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**NO COMITY IN ERROR : ASYLUM AND
« WARS OF CHOICE »**

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1. Introduction

On 29 October 2004, a U.K. Immigration Appeal Tribunal (« I.A.T. ») granted the asylum appeal of a Russian military deserter named Andrey Krotov (« AK »).¹ AK, a Russian citizen born in 1977, had initially evaded military service in the Russian army in 1996 when he first became eligible to serve.² In January 2000, after call-up and three months of training, he was sent to Grozny, in Chechnya. He deserted shortly afterwards. He made his way, via Ukraine, to the U.K., where, on arrival in February 2000, he claimed asylum immediately, pursuant to the United Nations Convention relating to the Status of Refugees 1951 and Protocol of 1967 (« the Convention »).³

On 1 June 2001, the Home Office deemed AK to be an illegal entrant, and removal directions were served upon him. AK appealed to the Asylum Adjudicator, but the appeal was dismissed in a determination dated 20 December 2001, on the grounds that his situation did not engage the Convention grounds for refugee status. AK then appealed to the I.A.T. Following a hearing on 22 April 2002, it issued its determination on 2 May 2002, dismissing AK's appeal against the Adjudicator's decision. However, it granted leave to appeal to the Court of Appeal on the ground that it was arguable « the Adjudicator's findings on the applicant's objections to performing military service are flawed ».⁴

In its judgement dated 11 February 2004, the Court of Appeal⁵ allowed AK's appeal. It held that refugee status could be available to a post-desertion applicant if he believed he could be required to participate in military action involving breaches of the basic rules of human conduct. Such an applicant needed to show that there had been a systematic basis for the inhumane acts he might otherwise have been required to carry out, as a result of deliberate policy or official indifference. The Court of Appeal then remitted the case to the I.A.T. for reconsideration of all the relevant materials placed before it in order to ascertain whether AK could provide sufficient evidence of the realities of the war in Chechnya in relation to the level and nature of the conflict at the time of his desertion (1999 – 2000), and the attitude of the Russian Government towards it.

The I.A.T. conducted this reconsideration on 18 May 2004, issued its judgement on 29 October, and allowed AK's appeal. It concluded, in paragraph 31 of its determination, that

... [O]n the evidence which we have had as to the position at what we have taken as the relevant time, we have concluded that the evidence shows that breaches of the basic rules of human conduct

are sufficiently widespread that it should be inferred that the Appellant was at a real risk of being required to participate in such acts in the broad sense described, that he would have been formally or informally punished for any refusal to do so, and that fear of the consequences was a significant part of his claim for asylum.

Fundamental to the issue of AK's asylum claim was whether his desertion from the Russian army could be placed within the Convention definition of « refugee » so as to entitle him to seek asylum.⁶ This definition is given in Article 1A(2) of the Convention,⁷ and applies to any person 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.

« Convention reasons » as listed in Article 1A(2) must normally be personal, and assessed on an individual basis.⁸ As explained in the U.N. High Commission for Refugees *Handbook*,⁹ the original 1951 Convention was designed to co-ordinate assistance to refugees uprooted by World War 2; its 1967 Protocol effectively allows state parties to apply the Convention to new situations as and when they should occur.¹⁰ Consideration of refugee status pursuant to the Convention is thus a matter of treaty obligation, while procedures for doing so are left to individual member states.¹¹

There is no automatic entitlement to refugee status merely due to the consequences of an armed conflict.¹² Similarly, « [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 ». ¹³ However, AK's objection to the war in Chechnya was to his probable participation in « actions which breach the basic rules of human conduct in war ». ¹⁴ Accordingly, his disagreement with that war amounted to a political opinion, punishment for which created his « well-founded fear of persecution ».

AK's argument had failed initially before the Adjudicator, who had ruled that a maximum term of 7 years imprisonment by the Russian Federation for desertion did not amount to persecution.¹⁵ The Court of Appeal, however, instructed the I.A.T. to adopt a two-staged test, and thereby to link the cause of AK's flight (the inhumane manner in which the Russian Federation pursued its campaign in 1999 – 2000 against the Chechen separatists) to the likely result of desertion (persecution-by-imprisonment).¹⁶ In other words,

once evidence of a systematic pattern to abhorrent acts carried out in a particular conflict had been produced, it was then open to a court to determine whether fear of punishment for refusing to participate in it was the genuine reason motivating the asylum claim.

This altered framework of analysis allowed the I.A.T. to observe, in pertinent part, that

[Although ...] soldiers may be able to decline to participate actively in atrocities without punishment ..., it is not necessarily so clear that those who are not punished for not actively participating in repugnant activities should be regarded as not persecuted, We also do not regard it as impossible for there to be policies ..., breaches of which do not lead to punishment but which can lead to ostracism by fellow soldiers or non-promotion; those constitute pressures which should not be ignored It should not be assumed that the only basis for showing a « requirement » to participate is a formal or informal punishment system.¹⁷

It then concluded that, on the evidence,

[B]reaches of the basic rules of human conduct are sufficiently widespread that it should be inferred that the Appellant was at a real risk of being required to participate in such acts in the broad sense described, that he would have been formally or informally punished for any refusal to do so, and that fear of the consequences was a significant part of his claim for asylum.¹⁸

The Convention is silent as to conscientious objection. Fortunately for AK, he won his appeal, yet it is disturbing that, of three issues raised - the state use of armed force, the means and methods utilised, and the state's power to compel military service, only one was decisive to AK's claim for asylum: the means and methods utilised. The underlying rationale for the use of force, and the right to object on grounds of conscience were deemed non-justiciable. Of these latter two issues, it is arguably the judicial acceptance of the state's power to compel military service that carries the greatest potential for international harm at present.

A state's power to compel military service can signal a lack of democratic transparency. Accordingly, this discussion is structured as follows. In Part 2, the non-availability of a right, either « absolute » or « partial », of conscientious objection, is reviewed. In Part 3, the non-justiciability of aggression is outlined, in order to foreground the serious consequences entailed by a state's power to compel. In Part 4, the economic and

human ramifications of compulsion are then considered. It is concluded that « wars of choice » in particular will continue to provide a rich source of highly problematic claims for political asylum.

2. Conscientious Objection

The *Handbook* notes that where military service is compulsory, the failure to perform this duty is invariably made a criminal offence.¹⁹ Failure to serve can take two forms: desertion, and refusal. Desertion is viewed seriously as it may increase the dangers posed to those who do not desert, and can be subsumed in a charge for treason. A refusal to serve is simply unlawful conduct. Alternatively, a legal substitute may be available, either in the form of national civilian service and/or a stance of conscientious objection. Compulsory military service thus exhibits the ongoing tension between individual rights and duties in relation to the state - a tension reflected in the degree of cultural relativism still tolerated world-wide in many legal areas. This section considers specific aspects of the practice.

2A. The Prevalence of Conscription

Compulsory military service is decided on a state-by-state basis. Different domestic perceptions of military need are the result. Even in those states in which service substitution or conscientious objection is available, the basis for military exemption differs. In contrast, whether a « human right » of conscientious objection even exists was reviewed in an earlier asylum case by the Court of Appeal,²⁰ and subsequently discussed by the House of Lords.²¹ In *Sepet* two Turkish men of Kurdish origin separately evaded compulsory conscription in Turkey on the grounds that neither wished to run the risk of eventual participation in military action in Kurdish areas of the country.²² Turkish law does not provide any non-combatant alternative to military service, and evaders are liable to prison sentences of between 6 months and 3 years, irrespective of the reasons for their refusal to serve.²³

The claims in *Sepet* for asylum in the U.K. were first rejected by the Secretary of State, and subsequently by the Special Adjudicator, the I.A.T., and the Court of Appeal.²⁴ In also rejecting the appeals, the House of Lords examined the extent to which any uniformity of state practice exists in relation to the issue of compulsory conscription. It found that, while most European states either have no conscription or provide alternatives, of 180 states surveyed in a War Registers International report (1998), some form of conscription exists in 95, 52 of which recognise no right of conscientious objection.²⁵ A further 7 states make no such provision. Nor could a « right » of conscientious objection be

discerned from the available evidence of human rights law in relation to the prohibition of involuntary servitude.²⁶ By way of example, Lord Bingham²⁷ pointed to the express exclusion from the prohibition of « forced or compulsory labour » found in Article 8(3)(c)(ii) of the 1966 International Covenant on Civil and Political Rights :

8(3)(c) For the purpose of this paragraph the term « forced or compulsory labour » shall not include: ...

(ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors.

A « right » of conscientious objection as an aspect of the freedoms of thought, conscience and religion was also discounted.²⁸ Instead, the converse was held to be true: states are deemed to have a right to compel military service, and to punish military *refuseniks* under domestic criminal law.

2B. Refusals to Serve

In relation to AK, this aspect of *Sepet* was further refined by the Court of Appeal. Neatly side-stepping an accusation that it was « attempting to spell out an exemption from a generally-recognised power to compel citizens to fight », ²⁹ the Court of Appeal felt the prevalence of particularly violent acts seen in some wars arguably would better substantiate a refusal to serve in them. If this were the case, punishment could constitute persecution. In respect of the evidentiary burden on an asylum seeker to prove such acts were occurring at the relevant time, the Court clearly preferred domestic courts to apply an international law test in order to verify the true motives for a post-desertion asylum claim. It concluded that courts must

[H]ave regard to the realities of the particular conflict in which an applicant has refused to participate rather than to the specific question whether or not that conflict has yet been internationally condemned.³⁰

As for AKs « partial » political belief, or conscientious objection to the war in Chechnya, recognition as a refugee had to be based on the genuineness of his « political, religious, moral or conscientious objection to military action in general ». ³¹ As noted by the Court of Appeal, « he had no general objection to performing military service ». ³² This « partial » objection to military service however had previously led the Adjudicator to view AK's claim to refugee status with scepticism. He concluded :

25. He does not qualify for refugee status since, according to my reading of his evidence, he has no genuine political, religious, moral or conscientious objection to military action in general. ...³³

AK's human rights claims on the basis of Articles 2, 3, 6, and 8 of the European Convention of Human Rights³⁴ were similarly dismissed :

The extra-judicial executions of deserters during the period 1994 to 1996 have apparently long since ceased. It cannot be said that imprisonment for a maximum term of seven years for desertion during a war is disproportionate and there is no evidence that any punishment suffered by the Appellant would be disproportionately severe for any Convention reason.³⁵

On granting leave to appeal to AK, the I.A.T. posed the following question :

Does a particular war need to have been internationally condemned before an asylum seeker can succeed in a claim under the Refugee Convention on the basis of a partial objection to it? If yes, has the conflict in Chechnya been internationally condemned? If no, does it meet whatever is the appropriate test ?³⁶

The issue of the test to be applied arose due to a conflict at I.A.T. level, as guidance from the *Handbook*, paragraph 171, was unclear :

Not every [conscientious objector] conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. *Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to the basic rules of human conduct*, punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution. [*Emphasis added.*]

In the earlier case of *Foughali v. S.O.S.H.D.*,³⁷ an I.A.T. panel decided that the appropriate test should be determined on the basis of « sufficient objective evidence of violations of the basic rules of human conduct », ³⁸ However, the I.A.T. panel in AK's case preferred a conflict first to have been internationally condemned, in order to avoid judicial comment on events occurring elsewhere.

In *AK*, the approach in *Foughali* was preferred. As noted by Potter, L.J.,

[W]hile it must be acknowledged that the Convention itself is silent as to conscientious objection and the norms of international law, I consider that the terms of the *Handbook* and court decisions have recognised a point at which punishment for objection to participation in a particular conflict on grounds of its legality may properly be regarded as establishing persecution for the purposes of the Convention.

The basis upon which they have done so is ... by treating a genuine conscientious refusal to participate in a conflict in order to avoid participating in inhumane acts required as a matter of state policy or systematic practice, as amounting to an (implied or imputed) political opinion as to the limits of governmental authority, which thereby attracts the protection of the Convention ...³⁹

... .

[W]hilst « international condemnation » is serviceable for descriptive purposes, it does not define the category. Strictly speaking international condemnation is only one indicator – albeit a highly relevant one – of whether the armed conflict involved is/would be contrary to international law.⁴⁰

Accordingly, the phrase « type of military action ... condemned by the international community as contrary to the basic rules of human conduct »⁴¹ cannot extend to a war in principle; justiciability is confined to an evaluation of relevant, objective evidence as to the manner in which a war is fought. Any « window of opportunity » for a successful post-desertion asylum claim thus remains very small indeed.

3. The « International Law Test », and Justiciability

The international law test approved by the Court of Appeal requires the military conduct of a war to be examined in order to gauge whether or not it is in compliance with international humanitarian law, e.g., that contained in the 1949 Geneva Conventions on the laws of armed conflict, and their two 1977 Protocols.⁴² The Court further confirmed that the phrase « basic rules of human conduct » has a distinct legal meaning both within the international law of armed conflicts, and international human rights law.⁴³ It noted that an international law test facilitated a better approach to desertion cases, for which « international condemnation » provided one « highly relevant » indicator.⁴⁴ This section considers in turn some current problems with this test.

3A. The « International Law Test »

Once the I.A.T. agreed that Russian forces had breached the rules of human conduct at the relevant time, it then went on to assess whether AK might, or would have been required to participate in such actions. Available evidence included a 2001 U.S. State Department Report on Russia, C.I.P.U. Reports of 2000 and 2001, an Amnesty International Report for 2000, and Human Rights Watch Reports for 2000 and 2001.⁴⁵ The panel then considered written representations from the U.N. Human Rights Commissioner after a visit to Chechnya in Spring 2000, and Resolutions adopted in 2000 and 2001 by the U.N.H.R.C.⁴⁶ The Council of Europe, in its investigation of conditions in Chechnya, elicited unsatisfactory replies from Russia, and in early 2001, the Parliamentary Assembly of the Council of Europe passed its own Resolution expressing concerns.⁴⁷

As noted by the I.A.T., the many reports recognised that « such international condemnation as there was related not to the war in principle but to the disproportionate force used in its conduct »,⁴⁸ and that due to limited reporting and « no real effort by the Russians to investigate »,⁴⁹ the evidence was general, and often based on hearsay. Nevertheless, it concluded in pertinent part that

... [A]t least during this period of large scale conflict the evidence shows that breaches of those basic rules were widespread. The evidence suggests that the Russians had something to be ashamed of and, knowing that, sought to preclude outside scrutiny.⁵⁰

The I.A.T. then confined this conclusion specifically :

[T]he condemnation relates to the absence of investigations and to the manner of the conduct of the war. This perhaps adds to the sense of not having a specific test of international condemnation for these purposes'.⁵¹

This limited determination reflects the fact that, despite the very real progress made in the modern era to restrain the outbreak of armed conflict, wars continue to occur. In view of the incomplete nature of international criminal justice, the underlying rationale for the use of force in any given armed conflict remains beyond the scope of independent judicial enquiry.⁵² Indeed, to focus attention on the modern restraint of inter-state war is to misconceive not only the traditional usefulness to states of war, but further, to ignore the political space within which states endeavour to retain the right to use armed force. As such, « aggression » remains a political, rather than a legal, concept.⁵³

The background to this situation is straight-forward enough. The « justness » of the use of armed force became a real issue during the League of Nations era,⁵⁴ and efforts were made throughout the 1920s to restrain what had previously been viewed as a right. The Kellogg-Briand Pact of 1928⁵⁵ was one such attempt. Legally speaking, the Pact did not prohibit war,⁵⁶ yet it was referred to by the Military War Crimes Tribunals at Nuremberg and Tokyo after World War 2 as one basis for the condemnation of Axis crimes against the peace.⁵⁷ As for the Geneva Conventions of 1949, and two associated Protocols of 1977, the rules for international(-ised) and non-international armed conflicts are kept clearly separate;⁵⁸ it has been left largely to the human rights organisations to press for a more comprehensive approach to the use of armed force.⁵⁹

Although efforts to deter armed conflicts have generally operated better through U.N. frameworks,⁶⁰ one crucial perspective which should be maintained is that it is only in relation to the rationale for which a war is waged that contemporary attitudes have altered. No express provision is made in the Charter for civil wars or non-international armed conflicts – the most frequently-occurring type of armed conflict.⁶¹ U.N. member states are bound by Charter Article 2(4) not to use or threaten to use armed force against the territorial integrity or political independence of any other state, or in any other manner inconsistent with the purposes of the U.N.,⁶² and Charter Article 51 memorialises the inherent right of self-defence.⁶³ As for collective self-defence, the international community remains dependent on so-called coalitions of the willing,⁶⁴ as an autonomous armed force for the U.N. has never been formed.⁶⁵

It is thus not yet open to the courts independently to differentiate between those armed conflicts which involve some context of national self-defence or other pursuit of U.N. purposes, and those which do not. The U.N. Security Council has a primary obligation under Chapter VII of the Charter to determine whether breaches of, or threats to, international peace and security have occurred, and what action to take. Although such a determination will have the force of law,⁶⁶ the Security Council need not consult law in its handling of disputes,⁶⁷ and Charter Article 103 permits it to modify the application of traditional rules of customary law in a given situation.⁶⁸ Such a political discretion alone leads to heightened sensitivity regarding the demands of international comity.

Moreover, aggression, as a legal concept, remains without a definition in international law. Adoption of U.N.G.A. Resolution 3314 (XXIX) of 14 December 1974, on a Definition of Aggression, was by consensus vote; the definition is thus political.⁶⁹ Unless there is U.N. Security Council

condemnation of an internal armed conflict pursuant to Chapter VII of the Charter, the term « aggression » is generally assumed to characterise only state-to-state uses of armed force. Whether the term can ever be used independently to describe military action taken domestically within sovereign territory remains highly controversial.⁷⁰ Alternatively, the new International Criminal Court (« I.C.C. ») will have jurisdiction over the crime of aggression, but only as of 2009.⁷¹

Otherwise, a situation of aggression might be « discovered » by *ex post* analysis of state action taken against attack, pursuant to Article 51.⁷² However, as was confirmed by the Nuremberg Military War Crimes Tribunal, a legal right of self-defence is confined by the narrow and rather obsolete framework of the *Caroline* case of 1837,⁷³ and ostensibly requires an armed attack to occur, first. More realistically, there is a growing recognition of an extension of this doctrine to encompass anticipatory, or pre-emptive self-defence, but that, too, remains controversial as one state's pre-emptive self-defence can resemble another state's view of aggression.⁷⁴

Therefore, the scope of independent judicial analysis is constricted. Although an international law test in post-desertion asylum cases affords a greater degree of discretion within which international condemnation may play a supporting role, the known pitfalls of international comity must be contemplated. Potter, L.J., carefully remarks on the dangers of jurisdictional over-reach, as follows :

In dealing with such matters, the courts of this country are not purporting to exercise jurisdiction, whether territorial or international, over the national of another state in respect of an internationally recognised crime alleged against him, as in the case of General Pinochet,⁷⁵ but are examining the conditions existing and actions taking place abroad for the purpose of deciding the rights of asylum recognised and afforded in this country to refugees. While it may be that, in other areas of its jurisdiction, the English court is reluctant to adjudicate upon the nature or legality of actions taking place abroad, it does not shy away from doing so when such a process is an inevitable ingredient of the jurisdiction to be exercised.⁷⁶

3B. The Justiciability of « Aggression »

Recent cases in the U.K. have confirmed the present non-justiciability of « aggression ». In *The Campaign for Nuclear Disarmament (« CND ») v. The Prime Minister of the United Kingdom*,⁷⁷ an advisory declaration by judicial review was sought of the meaning of U.N. Security Council

Resolution 1441 of 8 November 2002 – in particular, whether Iraqi non-compliance with its terms permitted third states to take military action. The case, a thinly-veiled challenge to the legality of U.K. participation in the 2003 Iraq war, was dismissed as non-justiciable by a Divisional Court of three.⁷⁸ The Court held it was unnecessary to interpret Resolution 1441 to determine personal rights or duties under domestic law. The Resolution had not been incorporated into English domestic law, and even if it had been, the Court would still so decline if to do so would be damaging to the public interest in the field of international relations, national security or defence. Moreover, the Court found there to be no sound basis for believing the U.K. Government had been wrongly advised as to the true position in international law.

Subsequently, in *Jones and Milling, et al. v. Gloucestershire Crime Prosecution Service*,⁷⁹ the Court of Appeal (Criminal Division) similarly concluded that the defendants' belief in the illegality of U.K. participation in the 2003 Iraqi war provided no defence, for purposes of Criminal Law Act 1967, section 3, to a charge of criminal damage. Unlike in *CND*, the defendants in *Jones & Milling, et al.*, argued that personal rights and duties under domestic law were at issue: a perceived duty to act to thwart the U.K.'s « unlawful » participation had made them subject to criminal prosecution. They had been charged with various offences of criminal damage, arson and conspiracy to cause criminal damage in March 2003 at R.A.F. Fairford - at the time, a 24-hour operational military airbase, a N.A.T.O. stand-by base, and base for visiting Allied U.S. forces. When arrested, the defendants indicated their intention had been to prevent the U.S. and the U.K. from using the base for war crimes in Iraq.

The appeal originated from a hearing preparatory to trial, in which Bristol Crown Court had ruled against the defendants, as a belief in the illegality of the war against Iraq, and of the U.K.'s participation in it, were simply not relevant to any defence available to them. The Court of Appeal was largely in agreement, and its analysis of the justiciability of an international « crime » of aggression is enlightening.⁸⁰ After first reviewing the Crown Court's ruling as to the relevant elements of domestic criminal law, and noting that the word « crime » in s. 3 of the Criminal Law Act 1967 means a « crime in domestic law », the Court of Appeal, stated, in pertinent part, as follows :

Whether the alleged international crime of aggression is a crime in domestic law depends upon the effect of public international law rules in English Law.⁸¹

The Court briefly reviewed relevant domestic authorities on the subject, and further reasoned, in pertinent part :

There is no doubt, therefore, that a rule of international law is capable of being incorporated into English law if it is an established rule derived from one or more of the recognised sources, that is a clear consensus, evidenced by the writings of scholars or otherwise, or by treaty. In our view, the question as to whether or not a rule of international law forms part of English law is governed by the principle of certainty; and the question as to whether or not it constitutes a crime depends upon an analysis of whether or not a breach of the rule can properly result in penal consequences. The mere fact that an act can clearly be established to be proscribed by international law, and is described as « a crime » does not necessarily of itself determine its character in domestic law unless its characteristics are such that it can be translated into domestic law in a way which would entitle domestic courts to impose punishment.⁸²

The Court of Appeal then examined authorities further afield, such as the Nuremberg Charter, and the Rome Statute of the I.C.C. In relation to crimes against the peace, or « aggression », the Court preferred not to pronounce on whether the Nuremberg and Tokyo Military War Crimes Tribunals were exercising jurisdiction as courts under the Agreement and Charter, or instead were acting as domestic courts applying international law principles.⁸³ A discussion paper issued by the Assembly of States Parties of the I.C.C. in September 2003 was then reviewed as it gave details of the on-going drafting work to establish a legal definition of aggression. The Court of Appeal concluded, in pertinent part :

[W]e have already noted, ... some of the problems which prevent the I.C.C. from having jurisdiction over the crime of aggression. One of the preconditions to the exercise of the Court's jurisdiction in the [draft] definition is ... that the Prosecutor has to ascertain whether the Security Council has made a determination of an act of aggression committed by the state concerned. ... [Another] option for discussion enquires whether or not the Court can proceed with the case in the absence of any determination by the Security Council or whether it has to dismiss the case. It is difficult to see in these circumstances how it can be said that there is, accordingly, a firmly established rule of international law which establishes a crime of aggression which can be translated into domestic law as a crime in domestic law, where there is no consensus as to an essential element of the crime.⁸⁴

Accordingly, the distinction between universal condemnation on the one hand, and international jurisdiction on the other, is mirrored in a corresponding distinction between prescriptive and enforcement jurisdiction at domestic state level – at least, in the U.K. Although the International Criminal Courts Act 2001⁸⁵ provides the statutory basis in the U.K. for the domestic implementation of the three crimes already defined under the Rome Statute,⁸⁶ there is as yet no clear legal basis for an international crime of aggression. This makes it impossible for conscientious objectors – either « partial » or « absolute » - to point to an « illegal » armed conflict, e.g., one not waged for national self-defence, when seeking to prove the genuineness of their political opinion.

3C. The « Competence » to Determine Aggression

Even though the I.C.C. is to have jurisdiction to try persons for the crime of aggression at some point after 2009,⁸⁷ the issue of the competence to determine a situation of aggression continues to raise difficulties. This issue was recently discussed at an informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held on 13 - 15 June 2005 at Princeton University, in New Jersey.⁸⁸ The purpose of the session was to facilitate the work of the Special Working Group, and to reflect opinions and conclusions regarding different issues. It was also decided to establish an online « virtual working group » to allow ongoing discussions outside regular and other inter-sessional meetings.⁸⁹

Noting that the relevant provisions in the Rome Statute of the I.C.C. had been incorporated quite late in the drafting process, and « were not necessarily clear » as they were not the result of specific negotiation,⁹⁰ the participants in the working group focused their attention on a 2002 discussion paper.⁹¹ This suggested that « determination of the existence of an act of aggression by an appropriate organ should be made a precondition for the exercise of the Court's jurisdiction ... ».⁹² The possibilities reported included the U.N.S.C., the U.N.G.A., the I.C.J., and the Assembly of States Parties of the I.C.C. itself.⁹³

The working group again highlighted a central difficulty. Although the Security Council, pursuant to Article 39 of the Charter, has the primary responsibility to determine a breach of international peace and security,⁹⁴ some in the working group were concerned that handing the prior determination of aggression to that organ could effectively leave the new I.C.C. in a « state of paralysis ».⁹⁵ As « the makers of the U.N. – chief among which was the U.S. – created a political rather than a legal system' after World War 2,⁹⁶ the Security Council need not view international law as a yardstick regarding domestic questions for Charter purposes.⁹⁷ However, if competence to determine aggression is

transferred to the I.C.C. or is shared with the Security Council, the existing distribution of power and authority originally designed into the Charter is undermined. Even though the I.C.C. was created to act as a superior enforcement body,⁹⁸ maintaining the *status quo* could equally undermine « the development of an autonomous definition of the crime of aggression, particularly where a body guided by political rather than legal considerations would make such a determination ».⁹⁹ In any event, Article 13 of the Rome Statute gives further insight into the issue of competence, as jurisdiction is differently privileged, depending on the referring body: states, the Security Council acting under Chapter VII of the Charter, and/or independent Prosecutorial initiative.¹⁰⁰

The working group noted that the I.C.C. Prosecutor has competence to proceed with an independent investigation, unless prevented by Article 16 of the Statute.¹⁰¹ Article 16 allows the Security Council, acting by Resolution adopted under Chapter VII of the Charter, to defer an investigation or prosecution for twelve months, renewable, thereby affecting referrals from states, as well. As each permanent member of the Security Council holds a veto power, even in situations involving itself, the permanent members and four non-permanent members must all first agree.¹⁰² The resulting potential for deadlock then has obvious implications for future armed conflicts such as that ongoing in Chechnya and the surrounding regions, over which the I.C.C. might someday wish to assert its competence.

It was also noted that penalising an « attempt » to commit an act of aggression, while perhaps desirable, would prove problematic should a body other than the I.C.C. be charged with predetermining the crime¹⁰³; the I.C.C. would need still to find sufficient grounds for prosecution in individual cases. Criminalising « attempt » further highlights the need for separate rights of defence of an accused.¹⁰⁴ Other issues of present relevance include aggression as a « *leadership* crime » (excluding mere participants, such as soldiers executing orders),¹⁰⁵ the distinction between state acts of aggression and individual participation in a collective act,¹⁰⁶ and the legal position of a « leader » who could, but chooses not to prevent an act of aggression.¹⁰⁷

The fact that some states are better able than others to promote and wage war (e.g., the war on terror¹⁰⁸) bodes ill for any growing political momentum to create an « autonomous definition of the crime of aggression ». What also emerges from these various points is that, once aggression has a legal definition, not only will military leaders face the need to protect their personnel from charges of genocide, crimes against humanity and war crimes, but further, they will be placed in a position where they must also be prepared to challenge their

political masters regarding particular state uses of armed force. This will undoubtedly appear untenable to many, as following « superior orders » is a fundamental of military training.¹⁰⁹ Until such a definition appears, however, the case for recognition of a human right – either « absolute » or « partial » - of conscientious objection is compelling.

4. Economic and Human Consequences of Conscription

On the issue of a « right » of conscientious objection, Lord Hoffman in *Sepet* waxed somewhat unsympathetically and certainly more concisely when reflecting on the potential for a personal conflict between conscience and a « duty » to the state. Comparing a refusal to serve in the military with other acts of civil disobedience, such as a targeted refusal to pay taxes, or a protest at new road building,¹¹⁰ he indicated that a risk of legal sanction always arises when laws are broken. It is of the essence of law, he seemed to intimate, that human activity is regulated. For example, an objection based on the human right to manifest a religion or belief, Lord Hoffman noted, could be limited so far as « necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others ».¹¹¹

However, and despite the obvious societal benefits provided by laws for taxation, road building, the protection of the public safety and strong individual freedoms, it is not the provision of public benefits, *per se*, that causes concern so much as the means adopted by which to make such provision. In other words, were the judiciary to adopt a framework of analysis regarding compulsory conscription similar to that utilised to make justiciable the manner in which a war is waged, various disturbing aspects of democratic opacity could be made more distinguishable for purposes of recognising a « right » of conscientious objection, and by way of corollary, the acceptance of military-based claims for asylum on grounds of political conscience. In particular, while military conscription arguably provides a less expensive method to achieve military readiness, it is also one which shares many characteristics in common with involuntary servitude. Such pragmatic economic and human considerations are now examined.

4A. The Economics of Conscription

To point out that the industrial-financial balance of forces in conjunction with political-social factors largely determine overall state military expense is trite economics,¹¹² but the focus then turns quickly towards examination of the economic model to be chosen for this purpose. In terms of resource allocation, state investment in arms-related industries may be a rational choice both for citizens and decision-makers as it promotes technological

advance. For example, the development of a military-industrial complex, so-called during the Cold War (albeit arguably apparent much earlier), became especially prominent in the U.S.S.R.¹¹³ However, and as noted by Giddens, military leaders and manufacturers in the U.S.S.R., as elsewhere (most notably the U.S.), were notorious for their combined influence over political choices and policies.¹¹⁴

Despite the many changes in geopolitical circumstance since the end of the Cold War,¹¹⁵ it can still be argued that a close meshing of military and industrial interests remains apparent in many societies.¹¹⁶ In terms of finance, on-going developments in military hardware reflect the more-or-less fixed costs or benefits of production. Civilian spill-over effects or opportunities are also possible.¹¹⁷ However, a compulsory conscription system such as that in operation in Russia must by definition reduce the price of military readiness, by the transfer of personnel costs into economic externalities, rather than internalities.¹¹⁸

Compulsory military conscription simply costs less, as does a subsidy-or-surrogate system in which conscripts may buy themselves out of service obligations. According to a recent news report, the Russian defence ministry estimates that the Russian Federation calls-up about 350,000 annually for compulsory military service, 90.5% of whom avoid or delay the draft (rising to 97% for Muscovites). While many young men manage to escape service, allegedly by paying money to senior officers,¹¹⁹ the Russian Defence Ministry maintains publicly that conscripts remain necessary until a system for paid volunteers can be instituted, at some point in the future.¹²⁰

In terms of the source of a power to compel, the formulation of national laws and rules is left to national constitutional arrangements, a task with which an elite minority is normally charged. How that minority is chosen will naturally vary from state to state, but compulsion can appear efficient if only to secure the state's monopoly on the use of armed force. The transition from private armies¹²¹ to state ones coincided with the slow development of modern international state-centric structures - an historical occurrence fundamental to any understanding of the exercise of jurisdiction within state territory. The power to compel - once made legally enforceable - requires no further negotiation as to its terms. The source of legal enforceability however may be somewhat less clear.

At least in terms of economic function, then, a universal system of compulsory military service obviates the need for negotiation. This has its benefits. For example, paying for services costs money, as do military recruitment drives.¹²² If there is nothing to trade, a compulsory

system cannot reflect the full social costs, unlike a normal employment situation. When the time arrives to utilise national armed force either externally or internally, troop numbers already exist. Should a government rule by decree or intimidation, rather than by consent, revenue can be taken directly from the state's patrimony without levying taxes. A compulsory military thus allows a state to bypass the necessity for realistic taxation and exposes to the public gaze only the barest costing of military preparedness.

War can then appear « cheaper » to wage, while the converse is true if labour costs are fully negotiated.¹²³ However, as a non-transparent cost in the use of armed force, compulsion effectively facilitates the outbreak of war, and, in particular, « wars of choice ». As noted by Balakrishnan, « the terms for the production and appropriation of resources ... determine the agents and stakes of armed conflict », ¹²⁴ so it is hardly surprisingly that states permitting rights of « absolute » conscientious objection do not extend this limited concession to « partial » objections during unpopular wars.¹²⁵ However, Balakrishnan also queries « when do the costs and benefits of war make it a rational policy, for states refashioned under the economic discipline of capitalism » ?¹²⁶ To be confined simply by contexts of state power when considering the power to compel, in other words, is to accept the premise that the political is both separate from and superior to the economic.

This is so for various reasons. A lack of governmental accountability attributable to the absence of public negotiation concentrates power in elite hands. Unaccountable power can be used to obscure the basis of government decision-making. In relation to the use of force, public scrutiny of government policy or particular allocations of state finance becomes impossible. Hiding the costs of war in particular can have profound implications for weakened representative institutions, affording wider opportunities for corruption.¹²⁷ It then becomes relevant to query whether and to what extent such unaccountable and non-negotiable concentrations of elite power might still possess a rational economic basis for resource allocation, or instead cause detriment to the overall welfare of the state, the public and society, and thus be viewed as illegitimate.

Fully-costed or not, a war may be thrust upon a state, as in one for national defence. Such an emergency situation is different if only on the basis that « wars of choice » are not so easily aligned to « a logic of accumulation ». ¹²⁸ Should the governed for example give their consent to require the state to tax them for adequate military protection (or road building), not only is there then the possibility of closer public scrutiny as to how public money is spent, but « wars of necessity » (as

in national self-defence) and « wars of choice » (including so-called imperialist campaigns) become more clearly distinguishable. Once taxpayers pay in full for their military personnel, economically efficient behaviour would then tend to dictate specific strategies, such as (1) recruit a career military for whom training and equipment are not wasted through a rapid turnover or high attrition rate, (2) employ only the poorest, and/or (3) scrutinise the causes to which fully-costed military expenditure is dedicated. It thus can be argued that a legitimate *legal* source for the state's power to compel can only arise if there is a direct relationship between taxation, representation, and expenditure.

A fully-costed military can also be characterised as a rational economic choice due to greater transparency in the value (price?) attributable to individual human life. *Compulsory military conscription in this precise context is inefficient in terms of resource allocation, unless human resources are not scarce or are otherwise deemed by the public to be of little value. As noted in pertinent part by Lord Hoffman, in *Sepet*,*

(...)[T]he objector's religious, moral or political feelings are only part of a complex judgement that includes the pragmatic question as to whether compelling conscientious objectors to enlist or suffer punishment will do more harm than good. Among the other relevant factors are the following: first, martyrs attract sympathy, particularly if they suffer on religious grounds in a country which takes religion seriously; secondly, unwilling soldiers may not be very effective; thirdly, they tend to be articulate people who may spread their views in the ranks; fourthly, modern military technology requires highly trained specialists and not masses of unskilled men.¹²⁹

Clearly, compulsory military service is difficult to justify economically unless it can be balanced against the manifold requirements of a modern army, a society based on civilian control and legitimacy, human rights and the rule of law. The absence in many states of fully-costed, economically-transparent policies also adds more weight to the need for a « right » of conscientious objection, which a « power-politics » approach to military conscription will never provide. It is equally clear that it is the opaque politics and economics, underlying some wars that lead many « partial » objectors to desert.

4B. Conscription and Involuntary Servitude

In light of U.N. Charter Article 2(4), it can be argued theoretically that each and every individual has a right to refuse to participate in an international armed conflict, unless it is authorised by the U.N. Security Council.¹³⁰ However, Charter Article 51 memorialises the notional duty

of individuals to participate in the armed defence of their country of allegiance if it is attacked. The boundary between the two makes distinct those national constitutional traditions which utilise, on the one hand, a theory of natural law stressing man's duties to the sovereign, and on the other, those which extend such theories to encompass man's rights against his sovereign and everyone else.¹³¹

International laws ultimately can work for the benefit of individuals, but none at present give any specific insight into military conscription. In view of the statistics indicated earlier,¹³² many deserters such as AK and Sepet are essentially unable to apply for alternative civilian or other non-combatant work when called-up for military service, nor can they substantiate easily a claim to refugee status abroad after evading service. While this may raise several questions in relation to compelling participation in mortally dangerous activities, one question in particular needs to be addressed. Specifically, how can it still be the case, in an era of « equal » human rights, that compulsory military service is excluded from the scope of the prohibition against involuntary servitude?

In *Sepet*, the central issue to which the Court of Appeal was directed was whether conscientious objection to compulsory military service could, without more, found an asylum claim under Article 1A(2) of the Convention. As noted earlier, one argument in support of this contention was that a fundamental « human right » of conscientious objection had emerged, as recognised for « a long time » by the U.N.H.C.R.¹³³ Before concluding that no such right – fundamental or otherwise – could yet be found to exist, the Court was directed to the possible sources of such a « right »: academic materials, treaties, United Nations materials, European materials, the practice of states, the 1969 Vienna Convention on the Law of Treaties, and relevant jurisprudence.

The Court found there was, on the one hand, an acceptance (express or implied) that military service is excluded from a characterisation of involuntary servitude,¹³⁴ and on the other, a steadily-growing, but essentially *political* impetus for states to provide some measure of conscientious objector status, or alternative civilian or non-combatant duties.¹³⁵ There is no « right » (fundamental or otherwise) to claim exemption from military service for reasons of conscience. As for U.N.H.C.R. recognition of such a right « for a long time », the *Handbook*, paragraph 173, rather sets a different tone, stating in pertinent part that

An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e., civilian) service.

(...). In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

Accordingly, the choice to adopt a system of compulsory military service or not remains within the reserved domain of states rights. Inasmuch as some treaty obligations are less capable than others of binding the ruler as well as the ruled, compulsory military systems differ in their operation. Modern contexts of government restraint in relation to the treatment of individuals, even when the subject of treaty obligation, generally remain a matter for domestic state governance until the Security Council intervenes.

There is thus judicial acknowledgement that states have the power to compel citizens to bear arms, and lose their lives, for any purpose whatsoever. Yet, while some compulsory civic duties, such as paying taxes or building new roads, can be viewed as essential to a well-ordered society, not all perhaps should be. For example, those building roads typically are hired at market rates for their labour,¹³⁶ the costs of which are internalised. A bid for the job is determined accordingly. Assuming that conscripts are paid on much lower scales (if that) than a voluntary force, it soon seems odd, if only at a basic level of logic, that courts appear unwilling to break an equivalent approach to compulsion despite the different outcomes of this facet of state power over the individual. In other words, compulsory participation in the military (e.g., « equality of sacrifice », etc.) is difficult to equate with other civic duties.

In a competitive market, the provision of public goods through « coercive surplus extraction » - taxation being one form - represents a market failure. Market failures are attributed by many economists to the absence of clearly-defined property rights.¹³⁷ Once there is a property or ownership interest, a corresponding right of sale internalises what was previously a transactional externality. « Rights » of sale must be preceded, however, by political choices as to what can be legally owned. Yet, while economics can instruct one in how to think, economic choices are made politically. Employment markets operate along these lines. Individuals are deemed to « own » their labour, and to be in a position to negotiate its value competitively, but many states provide for a minimum wage.

In contrast, the absence of negotiation rights is evidence that there is no property to sell or transfer. To return to the example of road-building, it is obvious that individuals or groups of citizens are unlikely to build public roads independently, if only because the tolls then needed to recoup the outlay would render the roads less public, i.e., only those able to pay could use them. Compulsory taxation is therefore mandated

to address this market failure, pay competitive labour market costs, and supply a collective good. Legitimate representative politics demand that the public must first require the government to tax it for this purpose – the « free » road. In contrast, a non-negotiable system of conscription short-circuits the foundation step of a public demand for realistic taxation. Less taxation to fund government decision-making obscures the amounts available to spend, resulting in inadequate public oversight of government decision-making. Although war then might be « freer » for the elite to use, any resulting collective good becomes more difficult to discern, as does governmental legitimacy.

Compulsion limits personal autonomy. If compulsion results from public consultation to provide a collective good, it is less objectionable. However, as compulsory extractions from surplus generated by individual property, such as wage taxation, can supply collective goods, there is a direct comparison to be made between slave emancipation and compulsory conscription. As late as 1926, Article 1(1) of the Slavery Convention¹³⁸ defined slavery as « the status or condition of a person over whom any or all of the powers of the right of ownership are exercised », ¹³⁹ Demetz posits that a firm using slave labour is not liable to the full costs of its activities, as wages will be at subsistence levels, if that. The private costing of slavery alters dramatically however as the law permits a right of sale. If the slave is allowed to buy his (or her) freedom, the market for labour internalises costs more efficiently as the market becomes more competitive. He concludes: « the transition from serf to free man in feudal Europe is an example of this process ». ¹⁴⁰

While it may well be the case that the various international instruments pertaining to involuntary servitude and human rights exclude military service either expressly or impliedly, ¹⁴¹ it is alarming that any interest an adult citizen has in his or her personal autonomy is ever deemed beyond negotiation. The courts are able only to view as persecution a fear of punishment which results from a refusal to serve if that refusal is premised on the inhumane manner in which a particular war is fought. Yet, of the three possible arguments on which to found a post-desertion case for asylum indicated throughout this discussion, it is the judicial acceptance of compulsory military service that possibly does most harm. The right to life is a fundamental one. Obviously, if a person wishes to volunteer for military purposes in his or her state of allegiance, that is that person's individual choice, but it is the plight of the individual objector that best highlights the political limits of law in relation to war, and in particular, to « wars of choice ».

5. Conclusion

Although U.N. Charter Articles 2(4) and 51 are an attempt to restrain the right of states to engage in the use of armed force, there is as yet no legal definition of « aggression ». The I.C.C. will have jurisdiction to try crimes of aggression at some point after 2009, but an important preliminary step towards this result is proving problematic – that of the competence to determine a situation in which aggression has occurred. There are laws constraining the means and methods to be used in an armed conflict, but these have been until recently far more rigorously applied in relation to international armed conflicts than to internal, or civil ones. The I.C.C. has « complementary » jurisdiction over crimes against humanity, and war crimes which do not reflect this separation, but that forum is as yet relatively untested.

It is not until law is applied to the facts of human existence that its strengths and weaknesses become apparent. To be recognised as a refugee, one must have fled one's own country of nationality or of habitual residence.¹⁴² Modern developments in international humanitarian law are directed to sparing both participants and civilians from the excesses of war, but there is no automatic entitlement to refugee status due solely to the consequences of an armed conflict.¹⁴³ A person must also have, and prove, a well-founded fear of persecution were he or she to be returned. For the Convention to apply, the reasons for a well-founded fear of persecution must fall within the definition contained in Article 1A(2). The consequences of an armed conflict can thus only provide some evidence of such reasons ; « something more », that is personal, and individual, must exist.

The Convention is silent as to the position of conscientious objectors, and the *Handbook* merely invites states « to grant refugee status to persons who object to performing military service for genuine reasons of conscience ».¹⁴⁴ As for that « something more » required over and above the consequences of a war, the *Handbook* states « it is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action ».¹⁴⁵ Moreover, there apparently is no « human right » of conscientious objection, either – either « absolute » or « partial ».

So, « aggression » is non-justiciable, there is no automatic refugee status for those fleeing the consequences of a war, and there is no right of conscientious objection. Despite the daily precautions that individuals are required to take to preserve their levels of civil autonomy, they are in effect powerless either to stop a war and/or to avoid dying in it. The lives of individuals remain essentially forfeit to the demands of the state.

While it is true that the survival of states is a matter of huge importance, there remain questions regarding the extent to which states are « entitled » to go in their efforts to survive. It is thus that the *Handbook*, in paragraph 171, qualifies its approach to military objection in relation to « types of military action, with which an individual does not wish to be associated ». In turn, this « type of military action » is to be one which « is condemned by the international community as contrary to the basic rules of human conduct ».

Laws which are unclear as to their substance are likely to be litigated more frequently. The *Handbook* certainly does not have the force of law, yet it suggests that an inhumanely-fought war can open the door to refugee status if a well-founded fear of persecution is premised on a « political opinion as to the limits of governmental authority ».¹⁴⁶ This persuasive guidance would imply that « man's rights against his sovereign and everyone else » can trump « man's duties to the sovereign ».¹⁴⁷ Conversely, compulsory military service is rendered no less objectionable by the fact that military service is excluded from a characterisation of involuntary servitude.

It may well be that a fully participating, representative society, such that the public collectively can retain the right of control over all government decision-making and hence government control over individuals, simply cannot exist. Nonetheless, any aspect of individual life which is made non-negotiable through power politics opens the door to state abuse. 'Wars of choice' become easier to wage, the right to life is reduced from a fundamental one to something more disposable, and people are left to save themselves however best they can. As noted earlier, it is the non-transparent political policies and economic choices that lead many objectors to desert. As a result, and until there is a clear law which recognises, cedes, or otherwise creates a « right » of conscientious objection, cases such as AK's are likely to re-occur.

NOTES AND REFERENCES

- * I wish to thank Harvey M. Bagg, Jr., Esq. (Lt., U.S. Naval Reserve) and Wg. Cdr. K.D. Burns, R.A.F., for useful debates, and comments. I also wish to thank Prof. S.R. Giles for his comments, for bringing various materials to my attention, and for kindly agreeing to provide the German translation of this article's abstract.
1. *AK (Russia-Chechnya deserter) Russia ('AK')* [2004] United Kingdom Immigration Appeal Tribunal ('UKIAT') 00294.
 2. The Russian Federation calls-up men aged 18 to 27 for two years' service. N.P. Walsh, 'Young, patriotic and bullied to death', *The Guardian*, 28 July 2005, p. 16.
 3. (1954) United Kingdom Treaty Series ('U.K.T.S.') 39, Cmd. 9171; 189 United Nations Treaty Series ('U.N.T.S.') 150, and (1969) U.K.T.S. 15, Cmd. 3906; 606 U.N.T.S. 267, respectively.
 4. *Krotov v. Secretary of State for the Home Department ('S.O.S.H.D.')* ('Krotov') [2004] England and Wales Court of Appeal ('E.W.C.A.') Civ 69, paragraph 4.
 5. Civil Division : Potter, L.J.; Rix, L.J.; Carnwath, L.J.
 6. The actual grant of asylum is not dealt with in the 1951 Convention or 1967 Protocol. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relation to the Status of Refugees ('Handbook')* (HCR/IP/4/Eng/REV.1, 1979, 1992), paragraphs 12 and 24.
 7. The 1951 definition has a temporal limitation (events occurring before 1 January 1951).
 8. *Handbook*, paragraph 44.
 9. *Supra* note 6. *Handbook*, paragraphs 5 - 11.
 10. The Protocol is an independent instrument. *Handbook*, paragraph 9. See Editorial, Robertson, 'Humanity's core principle is not safe in their hands', *The Guardian*, 30 April 2005, p. 24 (U.K. Conservative Party threatens once it regains power to withdraw from the Refugee Convention).
 11. *Handbook*, paragraph 29, notes that
Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.
 12. *Handbook*, paragraph 164.
 13. *Handbook*, paragraph 168.
 14. *AK* [2004] UKIAT 00294, paragraph 13.
 15. *Krotov* [2004] EWCA Civ 69, paragraph 3.
 16. *AK* [2004] UKIAT, paragraph 10.
 17. *AK* [2004], paragraph 29
 18. *AK* [2004], paragraph 31.
 19. *Handbook*, paragraph 167.
 20. *Sepet, et ano. v. S.O.S.H.D.* [2001] EWCA 681.
 21. *Sepet, et ano. v. S.O.S.H.D.* [2003] UKHL 15.
 22. Cf. D. Pallister, 'U.K. Muslim who refused to fight in Iraq loses appeal', *The Guardian*, 8 October 2004, p. 10 (R.A.F. prosecution for absence without leave).
 23. *Sepet* [2003] UKHL 15, paragraph 5.
 24. *Sepet* [2003], paragraph 1 (citations omitted).
 25. *Sepet* [2003], paragraph 18.
 26. Universal Declaration of Human Rights ('U.D.H.R.') (adopted and proclaimed by U.N.G.A. Resolution 217 A (III) of 10 December 1948), Article 4; International Covenant on Civil and Political Rights ('I.C.C.P.R.') (adopted and opened for signature, ratification and accession by U.N.G.A. Resolution 2200 A (XXI) of 16 December 1966, in force 23 March 1976), Article 8; European Convention on Human Rights ('E.C.H.R.') (Rome, 4 November 1950, in force 3 September 1953), Article 4.

27. *Sepet* [2003] UKHL, paragraph 10.
28. U.D.H.R., Article 18; I.C.C.P.R., Article 18; E.C.H.R., Article 9. See however *Sepet* [2003] UKHL, paragraph 13 (U.N.H.C.R. General Comment No. 22 (30 July 1993), paragraph 11).
29. *Krotov* [2004] EWCA Civ 69, paragraph 48 (per Mr. Sean Wilken, for the S.O.S.H.D.).
30. *Krotov* [2004], paragraph 51 (per Potter, L.J.).
31. *Krotov* [2004], paragraph 2.
32. *Krotov* [2004], paragraph 2, *quoting* the Adjudicator.
33. *Ibid.*
34. AK's counsel had referred to army conditions, the nature of the Chechen war, human rights abuses, and ill-treatment. *Krotov* [2004] EWCA Civ, paragraph 3. Contrast *Isayeva, Yusupova and BazaYeva v. Russia* (E.C.H.R. Cases 57947/00, 57948/00 and 57949/00; 24 February 2005, final) (Russia fined for breach in Chechnya of Articles 2, 3, and 13).
35. *Krotov* [2004], paragraph 3, *quoting* the Adjudicator.
36. *Krotov* [2004], paragraph 5.
37. 2 June 2000 [00/TH/01513]. See also *Krotov* [2004] EWCA Civ 69, paragraph 3 (*B (Russia) v. S.O.S.H.D.* [2003] UKIAT 00020, paragraphs 42 – 48, largely approved).
38. *Krotov* [2004], paragraph 10, *quoting* the I.A.T. in *Foughali* [2000].
39. *Krotov* [2004], paragraphs 44 and 45 (citations omitted).
40. *Krotov* [2004], paragraph 48.
41. *Handbook*, paragraph 171.
42. For details of these, and other relevant documents, see A. Roberts and R. Guelff, *Documents on the Laws of War* (Oxford: O.U.P., 3d ed., 2000).
43. *Krotov* [2004] EWCA Civ, paragraph 26, *quoting* B [2003].
44. *Krotov* [2004], paragraph 26, *quoting* B [2003].
45. *AK* [2004] UKIAT 00294, paragraphs 15 – 18, 22.
46. *AK* [2004], paragraph 19, 23.
47. *AK* [2004], paragraph 20.
48. *AK* [2004], paragraph 20.
49. *AK* [2004], paragraph 25. See also U.N. Doc. CCPR/C/78/L/RUS, 26 March 2003 (U.N.H.C.R. List of Issues: information regarding Chechnya).
50. *AK* [2004], paragraph 26.
51. *AK* [2004], paragraph 26.
52. This should change after 2009. See Article 5(2), 1998 Rome Statute of the International Criminal Court ('I.C.C.'). U.N. Doc. A/Conf.183/9 (17 July 1998), in force, 1 July 2002). As of 12 May 2005, there were 99 state parties. See *infra*, notes 87 - 108, and accompanying text.
53. C. Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Dordrecht: Nijhoff, 1987), p. 8.
54. See, e.g., E. Chadwick, 'Doves and Fireballs': German-Soviet Neutrality, Collective Security, and the League of Nations', and 'To the Victors the (Legal) Spoils? American Perspectives on Neutrality, Self-Defence, and Aggression, from Kellogg-Briand to Nuremberg', in E. Chadwick, *Traditional Neutrality Revisited: Law, Theory and Case Studies* (The Hague: Kluwer Law International Humanitarian Law Series, Vol. 4, 2002), at p. 89, and 129, respectively.
55. The General Treaty for the Renunciation of War, in force, 24 July 1929, Cmd. 3410; *League of Nations Treaty Series*, 94, p. 57.
56. The Pact's signatories effectively recognised the *legality* 'wars of self-defence, League wars and the others provided for' in individual state letters of 'understanding'. See Editorial Comment, Borchard, 'The Multilateral Treaty for the Renunciation of War' [1929] 23 *American Journal of International Law* ('A.J.I.L.') 116, 117.
57. The Hague Conventions, the Versailles Treaty, Treaties of Mutual Guarantee, Arbitration, and Non-Aggression, and the Kellogg-Briand Pact are specifically

- mentioned. 'International Military Tribunal ('I.M.T.') (Nuremberg), Judgement and Sentences, 1 October 1946', *reprinted* [1947] 41 *ibid.* at 172, 214 - 216.
58. This separation is not made in the Rome Statute of the I.C.C., Article 8.
59. Cf. N.A. Lewis, 'Justice Department Toughens Rule on Torture', *New York Times Online*, 1 January 2005 (definition of torture broadened).
60. Specifically, U.N. Charter Articles 2(4) and 51, and Chapter VII in general.
61. U.N. Charter Article 2(7) does not however 'prejudice the application of enforcement measures under Chapter VII'.
62. U.N. Charter, Article 2(4).
63. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)* [1986] *International Court of Justice Reports* 14, paragraph 188. See Editorial Comment, Kunz, 'Individual and Collective Self-Defence in Article 51 of the U.N. Charter' [1947] 41 *A.J.I.L.* 872, 876.
64. U.N. Charter Article 42. See, e.g., Security Council, 3988th Meeting (Nato Intervention in Kosovo), U.N. Doc. S/PV.3988, 24 March 1999; 'Iraq: Legal Basis', U.K.F.C.O. Memorandum 17 March 2003, *reprinted* [2002] 52 *International and Comparative Law Quarterly* 812.
65. U.N. Charter Article 43.
66. Charter Article 25. The language of Article 48(1), for purposes of armed action, is also mandatory.
67. See, e.g., Editorial Comment, Eagleton, 'The Task of the International Lawyer' [1947] 41 *A.J.I.L.* 435; L. Gross, 'The Charter of the United Nations and the Lodge Reservations' [1947] 41 *ibid.* 531, 538 - 544.
68. M. Bothe, 'Comments', in *International Economic Law and Armed Conflict* (H.H.G. Post, ed.) (London: Martinus Nijhoff, 1994), pp. 35, 37.
69. C. Bassiouni, *supra* note 53.
70. The conduct of non-inter-state armed conflicts is guided by the minimum guarantees of Common Article 3 of the 1949 Geneva Conventions, supplementary Protocol 2 of 1977, and human rights laws.
71. *Supra* note 52.
72. E.g., the pre-emptive U.S. air strikes against Afghanistan on 7 October 2001, prior to invasion in November.
73. Kunz remarks that the *Caroline* incident, discussed at 29 *British and Foreign State Papers* at 1137, and 30 *ibid.*, at 195, respectively, was not one of self-defence, but of necessity. The I.M.T. thus missed an opportunity to distinguish between municipal, and military, 'necessity'. Editorial Comment, Kunz, *supra* note 63, p. 876 n. 14.
74. See, e.g., E. Vulliamy and R. Norton-Taylor, 'Reservist ready to refuse call-up', *The Guardian*, 19 January 2005, p. 4 (belief that Iraqi occupation is illegal).
75. A reference to *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No. 3)* [2000] 1 Appeal Cases ('AC') 61. A House of Lords majority held that Criminal Law Act 1988, sections 134 and 135, had to come into force prior to the extra-territorial effect of domestic law over the international crime of torture..
76. *Krotov* [2004] EWCA Civ 69, paragraph 43.
77. [2002] England and Wales High Court ('EWHC') 2777 (Queen's Bench Division (Administrative)); applied by *Rep. of Ecuador v. O.E.P.C.* [2005] EWHC 774 (Q.B.D. (Commercial)).
78. Simon Brown, L.J.; Maurice Kay, J.; Richards, J.
79. [2004] EWCA Crim 1981, [2005] 1 Criminal Appeal Reports 12; (Latham, L.J.; Gibbs, J.; Richard Brown, J.).
80. *Jones and Milling* [2004] EWCA Crim, paragraph 13.
81. *Jones and Milling* [2004], paragraph 19.
82. *Jones and Milling* [2004], paragraph 24.
83. See, e.g., F.B. Schick, 'The Nuremberg Trial and the International Law of the Future' [1947] 41 *A.J.I.L.* 770, 780 - 781, who notes that the London Agreement

- of 8 August 1945 was an Inter-Allied treaty, and not a legislative act promulgated by the Control Council.
84. *Jones and Milling* [2004], paragraph 43.
 85. 2001 chapter 17. See also International Criminal Court Act 2001 (Elements of Crimes) (No. 2) Regulations (Statutory Instrument 2004, No. 3239) (made under s. 50(3) of the I.C.C. Act 2001, and in force, 30 December 2004), which set out the Elements of Crimes adopted by the Assembly of States Parties on 9 September 2002.
 86. The Rome Statute Article 6 definition of genocide is taken from the 1948 Genocide Convention. Article 7 (crimes against humanity) requires no nexus to an armed conflict - an expansion from Nuremberg confines. Article 8 (war crimes) is largely based on the 1949 Geneva Conventions, and 1977 Protocol 1, but extends to crimes committed in non-international armed conflicts.
 87. Rome Statute of the I.C.C., Article 5(2).
 88. See ICC-ASP/4/SWGCA/INF.1. No further issues were added to the proposals on aggression found in the 2004 inter-sessional meeting report, ICC-ASP/3/25, annex II, appendix.
 89. ICC-ASP/4, paragraphs I(3), and II.E.5(91).
 90. ICC-ASP/4, paragraph II.B.1(5).
 91. PCNICC/2002/2/Add.2.
 92. ICC-ASP/4, paragraph II.D.2(64).
 93. ICC-ASP/4, paragraph II.D.2(65). On Monday 4 October 2004, an agreement defining relationship terms between the I.C.C. and U.N. was signed in New York. ICC *Newsletter*, October 2004, p. 8, accessed at www.icc-cpi.int.
 94. The U.N.G.A. has a claim to competence as it adopted Resolution 3314 (XXIX) of 14 December 1974, on the definition of aggression, and the 'Uniting for Peace' Resolution 377 (V) of 3 November 1950.
 95. ICC-ASP/4, paragraph II.D.2(73).
 96. Editorial Comment, Eagleton, *supra* note 67, at 436.
 97. *Ibid.* See also ICC-ASP/4, paragraphs II.D.2(67 – 68). The U.N.S.C. is under a general duty to uphold the U.N. Charter, and maintain international peace and security.
 98. For a discussion of this issue, see E. Chadwick, 'A Tale of Two Courts: the "Creation" of a Jurisdiction?' [2004] 9(1) *Journal of Conflict & Security Law* 71, 92 – 95. Power-sharing with states is termed 'complementarity'. Rome Statute, Preamble and Article 1. See, e.g., I. Tallgren, 'Completing the "International Criminal Order"' [1998] 67 *Nordic Journal of International Law* 107, at 119, and 'Epilogue', 135 – 137.
 99. See also ICC-ASP/4, paragraph II.D.2(68).
 100. See, e.g., U.N.S.C. Resolution 1564 of 18 September 2004 (Darfur); J.L. Diaz and C. Cardon, 'Ensuring Accountability in Darfur and Elsewhere [March 2005] 3 *Respect – The Human Rights Newsletter*, pp. 1 – 2 (first call on the U.N.S.C. to refer Darfur to the I.C.C.).
 101. ICC-ASP/4, paragraph II.D.2(74).
 102. Charter Article 27(3) requires 'an affirmative vote of nine members including the concurring votes of the permanent members'. Abstention by a permanent member does not constitute a veto.
 103. ICC-ASP/4, paragraph II.D.4(82), and more generally, ICC-ASP/4, paragraph II.B.2(33 - 43).
 104. ICC-ASP/4, paragraph II.D.1(62).
 105. ICC-ASP/4, paragraphs II.B.2(19 - 31). ICC-ASP/4, paragraph II.D.4(83), notes that 'the origin of the language on the issue of leadership crime' needs verification.
 106. ICC-ASP/4, paragraph II.B.2(33). An older discussion on this issue is found in H. Lauterpacht (ed.), *Oppenheim's International Law, Vol. II (Disputes, War and Neutrality)* (London: Longmans, Green and Co., 1952), pp. 192 – 194).

107. ICC-ASP/4, paragraph II.B.2(48 - 50). Article 16 of the 1996 draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission*, 1996, vol. II(2), states: '[a]n individual who, as a leader or organiser, actively participates in or orders the planning, (etc.), of aggression committed by a state shall be responsible for a crime of aggression'.
108. See, e.g., S. Hersh, 'Rumsfeld's dirty war on terror', *The Guardian G2*, 13 January 2004, p. 2.
109. 'Superior orders' is no defence to unlawful acts, but can be pleaded in mitigation. Cf. A. Gillan and E. Vulliamy, 'Soldiers may refuse to serve over legal threat', *The Guardian*, 21 July 2005, p. 4; A. Barnett, et al., 'Iraq, the secret US visit, and an angry military chief', *The Observer*, 1 May 2005, p. 15 (military leaders insist on 'black and white' legality before ordering troops to assault Iraq).
110. *Sepef* [2003] UKHL 15, paragraph 34. See also R. Norton-Taylor, 'Peace activists seek to withhold arms tax', *The Guardian*, 15 February 2005, p. 6.
111. *Sepef* [2003] UKHL 15 paragraph 46.
112. For discussion of this point, see E. Mandel, *The Meaning of the Second World War* (London: Verso, 1986), p. 48.
113. A. Giddens, *Sociology* (Cambridge: Polity Press, 1989), p. 359.
114. *Ibid.*
115. See, e.g., a brief comparison of the economics of socialism versus capitalism in R.E. Backhouse, *The Penguin History of Economics* (London: Penguin, 2002), Chapter 12.
116. Some reasons for which are discussed in Balakrishnan, Book Review (B. Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations*) [2004] 26 *New Left Review* 148. See, e.g., D. Leigh and R. Evans, 'Saudis link £40bn arms deal to call to expel dissidents', *The Guardian*, 27 September 2005, p. 7.
117. The Internet is a good example of a technological spill-over effect, while reduced domestic unemployment is a social one.
118. As noted by H. Demetz, 'Toward A Theory of Property Rights', in *Economic Foundations of Private Law* (R.A. Posner and F. Parisi, eds.) (Cheltenham: Edward Publishing Ltd., 2002), pp. 267, 269. For purposes of this discussion, an externality is a cost perceived as too high to make a transaction sufficiently attractive or valuable to negotiate. The environmental effects of some industries provide a case in point.
119. N.P. Walsh, *supra* note 2 ('only the poor serve'), and 'Cost of bribes soars', *ibid.*, 22 July 2005, p. 16 (payment of bribes common to avoid conscription).
120. N.P. Walsh, 'Young, patriotic', *ibid.*; C. Wheeler, 'Russian conscripts face abuse', *ibid.*, 21 October 2004, p. 18 (Human Rights Watch reports starvation, beatings, torture, and suicides).
121. G. Balakrishnan, *supra* note 116, p. 151, *quoting* Teschke : '[e]very lord was his own conflict unit'.
122. For a brief explanation of this example, see H. Demetz, *supra* note 118, pp. 267, 268 - 269.
123. See, e.g., R. Norton-Taylor, 'Army struggles to attract recruits', *The Guardian*, 26 August 2005, p. 13 (high employment makes voluntary recruitment more difficult).
124. G. Balakrishnan, *supra* note 116, p. 150.
125. See, e.g., E. Monaghan, 'US Army plagued by desertion and plunging morale', *New York Times Online*, 10 December 2004; Sanctuary Project, 'A Different Kind of "Route Irish"', 9 February 2005, *accessed at* www.indymedia.ie/newswire (U.S. soldiers urged to seek asylum at Shannon Airport, Eire, on transit to Iraq).
126. G. Balakrishnan, *supra* note 116, p. 158.
127. See, e.g., N.P. Walsh, 'Cost of bribes soar', *supra* note 119 (survey author states 'corruption [in Russia] is the mediator in all decisions in our life').
128. G. Balakrishnan, *supra* note 116, p. 156.

129. *Sepet* [2003] UKHL 15, paragraph 44. Lord Rodger added that 'in practice an extensive right of conscientious objection will tend to be asserted by the educated and articulate rather than by the less fortunate members of society'. *Ibid.*, paragraph 58 (*citing Gillette v. U.S.* (1970) 401 U.S. 437 (per Marshall, J.)).
130. Pursuant to U.N. Charter, Chapter VII, Article 42.
131. See E. Chadwick, 'The Importance of Equality to Neutral and Human Rights', in *Traditional Neutrality Revisited*, supra note 54, pp. 217, 247 (citation omitted).
132. *Supra*, text accompanying note 25.
133. *Sepet* [2001] EWCA 681, paragraph 20 (per Laws, L.J.)
134. *Sepet* [2001], paragraphs 27 (E.C.H.R. Article 4(3)(b)), 28 (I.C.C.P.R. Article 8(3)(c)(ii)), and 30 (American Convention on Human Rights Article 6(3)(b)), 42 – 43).
135. *Sepet* [2001], paragraphs 23 – 25 (academic materials), 31 – 34 (U.N. materials), 35 – 41 (non-E.C.H.R. European materials), and 42 – 51 (practice of states).
136. That is, of course, unless prison labour is used.
137. See, e.g., R.E. Backhouse, supra note 115, p. 283.
138. In force, 9 March 1927. The Convention was amended 7 December 1953 (in force, 7 July 1955). The 1926 definition is incorporated by reference in Article 7(a) of the 1956 Supplementary Convention on the Abolition of Slavery (in force, 30 April 1957).
139. Cf. the 1956 Supplementary Convention, Preamble : '[c]onsidering that freedom is the birthright of every human, ...'.
140. H. Demetz, supra note 118, p. 268. See also G. Balakrishnan, supra note 140, 6, p. 151 ('distinct property regimes emerged out of the class struggles between lords and peasants in different regions of Europe').
141. In addition to those cited in *AK* [2004] UKIAT 00294, supra note 27, see, e.g., the 1926 Slavery Convention, Article 5(2), and the 1932 I.L.O. Convention on Forced Labour (No. 29), Article 2(a) (in force, 1 May 1932).
142. Convention Article 1A(2).
143. *Supra*, note 12.
144. *Handbook*, paragraph 173.
145. *Handbook*, paragraph 171.
146. *Supra* note 39.
147. *Supra*, note 131.

SUMMARY

NO COMITY IN ERROR : ASYLUM AND « WARS OF CHOICE »

On 29 October 2004, a Russian military deserter from the war in Chechnya was granted political asylum in the United Kingdom. This was a problematic case for the authorities, not least because the deserter claimed a conscientious objection only to fighting that particular war.

There is no automatic refugee status for those fleeing the consequences of a war. To qualify as a refugee pursuant to the 1951 United Nations Convention relating to the Status of Refugees, and its 1967 Protocol, an asylum seeker must prove that he or she was a well-founded fear of persecution if returned. In this desertion-asylum case, a well-founded fear of persecution was deemed to arise from the asylum applicant's political opinion as to the limits of government authority, e.g., the utilisation of types of military action « condemned by the international community as contrary to the basic rules of human conduct ».

It is of concern, however, that this case provides no authority for the existence of a « human right » of conscientious objection to military service, despite the fact that « wars of necessity » and « wars of choice » are difficult to distinguish legally. It is thus argued that the non-existence of a « right » to object allows « wars of choice » to be waged more easily. Further, compulsory service permits a form of involuntary servitude to persist, and conceals the true costs war in economic and human terms. For these reasons, it is concluded, this problematic type of case is likely to re-occur.

RESUME

LE DROIT D'ASILE ET LES « GUERRES DE CHOIX »

Le 29 octobre 2004, le Royaume-Uni a octroyé l'asile politique à un déserteur russe de la guerre de Tchétchénie. Ce cas s'est avéré problématique pour les autorités, surtout parce que le déserteur ne revendiquait son objection de conscience que par rapport à cette guerre bien précise.

Il n'existe pas de statut automatique de réfugié pour ceux qui fuient les conséquences de la guerre. Pour obtenir la qualité de réfugié conformément à la Convention des Nations Unies de 1951 relative au statut des réfugiés, ainsi qu'à son protocole de 1967, un demandeur d'asile doit prouver qu'il ou elle craignait avec raison d'être persécuté(e) en cas de retour. Dans ce cas de désertion-demande d'asile, il a été considéré qu'une crainte justifiée d'être persécuté existait en raison de l'opinion politique du demandeur d'asile concernant les limites de l'autorité du gouvernement, par exemple, par rapport à l'emploi de méthodes de guerre « condamnées par la communauté internationale comme étant contraires aux règles de base du comportement humain ».

Il est cependant inquiétant de constater que ce cas ne légitime pas l'existence d'un « droit humain » d'objection de conscience par rapport au service militaire, bien qu'il soit difficile d'établir une distinction du point de vue juridique entre les « guerres de nécessité » et les « guerres de choix ». L'auteur argumente ensuite que la non-existence d'un « droit » à l'objection de conscience permet de mener plus facilement des « guerres de choix ». En outre, le service militaire obligatoire permet la persistance d'une forme de servitude involontaire et par ailleurs occulte les coûts véritables de la guerre au plan économique et humain. Par conséquent, la conclusion est que de tels cas problématiques sont susceptibles de se reproduire à l'avenir.

SAMENVATTING

BIJ MISVATTING GEEN WEDERKERIGHEID : ASIEL EN « OORLOG UIT VRIJE WIL »

Op 29 oktober 2004 werd in Groot-Brittannië politiek asiel verleend aan een Russische deserteur die de oorlog in Tsjetsjenië ontvlucht was. Voor de overheden was dit een zeer problematische zaak, aangezien de deserteur enkel in deze specifieke oorlog weigerde mee te vechten.

Er bestaat geen automatisch asielrecht voor personen die de gevolgen van een oorlog ontvluchten. Om als vluchteling beschouwd te worden volgens het Verdrag van de Verenigde Naties betreffende de Status van Vluchtelingen (1951) en zijn protocol (1967), moet een asielaanvrager kunnen bewijzen dat hij/zij wegens gegronde redenen een vervolging te vrezen heeft, indien hij/zij teruggestuurd zou worden. In dit geval van deserte resp. asielaanvraag werd erkend dat er sprake was van een gegronde vrees voor vervolging op basis van de politieke mening van de asielaanvrager omtrent de competentie van de regering. Een voorbeeld hiervan zijn de gebruikte methoden van oorlogsvoering die « door de internationale gemeenschap veroordeeld werden, omdat ze in strijd waren met de basisprincipes van menselijk handelen ».

Het is echter verontrustend dat dit geval het bestaan van een « mensenrecht » om dienst te weigeren wegens gewetensbezwaren niet rechtvaardigt, hoewel « noodzakelijke oorlogen » en « oorlogen uit vrije wil » juridisch gezien moeilijk te onderscheiden zijn. Er wordt dus bewezen dat het ontbreken van een « recht » om dienst te weigeren het voeren van « oorlogen uit vrije wil » gemakkelijker maakt. Bovendien creëert de dienstplicht het bestaan van een soort onwillekeurige slavernij, en worden daardoor de werkelijke kosten van de oorlogsvoering op economisch en menselijk vlak verborgen. Om deze redenen kan men tot de conclusie komen dat dergelijke problematische gevallen zich hoogstwaarschijnlijk nog zullen herhalen.

ZUSAMMENFASSUNG

IM IRRTUM KEINE WECHSELSEITIGKEIT : ASYL UND « GEWÄHLTE KRIEGE »

Am 29. Oktober 2004 wurde einem russischen Fahnenflüchtigen, der dem Krieg in Tschetschenien entflohen, politisches Asyl in Großbritannien gewährt. Für die Behörden war der Fall nicht zuletzt deshalb problematisch, weil der Fahnenflüchtige nur in diesem besonderen Krieg den Wehrdienst verweigern wollte.

Für diejenigen, die den Folgen eines Krieges entfliehen, besteht kein automatisches Flüchtlingsrecht. Um nach dem Abkommen über die Rechtsstellung der Flüchtlinge (1951) und seinem Protokoll (1967) als Flüchtling zu gelten, muß ein(e) Asylbewerber(in) beweisen, daß er/sie eine fundierte Furcht vor Verfolgung hat, falls er/sie zurückgeschickt werden sollte. In diesem Fahnenflucht- bzw. Asylfall wurde anerkannt, daß eine fundierte Furcht vor Verfolgung aufgrund der politischen Meinung des Asylbewerbers über die Grenzen von Regierungsbefugnissen bestand, z.B. bezüglich der Verwendung von Methoden der Kriegsführung, die « von der internationalen Gemeinschaft verurteilt worden waren, weil sie gegen die Grundregeln des menschlichen Verhaltens verstoßen ».

Beunruhigend ist aber, daß dieser Fall die Existenz eines « Menschenrechts » der Wehrdienstverweigerung aus Gewissensgründen nicht begründet, obwohl « notwendige Kriege » und « gewählte Kriege » juristisch schwer zu unterscheiden sind. Es wird also im folgenden argumentiert, daß das Nichtvorhandensein eines « Rechts » der Verweigerung die Führung von « gewählten Kriegen » leichter macht. Außerdem ermöglicht der obligatorische Wehrdienst das Bestehen einer Art unwillkürlicher Knechtschaft, und dazu noch verheimlicht er die eigentlichen Kosten der Kriegsführung in wirtschaftlicher und menschlicher Hinsicht. Aus diesen Gründen wird zu dem Schluß gekommen, daß solche problematischen Fälle sich in aller Wahrscheinlichkeit wiederholen werden.

RESUMEN

EL DERECHO DE ASILO Y LAS « GUERRAS DE ELECCIÓN »

El día 29 de octubre de 2004, el Reino Unido otorgó el asilo político a un desertor ruso de la guerra de Chechenia. Este caso resultó problemático para las autoridades, especialmente porque el desertor no reivindicaba su objeción de conciencia sino para esta guerra bien determinada.

No existe ninguno estatuto automático de refugiado para alguien que huye de las consecuencias de la guerra. Para obtener la calidad de refugiado conforme a la Convención de las Naciones Unidas de 1951 sobre el estatuto de los refugiados, y su Protocolo de 1967, el solicitante de asilo tiene que demostrar que debido a fundados temores de ser perseguido no pueda regresar a su país de origen. Si el solicitante de asilo es también desertor, se considera que había un temor fundado de ser perseguido por razón de la opinión política del solicitante de asilo en cuanto a las límites de la autoridad del gobierno, por ejemplo, en cuanto al empleo de métodos de guerra « condenados por la comunidad internacional porque violan las reglas básicas del comportamiento humano ».

Sin embargo, resulta preocupante constatar que este caso no legitima la existencia de un « derecho humano » a la objeción de conciencia frente al servicio militar, aunque desde el punto de vista jurídico sea difícil distinguir entre las « guerras de necesidad » y las « guerras de elección ». El autor se refiere entonces al argumento que la no-existencia de un « derecho » a la objeción de conciencia permite lanzarse más fácilmente en « guerras de elección ». Además el servicio militar obligatorio implica la persistencia de una forma de servidumbre involuntaria y oculta también los gastos reales de la guerra al nivel económico y humano. Por consecuencia, el autor llega a la conclusión que casos problemáticos similares volverán a producirse en el futuro.

RIASSUNTO

IL DIRITTO D'ASILO E LE « GUERRE PER SCELTA »

Il 29 ottobre 2004 il Regno Unito ha concesso asilo politico ad un militare russo, disertore della guerra in Cecenia. Questo caso è stato fonte di problemi per le autorità, soprattutto perché il militare rivendicava la sua obiezione di coscienza soltanto rispetto alla guerra in Cecenia e non ad altri conflitti: non esiste infatti uno status di profugo da conferirsi automaticamente a coloro che, in via generale, fuggono dalle conseguenze di un conflitto.

Per ottenere la qualità di profugo, in conformità con la Convenzione delle Nazioni Unite del 1951 e relativo protocollo del 1967, un candidato all'asilo deve provare che egli/ella abbia ragione di temere d'essere perseguitato/a in caso di ritorno al paese d'origine. Nel caso di specie, la paura del disertore di essere perseguitato è stata considerata giustificata in ragione dell'opinione politica del candidato stesso. Tale opinione infatti si estendeva a critiche sulla legittimità delle scelte politiche del governo russo, ad esempio, rispetto all'uso di metodi di guerra «condannati dalla Comunità internazionale come contrari alle regole di base del comportamento umano».

È tuttavia inquietante constatare che questo caso non legittima l'esistenza di un «diritto umano» all'obiezione di coscienza rispetto al servizio militare, benché sia difficile stabilire una distinzione dal punto di vista giuridico tra «guerre intraprese per necessità» e «guerre intraprese per scelta». L'autore sostiene che la non esistenza di un «diritto» all'obiezione di coscienza permette di qualificare più facilmente i conflitti come «guerre intraprese per scelta». Inoltre, il servizio militare obbligatorio fa sì che si crei una forma di servitù involontaria e che si occultino i costi veri della guerra sul piano economico ed umano. Le conclusioni riportano come tali casi problematici siano suscettibili di riprodursi in futuro.