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# Resistance to Military Conscription or Forced Recruitment by Insurgents as a Basis for Refugee Protection: A Comparative Perspective

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*While other nations rely on international principles to interpret treaty-derived terms in statutes governing refugee matters, the United States Supreme Court has, in recent cases, ignored this convention in taking a restrictive approach to refugee protection. By narrowly construing the term "political opinion" and unduly focussing on the persecutor's state of mind, the Court has limited the scope of protection for thousands of legitimate asylum seekers. The decisions of a number of relevant foreign tribunals show that the Supreme Court's rationale runs contrary to established international standards. This Article urges Congress to bring the doctrinal position of the United States back into conformity with international standards and comparative jurisprudence.*

## I. INTRODUCTION

Refugees are an inevitable consequence of war. However, not all of those who are displaced by conflict have an individualized fear of persecution as required by the international refugee treaties.[1] Indeed, many are likely to be fleeing from generalized risks of harm occasioned by being caught in the cross fire. This Article discusses

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1. *See infra* notes 2 and 3 and accompanying text.

certain instances in which claims for refugee protection could be recognized, even though they are asserted in the context of armed conflict and based on objection to participation in the conflict.

Initially, the role of state practice in the interpretation of the multi-lateral refugee treaties is addressed, followed by a discussion of recent United States jurisprudence on resistance to forced recruitment by insurgents as a basis for refugee protection. The international law context is then set out and recent comparative jurisprudential perspectives on resistance to military service as a basis for asylum are examined in detail. Finally, lessons for United States courts and policy-makers are presented.

## II. The Role of State Practice in the Interpretation of the Multi-Lateral Refugee Treaties

State practice is a well-established aid in the interpretation of multi-lateral treaties. The 1951 Convention relating to the Status of Refugees[2] or its 1967 Protocol[3] are good examples. According to the 1951 Convention, a refugee is one who:

> [O]wing 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.[4]

The Refugee Act of 1980[5] uses a definition "virtually identical to the one prescribed by international law."[6] According to this Act, a refugee is:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[7]

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2. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

3. Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force by the United States on November 1, 1968) [hereinafter Refugee Protocol].

4. Refugee Convention, *supra* note 2, art. 1(A)(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152. The 1967 Protocol relating to the Status of Refugees incorporates this definition, removing temporal and geographic limitations. Refugee Protocol, *supra* note 3, 19 U.S.T. at 6225, 606 U.N.T.S. at 268.

5. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

6. Arthur C. Helton, INS v. Cardoza-Fonseca*: The Decision and Its Implications*, 16 N.Y.U. Rev. L. & Soc. Change 35, 40 (1987-88).

7. Refugee Act of 1980 § 201(a), 8 U.S.C. § 1101(a)(42)(A) (1988).

Congress adopted this definition to "conform United States domestic law to the standards of the U.N. Protocol to which the United States acceded in 1968."[8] However, while the goal of Congress was conformity with an international standard,[9] none of the three United States Supreme Court decisions concerning the refugee definition under the Refugee Act examined foreign jurisprudence in the course of explicating treaty-derived terms.[10]

In contrast, the English House of Lords analyzed United States jurisprudence in its determination of an appeal involving the refusal of asylum applications to six Sri Lankan Tamils.[11] The issue before the House of Lords was the proper interpretation of the definition of the term "refugee" in the Convention. In its decision, the House of Lords analyzed two United States Supreme Court cases[12] regarding the proper test for determining a "well-founded fear of persecution."[13]

The House of Lords' decision and a United States Supreme Court decision were thereafter both discussed by the High Court of Australia.[14] Interpreting the treaty terms "well-founded fear of persecution," the Australian court concluded that both English and United States jurisprudence "establish[ed] that a fear may be well-founded for the purpose of the Convention and the Protocol even though persecution is unlikely to occur,"[15] noting that "an international convention should be interpreted . . . 'on broad principles of general acceptation.' "[16]

Interpretation through the use of generally accepted international principles is applied in many areas of law. Recently, the United States Supreme Court reviewed the sources by which to determine

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8. Helton, *supra* note 6, at 39.
9. *Id.* at 44.
10. *See* INS v. Elias-Zacharias, 112 S. Ct. 812 (1992) (interpreting "political opinion"); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (interpreting "well-founded fear of persecution"); INS v. Stevic, 467 U.S. 407 (1984) (interpreting "well-founded fear of persecution").
11. Regina v. Secretary of State for the Home Dep't, *ex parte* Sivakumaran, [1988] 1 All E.R. 193 (1987).
12. INS v. Stevic, 467 U.S. 407 (1984); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
13. *Ex parte* Sivakumaran, [1988] 1 All E.R. at 197.
14. Chan Yee Kin v. Minister for Immigration and Ethnic Affairs, 87 A.L.R. 412 (1989) (Austl.).
15. *Id.* at 448.
16. *Id.* at 435-36 (quoting James Buchanan & Co. v. Babco Forwarding & Shipping (UK) Ltd., 1978 App. Cas. 141, 152.

the intent of treaty parties.[17] In that case, in the course of determining the scope of liability by an international air carrier for injuries to passengers under the Warsaw Convention, the Court found it appropriate to refer initially to the text of the instrument. The Court explained that ambiguities can be resolved by resort to extrinsic sources, such as legislation, judicial decisions, and scholarly writing.[18] Additional aids to construction include the negotiating history of the treaty, commentaries, post-decision conduct, such as entry into subsequent international agreements that clarify treaty provisions, and the judicial decisions of other state parties.[19]

Apart from the United States, the courts of other countries also stress the need to respect shared expectations and use foreign jurisprudence to aid them in treaty interpretation. In one case, the House of Lords[20] noted that because the "expressed objective" of a provision regulating commerce was to "produce uniformity in all contracting States" the English court should not be constrained by English legal precedent.[21]

Another example of resort to comparative jurisprudence is found in a Canadian case[22] in which the Canadian Tax Court relied heavily on foreign jurisprudence. In that case, the Canadian court needed to determine the meaning of a term in a Canada-United States tax treaty. Because there was no Canadian jurisprudence on this topic, the Canadian court examined British, Australian, and United States jurisprudence.[23] The court specifically reviewed a United States Court of Appeals case in which the facts were similar and another United States court decision which "explicitly and specifically

17. Eastern Airlines, Inc. v. Floyd, 111 S. Ct. 1489 (1991).

18. *Id.* at 1493-97.

19. "We must also consult the opinions of our sister signatories in searching for the meaning of [the disputed treaty term]." *Id.* at 1501. In Air France v. Saks, 470 U.S. 392 (1985), the Supreme Court, in examining foreign jurisprudence in its search for the correct interpretation of another term used in the Warsaw Convention, explained that because " '[t]reaties are construed more liberally than private agreements,' " it is necessary to " 'look beyond the written words to . . . the practical construction adopted by the parties' " in order to " 'ascertain' " the meaning of the treaty. *Id.* at 396 (quoting Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943)). Looking beyond the written words, the Court concluded that the term in question, as used in French cases, "parallels" its use in British and American jurisprudence. *Id.* at 400. The Court specifically cited French jurisprudence, *id.*, observing that the holding of this case is in "accord with American decisions," *id.* at 404, and that the opinions of sister signatories are " 'entitled to considerable weight.' " *Id.* (quoting Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)).

20. James Buchanan & Co. v. Babco Forwarding & Shipping (UK) Ltd., 3 W.L.R. 907 (1977) (Eng.).

21. *Id.* The House of Lords concluded that as there was "no universal wisdom available across the channel" the English court was required to resort to customary domestic law methods for interpreting the term in question. *Id.*

22. Shere v. Minister of Nat'l Revenue, 1989 C.T.C. 2286 (Can.).

23. *Id.* at 2290.

agreed with [the prior decision]"[24] to identify the rule for its decision.

The examination of foreign jurisprudence by courts interpreting common terms under the Refugee Convention and Protocol should thus be a standard, not an occasional exercise.[25] When treaty-derived terms are used in a statute, as in the Refugee Act, the decisions of "sister signatories" are appropriate sources of statutory interpretation.

## III. RECENT UNITED STATES JURISPRUDENCE

In 1992 the United States Supreme Court decided a case[26] involving forced recruitment by insurgents as a basis for political asylum.[27] The case concerned Jairo Jonathan Elias-Zacarias, a Guatemalan man who was apprehended by United States immigration authorities in July 1987 and held for deportation proceedings.[28] He applied for asylum in the United States[29] and withholding of deportation[30] to Guatemala.

His claims for protection were based on an incident in January 1987 when two armed, masked guerrillas came to his home. The insurgents asked his parents and him to join the group, but they refused. The insurgents told them that they would be back. Mr. Elias-Zacarias was afraid that government forces would retaliate against

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24. *Id.* at 2292.

25. This Article concerns treaty interpretation, not treaty application. The United States Constitution declares that treaties are among sources that comprise the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1883). Also, the incorporation of the treaty definition of "refugee" into the Refugee Act of 1980 resolves any issues of applicability. 8 U.S.C. § 1101(a)(42) (1988).

26. INS v. Elias-Zacarias, 112 S. Ct. 812 (1992).

27. See Karen Musalo, *Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men Who Refuse to Bear Arms for Reasons of Conscience*, 26 SAN DIEGO L. REV. 849 (1989), for a review of United States case law prior to the Supreme Court's decision in *Elias-Zacarias*.

28. *Elias-Zacharias*, 112 S. Ct. at 814.

29. 8 U.S.C. § 1158(a) (1988) provides that "[t]he Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such an alien is a refugee." See *supra* note 7 and accompanying text for the definition of "refugee" under the United States statute.

30. 8 U.S.C. §1253 (h)(1) (1988) provides that "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

him and his family if he joined the anti-government guerrillas. He thereupon left Guatemala in March 1987.[31]

The issue for decision, according to the Supreme Court, was whether "a guerrilla organization's attempt to coerce a person into performing military service *necessarily* constitutes 'persecution on account of . . . political opinion' under . . . [the Refugee Act of 1980]."[32] The affirmative answer to the question given by the United States Court of Appeals for the Ninth Circuit was based on the rationale that "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor"[33]—which the Supreme Court regarded as "untrue"—and "because the persecutor's motive in carrying out the kidnapping is political," which the Supreme Court found "irrelevant."[34]

Justice Antonin Scalia, writing for the majority of the Court, was pointed in his analysis:

> The record in the present case not only failed to show political motive on Elias-Zacarias' part: it showed the opposite. He testified that he refused to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously *believed* that Elias-Zacarias' refusal was politically based.[35]

The Court emphasized that the ordinary meaning of the phrase "persecution on account of . . . political opinion" refers to the *victim*, not the persecutor.[36] As the Court explained: "Thus, the mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion."[37]

As to the argument by Mr. Elias-Zacarias that his neutrality in not taking sides with any political faction affirmatively expressed political opinion, the Court was dubious: "Even if it does, Elias-Zacarias still has to establish that the record also compels the conclusion that he has a 'well-founded fear' that the guerrillas will persecute him *because of* that political opinion rather than because of his refusal to fight with them."[38]

The United States Supreme Court in the *Elias-Zacarias* case has thus taken a relatively restrictive approach to refugee protection for

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31. *Elias-Zacarias*, 112 S. Ct. at 814-15.
32. *Id.* at 814.
33. *Id.* at 815 (quoting Elias-Zacarias v. INS, 921 F.2d 844 (9th Cir. 1990)).
34. *Id.*
35. *Id.*
36. *Id.* (construing 8 U.S.C. § 1101(a)(42)(B)).
37. *Id.* at 816.
38. *Id.* This specific intent requirement does not require "direct proof of his persecutor's motives" but "*some* evidence of it, direct or circumstantial." *Id.* at 816-17.

those who would be punished for resisting forced recruitment by insurgents.[39] The Court would presumably take a similarly narrow approach where the persecutor is governmental in character and the claim is based on punishment for resistance to military service for reasons of conscience.[40] International and comparative perspectives, however, do not support such an approach.

## IV. INTERNATIONAL AND COMPARATIVE PERSPECTIVES

### *A. International Doctrinal Context*

According to the Office of the United Nations High Commissioner for Refugees (UNHCR):

> the necessity to perform military service may be the sole ground for a claim to refugee status, *i.e.*, when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.[41]

No demonstration of a persecutor's motivation to harm a conscientious objector is required. What matters is the impact of the government's act—the denial to the objector of his or her freedom of religion or conscience.[42] Thus, in cases concerning the general application of a law such as conscription where no alternative to military

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39. The Board of Immigration Appeals of the United States Department of Justice has extended this restrictive analysis in a precedent decision concerning a claim of persecution on account of political opinion by a Tamil asylum applicant. *In re* T, No. 3187 (BIA Oct. 13, 1992) (interim decision) (on file with author).

40. The Supreme Court granted certiorari and vacated the lower court's decision in Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990), and remanded the case for consideration in light of *Elias-Zacarias*. INS v. Canas-Segovia, 112 S. Ct. 1152 (1992). The *Canas-Segovia* case involves claims for asylum for two Salvadoran brothers who sought to resist governmental military service on account of their religious beliefs as Jehovah Witnesses. *Id.*

41. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES [hereinafter HANDBOOK]. The *Handbook* has been recognized by the United States Supreme Court to be a useful source of guidance on the explication of the refugee definition. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987). The United Nations High Commission for Refugees (UNHCR) is responsible to supervise the application of the international refugee treaties. *See also* Refugee Convention, *supra* note 2, Preamble; Refugee Protocol, *supra* note 3, art. II ¶ 2.

42. Of course, just because a person evades military service does not make him or her a refugee. "A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat." HANDBOOK, *supra* note 41, ¶ 168. Moreover, not every asylum claimant who objects to military service for reasons of conscience will be a refugee. As the UNHCR makes clear, an applicant claiming to be an objector of conscience must demonstrate the sincerity of his or her convictions: "The

service exists, the persecutor's motivation may be both unnecessary and irrelevant in establishing a well-founded fear of persecution based on an individual's beliefs.[43]

Also, the UNHCR has specifically recognized that a military resister may be considered a refugee if he or she can show a risk of disproportionately severe punishment for reasons of race, religion, nationality, social group membership, or political opinion.[44] The inquiry on this ground concerns the objective indicia of the gravity of the punishment imposed, quite apart from the persecutor's state of mind.

### *B. Comparative Jurisprudence*

Relatively recent decisions of municipal tribunals of other Convention and Protocol signatories demonstrate that an undue focus on the persecutor's state of mind is unwarranted. These authorities hold that, regardless of the persecutor's motivation, disregard of an individual's religious or political beliefs or the imposition of disproportionately harsh punishment can amount to persecution.

#### *1. Canada*[45]

The Canadian Immigration Appeal Board[46] granted asylum to a Jehovah's Witness from El Salvador who refused to serve in the military because of his "strongly held conscientious objections to taking

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genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions." *Id.* ¶ 174.

43. *See* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 33-35 (1983). *See also* 1 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 231-66 (1966).

44. HANDBOOK, *supra* note 41, ¶ 169. The UNHCR recognizes that an application for refugee protection need not demonstrate that he or she is at risk because of an opinion actually held where the persecutor attributes an intolerable opinion to him or her. *Id.* ¶ 80.

45. See generally JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 179-84 (1991) for a discussion of early Canadian decisions on the issue.

46. Until relatively recently, the Immigration Appeal Board (IAB) of Canada, the highest administrative tribunal concerned with immigration matters, determined refugee appeals. In 1989, however, the IAB was restructured under a new name, the Immigration and Refugee Board, and its separate functions are now divided between the Convention Refugee Determination Division (CRDD) and the Immigration Appeal Division. The Immigration Act, R.S.C., ch. 28 (Supp. 4 1985) (Can.). The Canadian administrative cases discussed in this Article are cited by name when possible, but it has been the recent practice of the CRDD to delete identifying information from publicly released decisions in order to protect individuals and their family members. Such cases are cited by docket number and date.

human life."[47] The Canadian Board determined that the requirement of military service could amount to persecution, explaining:

> It matters little that [the applicant] is subjected to the same conscription laws or practices as other young men of military age who are without such scruples; the issue is not equal treatment, but fear of persecution. . . . Were [the applicant] required to enter the military and undertake military duties which would deeply offend his sensibilities, he would, in the Board's opinion, be suffering persecution.[48]

The Canadian Board in this case also addressed the question of "whether the cause of the fear [of persecution] is by reason of race, religion, nationality, membership in a particular social group or political opinion,"[49] and found that the applicant suffered persecution "by reason of religion." The Board explained:

> It is the religion of [the applicant] that is at the root of his convictions and scruples. For the fear of persecution to exist, the state need not deliberately search out such people for systematic and conscious persecution; indeed, here the state apparently allows the witnesses of Jehovah to practice their religion in their Halls without hinderance. However, the Board finds a systematic persecution by reason of religion. It is the failure of the recruiting system to make allowances for the convictions of the conscientious objector that forms the basis of the fear. Such a failure amounts to fear of persecution within the meaning of the Act.[50]

The Board did not require evidence of the state's intent to punish the applicant for being a Jehovah's Witness. "Systematic persecution" that forces an individual to commit acts that are abhorrent to his or her beliefs would suffice to justify refugee protection.

In a variety of decisions, Canadian courts and administrative bodies have granted asylum to applicants who were perceived as political enemies simply because they refused to perform military duty.[51] In one case, the applicant refused to report for military duty because he objected to human rights abuses perpetuated by the Salvadoran army.[52] The applicant had testified that he had never been politically

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47. Ramirez v. Minister of Employment and Immigration, No. V86-6161 at 4 (IAB May 5, 1987) (on file with author).

48. *Id.*

49. *Id.* at 5.

50. *Id.* The Canadian Immigration Act, 1976, reads:

> "Convention refugee" means any person who (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (i) is outside the country of his nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country.

The Immigration Act, R.S.C., ch. 35, § 1(2) (1988).

51. *See, e.g.*, Abarca v. Ministry of Employment and Immigration, No. W86-4030-W (IAB Mar. 21, 1986) (on file with author).

52. *Id.* at 2, 6.

active[53] and there was no evidence indicating that the applicant feared he "would be detained, tortured and beaten, or killed" for his unwillingness to serve in the military.[54] Nevertheless, the Canadian Board held that the applicant's fear was "one of persecution, not mere prosecution."[55] The Board found that the applicant's refusal to serve "has been perceived as a serious or threatening act of political opposition to the system as a whole."[56]

In another case involving a Salvadoran who feared severe punishment for his desertion from the army, the Canadian Convention Refugee Determination Division (CRDD) reviewed international authorities to determine the eligibility of the applicant for asylum.[57] The CRDD held that the applicant's refusal to serve would be considered to be not merely a breach of the law, but an act of disloyalty to the government. Such deserters are labelled "subversives" and "guerrilla supporters." The resulting punishment could be torture or death.[58] The CRDD concluded that the applicant was "a Convention refugee by reason of his political opinion" because "the possible excessive punishment of torture and death would not be for the act of desertion but for the perceived political act taken against the government."[59]

The Canadian authorities do not recognize "draft evaders" or "military deserters" *per se* as refugees. Instead, the tribunals have examined whether punishment for disobedience is consistent with standards of fundamental fairness.[60] For example, the Canadian CRDD granted asylum to an Iraqi citizen who feared execution as a military deserter if he returned to Iraq.[61] The CRDD held that, although fear of punishment "solely for refusal to perform military service" is not considered persecution:

> [i]t has however been recognized internationally that when the refusal to perform military service stems from sincere personal or religious conviction, or an unwillingness to participate in internationally condemned acts of violence, or where the punishment for refusal to perform service is disproportionately severe, this punishment may amount to persecution.[62]

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53. *Id.* at 2.
54. *Id.*
55. *Id.* at 6.
56. *Id.*
57. No. T89-05407 at 3-4, 6 (CRDD 1990) (on file with author).
58. *Id.* at 5.
59. *Id.*; *accord* Padilla v. Canada, F.C. No. 71 (Jan. 31, 1991) (on file with author); No. T89-01690 (CRDD Jan. 8, 1990) (on file with author). There is only one Federal Court of Appeals in Canada.
60. *Cf.* Musial v. Minister of Employment and Immigration, 1 F.C. 290, 38 N.R. 55 (1982) (punishment faced for refusal to serve in Polish military constituted only prosecution, not persecution).
61. No. V89-00924 at 3 (CRDD June 8, 1990) (on file with author).
62. *Id.* at 5 (citing HANDBOOK, *supra* note 41, ¶¶ 167-74).

Based on evidence that the applicant feared that he would be executed because the government would consider him a political enemy of the regime for his refusal to serve, the CRDD determined that the applicant "has established a well-founded fear of persecution for reason of his political opinion (as perceived by the Iraqi government)."[63]

Similarly, the CRDD held in another case[64] that although the applicant, an Afghan national, had never demonstrated strong political convictions, "his refusal to join in the fighting on the government's side [in civil war] could be perceived by the government as an opposing political statement" for which the applicant faced "disproportionately severe punishment."[65] On this basis, the CRDD granted political asylum.[66]

In the only case found involving nongovernmental agents of persecution, the Canadian CRDD granted asylum to an applicant threatened by these agents of persecution.[67] In that case, the applicant, a Lebanese national, went into hiding after he had been ordered to join the Amal militia by armed individuals. The applicant refused to join the militia because he knew that the militia killed innocent civilians.[68] Recognizing that the applicant's refusal to join the militia was for "valid reasons of conscience" and that the applicant's "life was at stake because he refused to join,"[69] the Canadian CRDD held that the applicant was eligible for asylum.[70] Unlike the

63. No. V89-00924 at 4, 6 (CRDD June 8, 1990) (on file with author).
64. No. T89-01610 (CRDD July 1989) (on file with author).
65. *Id.* at 5.
66. Persecution for imputed political opinion is not limited, of course, to cases that involve individuals refusing to perform military service. In Hilo v. Canada, F.C.J. No. 228 (March 15, 1991) (on file with author), the asylum applicant was a Syrian national who was part of a charitable religious group that actively raised funds to send food to needy people in Lebanon. Syrian police, suspicious of the group's intentions, warned the group to stop meeting, then beat and imprisoned one member of the group who had attempted to explain the group's philanthropic motivation. The court found that the Syrian security forces persecuted the group because they thought it was "politically motivated against the government and thus politically undesirable." *Id.* at 4. In this case, there was no nexus between the views of the applicant and the views attributed to him by the authorities. Nonetheless, the court held that the applicant was persecuted on account of political opinion and was a refugee within the meaning of the Refugee Convention.
67. No. M89-00149 (CRDD Feb. 20, 1989) (on file with author).
68. *Id.* at 2.
69. *Id.* at 3. In most instances, of course, nongovernmental agents of persecution are less likely to have an established justice system capable of applying the rule of law to individuals who refuse to be forcibly recruited.
70. *Id.* at 4.

United States Supreme Court, the CRDD did not examine the subjective motivation of the persecutor to determine whether the persecutor's disagreement with the victim's particular beliefs was the specific cause of the persecution.[71]

### 2. *United Kingdom*

Tribunals in the United Kingdom have also recognized that an individual can, in some instances, be eligible for asylum due to a form of systematic persecution, as when South African citizens have faced punishment for refusal to serve in the military because of the individual's abhorrence of apartheid. Three such United Kingdom cases are described by the Immigration Appeal Tribunal.[72] The tribunal explained that when the law of the land involves "a course of conduct abhorrent to a fundamental concept of our society[,] any sanctions imposed to enforce it may amount to persecution, provided the refusal to carry out the course of conduct was based on a ground specified by the Immigration Rules."[73] Reflecting the protection of fundamental human rights implicated by the Refugee Convention[74] and Protocol,[75] the tribunal thus recognized that a government can persecute an individual on account of his or her beliefs merely by enforcing a law of general application.[76]

Tribunals in the United Kingdom have also recognized that punishment for noncompliance with a law compelling military service can "amount to persecution . . . if a State . . . exceed[s] that which is thought to be acceptable limits in enforcement because of its national interests."[77] Regardless of whether the state knows of and disagrees with a victim's opinion or conviction that causes that

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71. *Id.* at 3.

72. Matkov v. Secretary of State for the Home Dep't, Appeal No. TH/106300/83 (3331) at 3 (1984) (on file with author).

73. *Id.* at 5. The United Kingdom Immigration Rules state:

> A person may apply for asylum in the United Kingdom on the ground that, if he were required to leave, he would have to go to a country to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any such claim is to be carefully considered in the light of all the relevant circumstances.

*Id.* at 1.

74. Refugee Convention, *supra* note 2.

75. Refugee Protocol, *supra* note 3.

76. The United Kingdom tribunal did not go as far as the Canadian Board. *See supra* text accompanying note 67. The tribunal in *Matkov* contrasted the South African cases with Doonetas v. Secretary of State, Appeal No. TH/12339/75 (820) (1976) (tribunal held that an individual was not necessarily eligible for asylum because he objected to miliary service based on his religious beliefs) (on file with author). *Matkov*, No. TH/106300/83, at 6. The tribunal specifically stated that the South African cases qualified *Doonetas* in stressing that persecution can result from a law of general application involving abhorrent conduct. *Id.*

77. *Id.* at 7. *See also* R. v. Secretary of the State for the Home Dep't *ex parte*

individual to breach a legal duty, punishment for that breach can constitute persecution.[78]

### 3. *Germany*

The highest Administrative Court in Germany[79] granted asylum to an individual whose religious convictions did not permit him to bear arms.[80] The court found that the asylum applicant

> was involved in a conflict between two duties: on the one hand, the State required him to perform military service; on the other hand, his religion required him to refrain from such service for reasons of conscience. If the State takes action against the person involved in such a conflict, the effect as far as he is concerned is persecution because of his religion.[81]

In focusing on the perspective of the asylum applicant, the court thus did not explicitly require proof of the persecutor's subjective motivation, unlike the United States Supreme Court.

German tribunals have granted asylum in circumstances similar to those described in the Canadian cases. The Bavarian Administrative Court, Ansbach, in 1988 recognized that a valid asylum claim can be based on fear of extrajudicial punishment for reasons of perceived political opposition.[82] That case involved an Ethiopian applicant from the province of Tigre who had refused to serve in the military.

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Binbasi, 1989 Imm AR 595, 599 (Eng.) (Although asylum cannot be granted simply because applicant is unable to "enjoy the full range of freedoms he would enjoy" in the United Kingdom, "a judgment has to be made as to whether the interference with freedom is sufficiently serious to merit asylum.").

78. The British courts have, in other circumstances, found that punishment for breach of a law of general application does not constitute persecution, but those cases did not involve either (1) legal obligations to engage in abhorrent conduct or (2) disproportionate punishment for the breach. *See* Atibo v. Immigration Officer, 1978 Imm AR 93 (Eng.) (applicant was not persecuted simply because he would be punished in Mozambique if he proselytized in public in violation of law prohibiting all public meetings). The distinction featured in *Atibo* is reflected as well in international human rights law, which includes refugee law. *See* Arthur C. Helton, *What is Refugee Protection?*, 2 INT'L J. OF REFUGEE L. 119 (Special Issue 1990). The exercise of freedom of expression (given virtually unqualified protection under the First Amendment of the United States Constitution) is subject to certain restrictions regarding the protection of national security and public order. *See* International Covenant on Civil and Political Rights, March 23, 1967, art. 19(3)(b), 999 U.N.T.S. 171.

79. Administrative courts hear all the cases involving administrative law matters in Germany. The highest administrative court is the German Federal Administrative Court in Berlin.

80. BVerwG IC 41.60, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, LEGAL BULL. No. 6 (1962) (trans. 1981) (on file with author).

81. *Id.*

82. People v. Federal Republic of Germany, VG (AN 19 K 87.35820) (Markus B. Heyder trans., 1988) (on file with author).

Evidence indicated that the government would likely detain, torture, or execute the applicant solely for suspicion of political opposition, a suspicion based on the individual's refusal to serve in the military.[83]

### *4. Austria*

Austrian law also recognizes that an individual who objects to military service based on convictions of conscience may be a refugee. Interpreting the Austrian Asylum Law of 1968, the Federal Ministry of the Interior in 1975 issued a regulation which states that an individual is eligible for asylum if that individual (1) refuses to serve in the military for Convention reasons and (2) is permitted no option to perform civilian rather than miliary service.[84] The rule recognized that severe punishment would ordinarily follow for such a refusal to serve.[85] The elements of this Austrian regulation evince a concern with the impact of the punishment visited upon the individual, rather than with the persecutors' state of mind.

## V. CONCLUSION

A persecutor's desire to overcome an individual's actual belief is not always necessary to establish a well-founded fear on the part of military resisters. Alternatively, the objector of conscience may demonstrate that his or her convictions "are not taken into account by the authorities in requiring him to perform military service"[86] and that "but for" such sincere convictions he or she would not be at risk of serious harm. Others who resist military service may show that disproportionately severe punishment may result from a refusal to serve and that refugee protection is thus warranted. Such an interpretation of persecution "for reasons of" a political opinion accords with the guidance provided by the specialized United Nations agency charged with supervising the application of the Convention and Protocol as well as "sister signatories" of the refugee treaties.

The recent decision of the United States Supreme Court in *Elias-Zacarias* may preclude protection for thousands of asylum seekers given the restrictive interpretation of the term "political opinion."[87]

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83. *Id.*; *see also* Federal Office for the Recognition of Foreign Refugees, No. 438-01986-88 (1988) and No. 438-01318-86 (1986) (Markus B. Heyder trans., 1988) (on file with author) (applicants granted asylum where they faced significant punishment for refusal to serve in the Iraqi army).

84. Austrian Federal Ministry of the Interior Regulation on Deserters and Draft Evaders, Z1.22.50¼-IIC/75 at 3-4 (Markus B. Heyder trans., 1975) (on file with author).

85. *Id.*

86. HANDBOOK, *supra* note 41, ¶ 172.

87. Linda Greenhouse, *Supreme Court Limits Political Asylum Claims*, N.Y. TIMES, Jan. 23, 1992, at A20, col. 1.

Such a limited approach is disfavored by international standards and comparative jurisprudence.[88]

Essentially, these authorities would promote the notion that resistance to compulsory military service, including forced recruitment by insurgents, can be a basis for a claim of refugee protection, particularly when the penalties imposed for such resistance are disproportionate[89] or when such service may involve participation in the systematic violation of fundamental human rights.

For adjudicators to focus on the specific intent to persecute and on the reasons for persecution as exclusionary elements may therefore unduly narrow the scope of refugee protection.[90] Such an intent would often be difficult to establish, even indirectly from the circumstances, when other plausible objectives could be attributed to a persecutor—for example, raising military forces, or enforcing discipline in guerrilla groups. Such deferential treatment by the Court in *Elias-Zacarias* was unwarranted and should not be adopted in other jurisdictions or extended unnecessarily to the judicial review of other types of asylum decisions in the United States.[91]

Given the divergence between international standards and comparative jurisprudence and the current United States doctrinal position, it may be incumbent upon Congress through legislation, or upon the agency responsible for implementation through the rule-making power,[92] to clarify criteria and the ambit of protection available

88. Indeed, one commentator has argued that the language and purpose of the Refugee Convention compel a liberal, as opposed to a restrictive, interpretation. A restrictive construction, according to this commentator, is nothing less than a "political" choice. *See* Walter Kälin, *Refugees and Civil Wars: Only a Matter of Interpretation?*, 3 INT'L J. OF REFUGEE L. 435 (1991).

89. Surely such a claim could be established when the nature of harm feared is extrajudicial execution.

90. *See* T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. OF REFUGEE L. 5 (1991) (arguing that too much emphasis is placed by adjudicators on identifying the cause of persecution in United States practice).

91. *See* Bret I. Parker, Comment, Immigration and Naturalization Service v. Elias-Zacarias*: A Departure from the Past*, 15 FORDHAM INT'L L. J. 1275, 1312 (1991-92). The Ninth Circuit took such a limiting approach recently when it remanded the case of Jose Canas-Segovia to the Board of Immigration Appeals holding that, while the Supreme Court's persecutory motive requirement applies to claims based on religious as well as political grounds, claims based on attributed political opinion continue to be cognizable. Canas-Segovia v. INS, 970 F.2d 599 (9th Cir. 1992). Claims of persecution on account of opinion imputed to a persecutor for resistance to military service thus remain available in the United States. *Id.* This conclusion is strengthened by a recent agency interpretation. *See* INS Op. Gen. Counsel, Continued Validity of the Doctrine of Imputed Political Opinion (Jan. 19, 1993) (on file with the author).

92. The Lawyers Committee for Human Rights in 1991 petitioned the United States Department of Justice seeking a rule on substantive eligibility criteria for refugee

under the refugee definition. Such clarification could promote respect for the obligations of the United States under the international refugee treaties.

status and asylum. Among the criteria proposed is: "Punishment for conscientious objection to military service may be persecution on account of political opinion or religious belief . . . ." Lawyers Committee for Human Rights, Petition to the Department of Justice Seeking a Rule on Substantive Eligibility Criteria for Refugee Status and Asylum at 20 (1991) (on file with author). As of this writing, no action has been taken by the Justice Department on the petition.