As a result, it appears as if the Qualification Directive and the Guidelines now coincide in relation to *jus ad bellum*.

¹³⁷ Para. 23

¹³⁸ *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, C-472/13, [2015]

¹³⁹ *Ibid.* para. 33

¹⁴⁰ See *Kühne and Heitz v Productschap voor Pluimvee en Eieren*, C-435/00, [2004] paras. 21-27

Upon closer examination of *Shepherd* it seems as though the CJEU, through its interpretation of article 9(2)(e), further raises the threshold for protection in relation to violations of *jus in bello*.

The CJEU implies a need for *Shepherd* to establish that performing military service would include crimes or acts falling under the exclusion clause. The CJEU holds it possible that war crimes were committed. However, quite alarmingly, it goes on to say that ‘an armed intervention engaged upon on the basis of a resolution adopted by the Security Council offers, in principle, every guarantee that no war crimes will be committed’ and that the same applies ‘to an operation which gives rise to an international consensus’.¹⁴¹ It appears as if the Court suggests that when there is international consensus, there is a very limited possibility for war crimes, an implication that clearly raises the bar and gives a limited possibility for protection on grounds of article 9(2)(e). Much like in the Handbook paragraph 171 we see a tendency of shifting focus away from a case-by-case assessment, instead relying on the international community’s opinions, which are often heavily influenced by politics.

In my opinion, regardless of these recent clarifications, it is clear that both *jus in bello* and *jus ad bellum* are relevant in the assessment of conscientious objection. The ordinary meaning of ‘human conduct’ may seemingly relate more closely to *jus in bello*, which specifically concerns the conduct of the parties engaged in a conflict. However, in light of the object and purpose of refugee law to protect the refugee, this wording should not be interpreted to exclude claims based in *jus ad bellum*. There is no reason to conclude that a person that would otherwise be prepared to bear arms cannot be of the belief that it would go against his conscience to fight in a war that is a violation of *jus ad bellum*. The fact that these violations are normally attributed to state or military leaders should not restrict conscientious objectors of all ranks from basing their claims in violations of *jus ad bellum*. Furthermore, the CJEU’s implication that no war crimes will be committed when an operation is supported by international consensus, in my opinion, shows an alarming naivety regarding the conduct in armed conflicts.

¹⁴¹ *Shepherd*, para. 41

3.4.1.3 Is proof of personal and/or direct participation in the military action required?

A question that arises in continuation of this is to what degree the conscientious objector would be required to participate in such “inhumane” acts, and furthermore, what standard of proof is to be applied, if any.

The wording of 171 does not in its ordinary meaning require proof of personal or direct participation. On the contrary it only demands that the applicant ‘does not wish to be associated with’ the acts in question. Unfortunately, adjudicators appear to have misinterpreted this term to require examination of the likelihood of participation in atrocities.¹⁴²

The Norwegian Immigration Appeals Board rejected the application of a group of Israeli soldiers due to lack of proof of a ‘real risk’ of participation in actions that violated international law.¹⁴³ In *Sepet*, this burden of proof is lowered to ‘might require’,¹⁴⁴ whilst *Krotov* attempts to offer a concrete test by asking whether soldiers ‘may be required on a sufficiently widespread basis’ to act in contradiction with humanitarian norms.¹⁴⁵

Applying a high burden of proof would go against the purpose of refugee law - to provide protection to those with a well-founded fear of persecution. In addition, when acknowledging that violations of international norms more often than not is a direct cause to the flow of refugees, this should be reason enough to favour those who do not wish to partake in such acts, instead of raising the bar.

Notwithstanding, the Guidelines require a ‘reasonable likelihood’ of participation in violations of international law, a threshold distinctly higher than in *Sepet* and

¹⁴² That the term ‘associated’ does not require actual or likely participation was confirmed in *Key v Canada* (Minister of Citizenship and Immigration) 2008 FC 383, para. 21

¹⁴³ *Supra* note 27, p.433

¹⁴⁴ *Sepet*, para. 8

¹⁴⁵ *Krotov*, para. 51

Krotov.¹⁴⁶ In determining whether such ‘reasonable likelihood’ exists, ‘the extent to which breaches of basic rules of human conduct occur in the conflict’ is relevant, a condition much reflecting ‘widespread basis’ in *Krotov*. It is evident that a certain level of proof of personal participation is required by the Guidelines, despite the wording in paragraph 171 making no such requirement.

Shepherd confirms a similarity to the Guidelines when applying ‘reasonably plausibly’ as the relevant standard. The Court further stresses that article 9(2)(e) does not refer solely to the situation in which the applicant would be led to commit war crimes ‘personally’. Situations where the applicant would participate only ‘indirectly’ are not ‘as a matter of principle, excluded’. Still protection can only be extended to those persons whose tasks could ‘sufficiently directly’ lead them to participate in war crimes.¹⁴⁷ The Guidelines confirm that in a more indirect participation, a claim of persecution is unlikely to arise without ‘additional factors’, hereunder the link between the applicants role and ‘foreseeability of or contributions to’ the violations of international law.¹⁴⁸

In regards to setting requirements for personal and direct participation, the two instruments seem quite similar. But the Guidelines go on to recognize that ‘the applicant’s reasons for objecting – regardless of the foreseeability or remoteness of the commissions of crimes linked to his or her activities – may be sufficient to qualify him or her as a conscientious objector’.¹⁴⁹ In other words, the Guidelines acknowledge the conscience of the applicant as a factor that can be decisive in the claim for protection for those serving indirectly. Here we can clearly see the consequence of the lack of recognition of the applicant’s conscience in the Qualification Directive.

In conclusion in relation to conscientious objectors and ‘political opinion’ as the chosen convention ground it is apparent that through concluding that the high standards set forth in paragraph 171 are not met, several courts have rejected claims of selective objectors especially. By linking the objection to a political opinion and an

¹⁴⁶ Guidelines, para. 26

¹⁴⁷ See paras. 36-38

¹⁴⁸ Para. 29

¹⁴⁹ *Ibid.*

external assessment regarding the international community's perspective of military action, the focus is shifted away from the convictions and sincerely held beliefs of the objector. One might question whether adjudicators place too much weight in the conditions set out in paragraph 171, as they are only meant as an interpretative guide to article 1A(2).

3.5 Conclusion

It is clear that both the Qualification Directive and UNHCR's recommendations provide essential interpretative guidance to the refugee definition in cases of conscientious objection.

Still it is evident that freedom of conscience could be given a more restrictive scope in the European context as *Bayatyan* opened for limiting this right, enabling a higher threshold for persecution. On the other hand, the Qualification Directive presents a less strict nexus requirement than the UNHCR, a softening-up favourable to the conscientious objector.

Even though a requirement of an international condemnation was rejected in *Krotov*, the Guidelines maintain that such condemnation is strong evidence of a violation of international law. The Qualification Directive makes no mention of this as a relevant factor, indicating a lower threshold for protection. Still it is clear that the Directive maintains a strong connection to political statements when implying in *Shepherd* that in principle no war crimes will be committed when there is international consensus on the armed intervention in question. This binding interpretation of article 9(2)(e) can deprive the conscientious objector of the violation of international law, on which he depends when seeking protection.

Finally, in setting the standard of proof for participation too high, as might be said for the Guidelines and Qualification Directive, we risk severely narrowing the scope of protection. Both instruments recognize indirect participation as relevant, but it is only the Guidelines that acknowledge the conscience of those serving more indirectly. In a

hypothetical case where the Guidelines had been applied instead of the Directive, the outcome in *Shepherd* might have been different.

4 Discussion

In order to come to a conclusion on the discrepancies between the instruments subject to analysis in this thesis and furthermore the circumstances under which a conscientious objector can be granted protection, there are two issues that need to be raised.

4.1 To what extent does the Handbook actually recognize conscientious objection?

As shown in section 3.4.1, case law clearly favours citing paragraph 171 in questions of conscientious objection. Yet, this paragraph makes no mention of refusal to serve for reasons of conscience. It is paragraph 170 that opens for protection where ‘performance of military service would have required [...] participation in military action contrary to [...] valid reasons of conscience’.

Whether or not paragraph 170 is to be viewed as an independent ground for protection comes across as rather unclear in legal writings and case law. Scholars often seem content with quoting paragraph 170 without further discussions on its status. Despite pointing out paragraph 170 as ‘the most helpful to the applicants’, *Seper* concludes that this paragraph ‘appears to be qualified by paragraph 171’.¹⁵⁰ Further indicating its dependence on paragraph 171 is *Hinzman*. The Court expressed that bringing oneself within paragraph 170 was not enough to entitle someone to protection, as it had to be read in conjunction with para 171.¹⁵¹

In a contextual interpretation, choosing the phrase ‘There are, however, also cases’ to introduce paragraph 170 may be seen as a retrospect to paragraph 169, (opening for

¹⁵⁰ See para. 12

¹⁵¹ See paras. 107-109

protection in cases of disproportionately severe punishment), indicating that paragraph 170 could also serve as an independent basis. In addition, paragraph 174 provides that ‘the genuineness of a person’s [...] reasons of conscience [...] will *of course* need to be established by a thorough investigation of his personality and background’, suggesting that the drafters of the Handbook had envisaged an independent internal assessment of the objector’s conscience after paragraph 170. When paragraph 170 states that it ‘may be the sole ground for a claim for refugee status’, it is difficult to come to the conclusion that the drafters of the Handbook have meant for paragraph 170 to be qualified by paragraph 171. Unfortunately, there are no available records of the drafters’ intentions.

So why then do cases like *Sepet* deny the objectors protection on the grounds that the standards in 171 are not met, and despite finding ‘strong and sincere’ convictions with the applicants,¹⁵² seemingly reject paragraph 170 as an independent ground for protection?

The lack of discussion around the interrelationship between paragraph 170 and 171 is concerning. While the wording in the Handbook clearly suggests the possibility of paragraph 170 being an independent ground for protection, case law suggests otherwise. The consequences of relying on paragraph 171 are clearly reflected in the refusal to offer protection to selective objectors, removing the objection from the realm of conscience. It can be argued that only by viewing paragraph 170 as an independent ground we achieve the internal assessment of conscience that paragraph 174 enables.

4.2 A critical view on the drafting of the Qualification Directive

Before concluding on the discrepancies, it is of interest to note that the Qualification Directive could have presented a different approach to conscientious objection than it does today.

¹⁵² See para. 8

Cecilia Bailliet notes that the developments within the EU regarding conscientious objection displays a type of ‘schizophrenia’.¹⁵³

When the European Commission first issued a proposal for the Directive in 2001¹⁵⁴ it encompassed protection where performance in military service would require participation in activities that were ‘irreconcilable with the applicants [...] valid reasons of conscience’.¹⁵⁵ It did not require acts to fall under the exclusion clause, as is the case in article 9(2)(e) today.

In reading the Commission’s Explanatory Memorandum, it is obvious that they were greatly inspired by paragraph 170 and 171 of the Handbook.¹⁵⁶ More importantly, the Commission expressed that incompatibility with general international norms was ‘not indispensable’ and that ‘even if the military action is generally conducted within the limits prescribed by the laws of war, the person may have valid reasons of conscience for not participating in it’. Through this they indicated that an individual’s conscience can give grounds for protection, regardless of violations of international law.

Clearly, this proposal was not retained in the Directive adopted in 2004. A thorough examination of the procedure from the Commission’s proposal up to the Council Directive has given no further answers as to why the original proposal was abandoned. On the contrary, what is clear is that the Council shifted the focus exclusively over to acts contrary to international law, excluding the recognition of ‘valid reasons of conscience’.

Despite being criticized by both UNHCR and ECRE as running counter to the standards within UNCHR’s Handbook and evolving human rights law,¹⁵⁷ the Commission made no attempt at including ‘valid reasons of conscience’ in the 2011-recast. A possible change of article 9(2)(e) was never mentioned in the recast-proposal, despite the Commission characterising the 2004-Directive as ‘vague and

¹⁵³ *Supra* note 8, p.367

¹⁵⁴ COM(2002) 510 final – 2001/0207(CNS)

¹⁵⁵ *Ibid.* art.11(1)(d)

¹⁵⁶ Official Journal 051 E, 26/02/2002 p. 0325 – 0334

¹⁵⁷ See *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*, 28 January 2005, and *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004*.

ambiguous’ and ‘insufficient to secure full compatibility with the evolving human rights and refugee law standards’.¹⁵⁸ With this as a backdrop it is surprising that the Commission, in light of the development towards recognizing conscientious objection as a human right, once more rejected ‘valid reasons of conscience’ in the 2011-recast.

4.3 Conclusion

Through the multiple rejections of ‘valid reasons of conscience’ the EU Member States decided to limit protection for conscientious objectors, and hence have intentionally refrained from broadening their interpretation of the Refugee Convention to include objections based in valid reasons of conscience. Having taken such a firm stand on the issue could indicate a lack of willingness to abandon this restrictive position in the future.

It is clear that if we are to follow case law on the interrelationship between paragraph 170 and 171 of the Handbook, the discrepancies between the Handbook and the Qualification Directive are seemingly less, seeing as both paragraph 171 and article 9(2)(e) set a high threshold for conscientious objectors through relying on external assessments.

Common for both these issues is that, despite thorough research, it has not been possible to uncover the intentions of the drafters of the two instruments.

5 Conclusion

This thesis presented the following research question: ‘under what circumstances may conscientious objection to military service be a ground for refugee status?’

¹⁵⁸*Supra* note 63, p.3

Considering the discrepancies in the instruments regulating conscientious objection in international refugee law it has proved challenging to provide a conclusive answer to this question, as presupposed.

It has been established that the Qualification Directive is given a more restrictive scope than the UNHCR's Handbook and Guidelines by linking the relevant military actions to the exclusion grounds and abandoning valid reasons of conscience as grounds for protection. A major concern with this approach is that a soldier's conscience may yet be affected at a threshold which is lower than that required for prosecution of a war crime. In connection with this finding it is worth stressing that *in theory* article 9(2)(e) does not contradict with the Refugee Convention in leaving out valid reasons of conscience as grounds for protection. In principle, as the list of acts of persecution is non-exhaustive, nothing stands in the way of including convictions of conscience in the Qualification Directive. But as illustrated in *Shepherd*, not explicitly including this aspect in 9(2)(e) may cause not only uncertainty, but also great variations in practice.

With case law indicating that paragraph 170 cannot function as the sole ground for protection, the actual degree of discrepancy between the instruments meant to provide interpretative guidance to article 1(A)2 is less than it would have been if 'valid reasons of conscience' was confirmed as an independent basis for protection in the Handbook. Until case law or legal writings further discuss this interrelationship, it is difficult to conclude on the degree of discrepancy.

In an attempt to provide interpretative guidance to the refugee definition in article 1(A)2 for cases of conscientious objection, it becomes apparent through exploring case law that the UNHCR's recommendations as well as the Qualification Directive rely on assessments of external factors, moving the focus of the claim away from the conscience of the individual objector.

This thesis has, as most commonly done in legal writings and case law, treated conscientious objection with a link to 'political opinion'. This link has entailed that selective objectors particularly have to overcome significant obstacles when claiming protection. And perhaps this is where the root of the problem lies – through placing a

limit on which political justifications can serve as basis for objection through applying the conditions in paragraph 171 of the Handbook, the adjudicator moves the focus away from the objector's conscience and over to an external assessment. His reasons for doing so might not seem surprising when recognizing that from a practical view it takes less of an effort to reject the claim based on an external assessment of the international community's view on the military action than to conduct an internal assessment of the objector's conscience. In rejecting the claim the adjudicator also avoids taking a public stand on whether the applicant's country of origin is violating international law, a rather politically sensitive statement.

Still, it may be argued that only through an internal assessment can matters of conscience as grounds for refugee status be addressed successfully. In a *de lege ferenda* perspective, adjudicators should therefore be less hesitant to recognize conscientious objections as claims of 'religion' or 'membership of a particular social group', both opening for an internal assessment of the objector.

In practice, it may prove a challenge to assess the truth of a claimant's statement of conscience. For courts to be able and willing to take on such an internal assessment, there seems to be a need for a clear and simple procedure for ascertaining valid reasons of conscience. One possibility, if applying 'political opinion' as the relevant Convention ground, could be to attempt to distinguish between civil disobedience done publicly and aimed at changing a law or policy, and conscientious objection undertaken more or less privately as an expression of moral convictions, as suggested by legal philosopher Joseph Raz.¹⁵⁹ In any case, the central focus of the assessment should be the conscience of the individual objector.

The two most recent instruments intended to provide guidance on protection for conscientious objectors have both been criticized by reputable scholars in international refugee law – the Guidelines on Military Service for lacking universality, and the Qualification Directive for running counter to the standards of the UNHCR's recommendations and evolving human rights law. In addition, the lack

¹⁵⁹Joseph Raz, *The authority of law: Essays on law and morality*, (Oxford: Clarendon Press, 1979), 276

of unequivocal acceptance of the authoritative weight of UNHCR's recommendations may, as shown in section 2, affect the adjudicator's willingness to apply these instruments.

As this thesis sought out to expose, there is a lack of harmonization between the instruments regulating conscientious objection. A clear sign of this is the absence of cross-referencing between the instruments. It has been suggested that further harmonization could be achieved by giving the UNHCR an expert role before the CJEU, allowing the UNHCR to present arguments for an interpretation of EU rules in light of the rules of international refugee law including UNHCR's own recommendations.¹⁶⁰

Only through a more active and concurrent use, preferably addressing more than one of the instruments subject to analysis in this thesis at a time, can we get a clearer answer to under what circumstances conscientious objection to military service may be a ground for refugee status.

¹⁶⁰ Roland Bank, 'The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law', *International Journal of Refugee Law* 27(2015), 243

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