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GUIDELINES ON INTERNATIONAL PROTECTION NO. 10:

Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees

UNHCR issues these *Guidelines* pursuant to its mandate, as contained in the Office's Statute, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* (reissued 2011) and, in particular, are to be read together with UNHCR's *Guidelines on International Protection No. 6: Religion-Based Refugee Claims* and *Guidelines on International Protection No. 8: Child Asylum Claims*. They replace *UNHCR's Position on Certain Types of Draft Evasion* (1991).

The *Guidelines*, the result of broad consultations, provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out mandate refugee status determination.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* and *the Guidelines on International Protection* are available at: http://www.refworld.org/docid/4f33c8d92.html.

I. INTRODUCTION

1. The situation of "deserters and persons avoiding military service" is explicitly addressed in *UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* [*"UNHCR Handbook"*].[1] Since the publication of the *UNHCR Handbook* there have been considerable developments both in the practice of States and in the restrictions placed on military service by international law. Given these developments, as well as divergences in jurisprudence, UNHCR issues these *Guidelines* with the aim to facilitate a consistent and principled application of the refugee definition in Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees in such cases. These *Guidelines* examine the position of individuals who seek international protection to avoid recruitment by, and service in, State armed forces, as well as forced recruitment by non-State armed groups.

2. These *Guidelines* address the definition of key terms [Part II], followed by an overview of international legal developments relating to military service [Part III]. Part IV examines the refugee determination criteria as they apply to claims involving military service. Part V considers procedural and evidentiary issues. The *Guidelines* focus on the interpretation of the "inclusion" components of the refugee definition. Exclusion considerations are not addressed, although they may be at issue in such cases, and will need to be properly assessed.[2] Further, issues around maintaining the civilian and humanitarian character of asylum, while often relevant to such claims, are not dealt with in these Guidelines.[3]

II. TERMINOLOGY

3. For the purpose of these *Guidelines*, these terms are defined as follows:

Alternative service refers to service in the public interest performed instead of compulsory military service in the State armed forces by individuals who have a conscientious objection to military service ["conscientious objectors"]. Alternative service may take the form of civilian service outside the armed forces or a non-combatant role in the military.[4] Civilian service can involve, for example, working in State-run health institutions, or voluntary work with charitable organisations either at home or abroad. Non-combatant service in the military would include positions such as cooks or administrative clerks.

Conscientious objection to military service refers to an objection to such service which "derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives."[5] Such an objection is not confined to **absolute conscientious objectors** [pacifists], that is, those who object to all use of armed force or participation in all wars. It also encompasses those who believe that "the use of force is justified in some circumstances but not in others, and that therefore it is necessary to object in those other cases" [**partial** or **selective objection** to military service].[6] A conscientious objection may develop over time, and thus volunteers may at some stage also raise claims based on conscientious objection, whether absolute or partial.

Desertion involves abandoning one's duty or post without permission, or resisting the call up for military duties.[7] Depending on national laws, even someone of draft age who has completed his or her national service and has been demobilized but is still regarded as being subject to national service may be regarded as a deserter under certain circumstances. Desertion can occur in relation to the police force, gendarmerie or equivalent security services, and is also the term used to apply to deserters from non-State armed groups. Desertion may be for reasons of conscience or for other reasons.

Draft evasion occurs when a person does not register for, or does not respond to, a call up or recruitment for compulsory military service. The evasive action may be as a result of the evader fleeing abroad, or may involve, inter alia, returning call up papers to the military authorities. In the latter case, the person may sometimes be described as a draft resister rather than a draft evader, although draft evader is used to cover both scenarios in these *Guidelines*. Draft evasion may also be pre-emptive in

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[1] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee*, (reissued, Geneva, 2011), ("*UNHCR Handbook"*), available at: http://www.refworld.org/docid/4f33c8d92.html, paras. 167-174.

[2] Reference is made instead to UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, ("*UNHCR Exclusion Guidelines"*), available at: http://www.refworld.org/docid/3f5857684.html.

[3] See, Executive Committee ("ExCom") Conclusion No. 94 (LII), 2002, on the civilian and humanitarian character of asylum, para. (c)(vii).

[4] See, further, for example, UN Human Rights Council, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, A/HRC/23/22, 3 June 2013, available at: http://www.refworld.org/docid/51b5c73c4.html.

[5] See, UN Commission on Human Rights, Resolution 1998/77, "*Conscientious Objection to Military Service*", E/CN.4/RES/1998/77, 22 April 1998, available at: http://www.refworld.org/docid/3b00f0be10.html. The Commission was replaced by the UN Human Rights Council in 2006.

[6] See, UN *Conscientious Objection to Military Service*, E/CN.4/Sub.2/1983/30/Rev.1, 1985 (the "*Eide and Mubanga-Chipoya report*"), available at: http://www.refworld.org/docid/5107cd132.html, para. 21. See also, paras. 128-135 regarding persecution in the context of conscientious objection to conflicts which violate basic rules of human conduct.

[7] See, European Court of Human Rights, *Feti Demirtaş c. Turquie*, Application no. 5260/07, 17 January 2012, available at: http://www.refworld.org/docid/4ff5996d2.html.

the sense that action may be taken in anticipation of the actual demand to register or report for duty. Draft evasion only arises where there is mandatory enrolment in military service ("the draft"). Draft evasion may be for reasons of conscience or for other reasons.

Forced recruitment is the term used in these *Guidelines* to refer to the coerced, compulsory or involuntary recruitment into either a State's armed forces or a non-State armed group.

Military service primarily refers to service in a State's armed forces. This may occur in peacetime or during a period of armed conflict, and may be on a voluntary or compulsory basis. Compulsory military service by the State is also known as **conscription** or "**the draft**". Where an individual volunteers to join the State military, it is called **enlistment**.

Reservists are individuals who serve in the reserve forces of the State's armed forces. They are not considered to be on active duty, but are required to be available to respond to any call up in an emergency.

4. Where alternatives to compulsory military service are not available, an individual's conscientious objection may be expressed through draft evasion or desertion. However, draft evasion or desertion is not synonymous with conscientious objection as other motivations, such as fear of military service or the conditions of such service may be involved. Conscientious objection, draft evasion and desertion may all take place in peacetime as well as during armed conflict. Moreover, whilst conscientious objection and evasion/desertion tend to arise in relation to conscription, they can also take place where the original decision to join the armed forces was voluntary or the obligation to undertake compulsory military service was initially accepted.[8]

III. INTERNATIONAL LAW ON MILITARY SERVICE

A. The Right of States to Require Military Service

5. States have a right of self-defence under both the UN Charter and customary international law.[9] States are entitled to require citizens to perform military service for military purposes;[10] and this does not in itself violate an individual's rights.[11] This is recognized explicitly in human rights provisions concerned with forced labour, such as Article 8 of the 1966 International Covenant on Civil and Political Rights ["ICCPR"].[12] States may also impose penalties on persons who desert or avoid military service where their desertion or avoidance is not based on valid reasons of conscience, provided such penalties and the associated procedures comply with international standards.[13]

6. The State's right to compel citizens to undertake military service is not, however, absolute. International human rights law, as well as international humanitarian and international criminal law, impose certain restrictions upon States [see Parts III.B. and III.C. below]. In general, for military recruitment and service to be justified it needs to fulfil certain criteria: prescribed by law, implemented in a way that is not arbitrary or discriminatory, the functions and discipline of the recruits must be based on military needs and plans, and be challengeable in a court of law.[14]

7. The position of non-State armed groups is different from that of States, in that only States can require military conscription. International law does not entitle non-State armed groups, whether or not they may be the *de facto* authority over a particular part of the territory, to recruit on a compulsory or forced basis.

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[8] See, for example, UN Commission on Human Rights, Resolution 1998/77, preambular para. see note 5 above.

[9] Article 51, UN Charter. See also, International Court of Justice, *Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits),* 27 June 1986, available at: http://www.refworld.org/docid/4023a44d2.html, paras. 187-201.

[10] This does not cover conscription of non-nationals in occupied territories in the context of international armed conflict: see Article 51 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), which states that an "Occupying Power may not compel protected persons to serve in its armed or auxiliary forces." "Protected persons" refers in this context to civilians in the occupied territory who are not nationals of the Occupying Power.

[11] The UN Human Rights Committee ("HRC") has noted this in relation to a complaint of discrimination (Article 26 of the 1966 International Covenant on Civil and Political Rights ("ICCPR")). See, *M.J.G. (name deleted) v. Netherlands*, CCPR/C/32/D/267/1987, 24 March 1988, available at: http://www.refworld.org/docid/50b8eca22.html, para. 3.2; see, similarly, the earlier case of *R.T.Z. (name deleted) v. Netherlands*, CCPR/C/31/D/245/1987, 5 November 1987, available at: http://www.refworld.org/docid/50b8ed122.html. That human rights law, in particular the ICCPR, applies to members of the military as well as to civilians was explicitly stated by the HRC in *Vuolanne v. Finland*, CCPR/C/35/D/265/1987, 2 May 1989, available at: http://www.refworld.org/docid/50b8ee372.html.

[12] Article 8(3)(c)(ii) ICCPR exempts from the prohibition on forced or compulsory labour (found in Article 8(3)(a)), "Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors." In addition, Article 2(2)(a) of the 1930 International Labour Organization ("ILO") Convention No. 29: Forced Labour Convention exempts from its prohibition on forced or compulsory labour (Article 1(1)), "any work or service exacted in virtue of compulsory military service laws for work of a purely military character." The reference to "military service laws" indicates that for the exemption to be valid, it must be set out in law. See also, the decisions of the HRC in *Venier and Nicholas v. France,* CCPR/C/69/D/690/1996, 1 August 2000, available at: http://www.refworld.org/docid/50b8ec0c2.html and *Foin v. France,* CCPR/C/67/D/666/1995, 9 November 1999, where the HRC stated that under Article 8 of the ICCPR States may require service of a military character, available at: http://www.refworld.org/docid/4a3a3aebf.html, para. 10.3.

[13] On procedures, in the European Court of Human Rights, see *Savda c. Turquie*, Application No. 42730/05,12 June 2012, available at: http://www.refworld.org/docid/4fe9a9bb2.html, see also, *Feti Demirtaş c. Turquie*, see note 7 above.

[14] Inter-American Commission on Human Rights ("IACHR"), "*Fourth report on the situation of human rights in Guatemala*", OEA/Ser.L/V/II.83, Doc. 16 rev., 1 June 1993, chap. V. See also, IACHR, *Piché Cuca v. Guatemala*, Report No. 36/93, case 10.975, decision on merits, 6 October 1993, indicating that the conscription process must be challengeable in a court of law, available at: http://www.refworld.org/docid/5020dd282.html.

B. The Right to Conscientious Objection against Compulsory Military Service

8. The right to conscientious objection to State military service is a derivative right, based on an intepretation of the right to freedom of thought, conscience and religion contained in Article 18 of the Universal Declaration of Human Rights and Article 18 of the ICCPR. International jurisprudence on this right is evolving. The UN Human Rights Committee's [HRC] caselaw has shifted from characterizing the right as derived from the right "to manifest" one's religion or belief and thus subject to certain restrictions in Article 18(3),[15] to viewing it as one that "inheres in the right" to freedom of thought, conscience and religion in Article 18(1) itself.[16] This is a significant shift, albeitnot without dissenting opinions.[17] The shift suggests that the right to conscientious objection is absolute, and that States may not impose restrictions on the right to freedom of thought, conscience and religion by way of compulsory military service.[18] According to the HRC, the right therefore "entitles the individual to an exemption from compulsory military service if this cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion."[19] Even in its earlier jurisprudence, where the HRC based its decisions on the right to *manifest* one's religion or belief [found in Article 18(1) read together with 18(3) ICCPR], the State had to demonstrate why such a restriction was "necessary", given that many other countries managed to reconcile the interests of the individual with the interests of the State through the provision of alternative service.[20]

9. The right to conscientious objection is also reaffirmed in regional instruments, either explicitly or by interpretation,[21] as well as in various international standard setting documents.[22]

10. The right to conscientious objection applies to absolute, partial, or selective objectors [see II.];[23] volunteers as well as conscripts before and after joining the armed forces; during peace time and during armed conflict.[24] It includes objection to military service based on moral, ethical, humanitarian or similar motives.[25]

11. A conscientious objector's rights under Article 18 ICCPR will be respected where he or she is (i) exempted from the obligation to undertake military service or (ii) appropriate alternative service is available. In assessing the appropriateness of alternative service, it is generally considered that it needs to be compatible with the reasons for the conscientious objection; of a non-combatant or civilian character; in the public interest; and not punitive.[26] For example, civilian service under civilian administration would be necessary in the cases of

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[15] Article 18(3) ICCPR provides certain limitations on the right to manifest one's religion or belief, namely "prescribed by law and (…) necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." For further analysis, see UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees,* HCR/GIP/04/06, 28 April 2004, *("UNHCR Guidelines on Religion-Based Claims"),* available at: http://www.refworld.org/docid/4090f9794.html, para. 15. Moreover, unlike other rights in the Covenant, restrictions on the grounds of national security are not permitted at all. As noted by the HRC, "... such restrictions must not impair the very essence of the right in question." See HRC, *Yoon and Choi v. Republic of Korea*, CCPR/C/88/D/1321-1322/2004, 23 January 2007, available at: http://www.refworld.org/docid/48abd57dd.html, para. 8.3.

[16] See, HCR, *Atasoy and Sarkut v. Turkey,* CCPR/C/104/D/1853-1854/2008, 19 June 2012, available at: http://www.refworld.org/docid/4ff5b14c2.html, as well as *Min-Kyu Jeong at al v. Republic of Korea*, CCPR/C/101/D/1642-1741/2007, 27 April 2011, available at: http://www.refworld.org/docid/4ff59b332.html.

[17] See, Individual opinion of Committee member Mr. Gerarld L. Neuman, jointly with members Mr. Yuji Iwasawa, Mr. Michael O'Flaherty and Mr. Walter Kaelin (concurring), *Atasoy and Sarkut v. Turkey*, *ibid.*

[18] See, *Yoon and Choi v. Republic of Korea,* para. 8.4., note 15 above and *Eu-min Jung* and *Others v. Republic of Korea,* CCPR/C/98/D/1593-1603/2007, 30 April 2010, available at: http://www.refworld.org/docid/4c19e0322.html, para. 7.4.

[19] *Min-Kyu Jeong at al v. Republic of Korea*, para.7.3, see note 16 above.

[20] See, *Yoon and Choi v. Republic of Korea*, para. 8.4, note 15 above and *Eu-min Jung and Others v. Republic of Korea*, para. 7.4, see note 18 above.

[21] The right to conscientious objection is explicitly recognized in two regional treaties: 2000 Charter of Fundamental Rights of the European Union, Article 10(2); 2005 Ibero-American Convention on Young People's Rights, Article 12(3). The right is also derived from the right to freedom of thought, conscience and religion in regional human rights treaties, and has been recognized as such by the European Court of Human Rights (see Grand Chamber judgment in *Bayatyan v. Armenia*, Application No. 23459/03, 7 July 2011, available at: http://www.refworld.org/docid/4e254eff2.html, para. 110, followed by ***Feti Demirtaş c. Turquie***, note 7 above; *Savda c. Turquie*, see note 13 above; and *Tarhan c. Turquie*, Application No. 9078/06, 17 July 2012, available at: http://www.refworld.org/docid/51262a732.html)) and by the IACHR (see *Cristián Daniel Sahli Vera et al. v. Chile*, Case 12.219, Report no. 43/05, 10 March 2005, available at: http://www.refworld.org/docid/4ff59edc2.html; see also the friendly settlement in *Alfredo Diaz Bustos v. Bolivia*, Case 14/04, Report no. 97/05, 27 October 2005, available at: http://www.refworld.org/docid/4ff59fbc2.html, para. 19). See also IACHR, Annual Report, 1997, Chapter VII: Recommendation 10, available at: http://www.refworld.org/docid/50b8bd162.html; Council of Europe Parliamentary Assembly, Recommendation 1518 (2001) on the exercise of the right of conscientious objection to military service in Council of Europe Member States, 23 May 2001, available at: http://www.refworld.org/docid/5107cf8f2.html; Council of Europe Committee of Ministers, Recommendation No. R (87) 8, 9 April 1987, available at: http://www.refworld.org/docid/5069778e2.html; and Council of Europe Committee of Ministers, Recommendation CM/Rec (2010) 4 on human rights of members of the armed forces, 24 February 2010, available at: http://www.refworld.org/docid/506979172.html.

[22] See, UN General Assembly resolution, 33/165, 1978 on Status of persons refusing service in military or police forces used to enforce apartheid, available at: http://www.refworld.org/docid/3b00f1ae28.html. See HRC, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18),* CCPR/C/21/Rev.1/Add.4, 30 July 1993, *available at:* http://www.refworld.org/docid/453883fb22.html, at para. 11, as well as the HRC's Concluding Observations on Ukraine, CCPR/CO/73/UKR, 12 November 2001, available at: http://www.refworld.org/docid/3cbbeb1c4.html, para. 20, and those on Kyrgyzstan, CCPR/CO/69/KGZ, 24 July 2000, available at: http://www.refworld.org/docid/507572ef2.html, para. 18. The former UN Commission on Human Rights also affirmed that a right to conscientious objection derives from the right to freedom of thought, conscience and religion (UN Commission on Human Rights Resolution, *Conscientious objection to military service,* E/CN.4/RES/1989/59, 8 March 1989, available at: http://www.refworld.org/docid/3b00f0b24.html, reinforced and developed in resolutions E/CN.4/RES/1993/84, 10 March 1993, available at: http://www.refworld.org/docid/3b00f1228c.html; E/CN.4/RES/1995/83, 8 March 1995, available at: http://www.refworld.org/docid/3b00f0d220.html; E/CN.4/RES/1998/77, see note 5 above, E/CN.4/RES/2000/34, 20 April 2000, available at: http://www.refworld.org/docid/3b00efa128.html; E/CN.4/RES/2002/45, 23 April 2002, available at: http://refworld.org/docid/5107c76c2.html; and E/CN.4/RES/2004/35, 19 April 2004, available at: http://www.refworld.org/docid/415be85e4.html). Its successor, the UN Human Rights Council, has endorsed this position in its 2012 resolution on conscientious objection (A/HRC/RES/20/2, 16 July 2012, available at: http://www.refworld.org/docid/501661d12.html) and latest in its 2013 resolution (A/HRC/24/L.23, 23 September 2013, available at: http://www.refworld.org/docid/526e3e114.html).

[23] Although the HRC has not discussed partial or selective conscientious objection either in *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18),* see note 22 above or in its recent decisions on individual complaints, a number of countries do make provision for selective or partial conscientious objectors. See, for example, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights,* para 47, see note 4 above.

[24] See, Part II on Terminology.

[25] *Ibid.*

[26] UN Commission on Human Rights resolution 1998/77, para. 4, see note 5 above. See also, *Atasoy and Sarkut v. Turkey,* note 16 above, para. 10.4.

individuals who object outright to any association with the military.[27] However, where the objection is specifically to the personal carrying of arms the option of non-combatant service in the military may be appropriate. Many States avoid the difficulty of having to evaluate the sincerity of a claim to conscientious objection by allowing the person a free choice between military and alternative service.[28] In some States recognition of conscientious objection has been granted only to certain religious groups. However, as noted above, this would not be consistent with the scope of the right to freedom of thought, conscience and religion, nor with the prohibition on discrimination.[29]

C. Prohibition on Underage Recruitment and Participation in Hostilities

12. Explicit safeguards exist to prevent the exposure of children to military service.[30] All recruitment (both compulsory and voluntary) in State armed forces and the participation in hostilites[31] of those under 15 years of age is prohibited under international treaty law.[32] Such recruitment amounts to a war crime.[33] Whether conducted by governments or by non-State armed groups, compulsory recruitment of persons under 18 years of age is prohibited pursuant to the 2000 Optional Protocol to the 1989 Convention on the Rights of the Child ("CRC") on the involvement of children in armed conflict ["Optional Protocol to the CRC"].[34] A similar restriction is found in the 1999 International Labour Organization Convention on Worst Forms of Child Labour.[35] The 2000 Optional Protocol to the CRC requires States to "take all feasible measures" to prevent children under the age of 18 taking a "direct part in hostilities" whether as members of its armed forces or other armed groups and prohibits outright any voluntary recruitment of children under 18 years into non-State armed groups.[36] Whilst voluntary enlistment of children of 16 years and above is permitted for State armed forces, the State is obliged to put in place safeguards to ensure, *inter alia*, that any such recruitment is genuinely voluntary.[37] Despite the different age limits set by international law, the more favourable age limits ought to guide the assessment of refugee claims based on the fact that the child has objected through seeking international protection to that recruitment and/or service. Regional instruments also contain prohibitions on the recruitment and direct participation of children in hostilities.[38]

IV. SUBSTANTIVE ANALYSIS

A. Well-founded Fear of Being Persecuted

13. What amounts to a well-founded fear of being persecuted depends on the particular circumstances of the case, including the applicant's background, profile and experiences considered in light of up-to-date country of origin information.[39] It is important to take into account the personal experiences of the applicant, as well as the experiences of others similarly situated, since these may well show that there is a reasonable likelihood that the harm feared by the applicant will materialize sooner or later.[40] The first-tier question to ask is: *What would be the predicament [consequence(s)] for the applicant if returned?* The second-tier question is: *Does that*

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[27] See, *Atasoy and Sarkut v. Turkey*, para. 14, see note 16 above. See also, *Min-Kyu Jeong at al v. Republic of Korea*, para.7.3, also note 16 above.

[28] For a general overview of State practice, see, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, see note 4 above. See also, War Resisters' International, *World Survey of Conscription and Conscientious Objection to Military Service*, available at: http://www.wri-irg.org/co/rtba/index.html. With respect to European countries see also the judgment of the European Court of Human Rights in *Bayatyan v. Armenia*, note 21 above.

[29] See, for example, HRC, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18),* see note 22 above, stating that "…there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs…", para. 11. With regard to State practice recognizing conscientious objection even when it originates from views outside of those of certain formal religions, see, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, para. 12, see note 4 above. See also, *Brinkhof v. Netherlands*, CCPR/C/48/D/402/1990, 29 July 1993, available at: http://www.refworld.org/docid/4a3a3ae913.html.

[30] See, in this regard, UN Security Council, *Resolution 1882 (2009) on children and armed conflict*, S/RES/1882 (2009), 4 August 2009, available at: http://www.refworld.org/docid/4a7bdb432.html.

[31] Technically, international humanitarian law distinguishes between non-international armed conflict and international armed conflict in this respect. In non-international armed conflict (Article 4(3)(c), Additional Protocol II to the 1949 Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflict ("Additional Protocol II")) the prohibition relates to use in hostilities. In international armed conflict (Article 77(2), Additional Protocol I to the 1949 Geneva Conventions, relating to the Protection of International Armed Conflict ("Additional Protocol I")), it is limited to taking direct part in hostilities. The Convention on the Rights of the Child ("CRC") adopts the narrower "direct part in hostilities" standard, see Article 38(2), CRC.

[32] Article 77(2), Additional Protocol I; Article 4(3)(c), Additional Protocol II; Article 38(2) CRC.

[33] See, Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the 1998 Statute of the International Criminal Court ("ICC Statute") which lists as war crimes "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities." See also International Criminal Court ("ICC"), *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, available at: http://www.refworld.org/docid/4f69a2db2.html; Special Court for Sierra Leone ("SCSL"), *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment)*, Case No. SCSL-04-15-T, 2 March 2009, available at: http://www.refworld.org/docid/49b102762.html, at para. 184 (finding that the prohibition on such recruitment is customary international law). Further discussion of what constitutes the war crime of underage recruitment can be found in the SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, 18 May 2012, available at: http://www.refworld.org/docid/50589aa92.html

[34] Articles 2 and 4, 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

[35] Article 3(a), 1999 ILO Convention No. 182 on Worst Forms of Child Labour.

[36] Articles 1 and 4, 2000 Optional Protocol to CRC.

[37] Article 3, 2000 Optional Protocol to CRC. See also, *UNHCR Guidelines on International Protection No. 8 Child Asylum Claims under Articles 1A(2) and 1(F) of the 1951 Convention and /or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, 22 December 2009, *("UNHCR Guidelines on Child Asylum Claims")*, available at: http://www.refworld.org/docid/4b2f4f6d2.html, para. 22.

[38] See, Article 22(2), 1990 African Charter on the Rights and Welfare of the Child, and Article 12(3), 2005 Ibero-American Convention on Young People's Rights.

[39] *UNHCR Handbook*, paras. 51-53, see note 1 above.

[40] *UNHCR Handbook*, paras. 42-43, see note 1 above, and *UNHCR Guidelines on Religion-Based Claims*, para. 14, see note 15 above.

predicament [or consequence(s)] meet the threshold of persecution? The standard of proof to determine the risk is reasonable likelihood.[41]

14. Persecution will be established if the individual is at risk of a threat to life or freedom,[42] other serious human rights violations, or other serious harm.[43] By way of example, disproportionate or arbitrary punishment for refusing to undertake State military service or engage in acts contrary to international law – such as excessive prison terms or corporal punishment – would be a form of persecution. Other human rights at stake in such claims include non-discrimination and the right to a fair trial right, as well as the prohibitions against torture or inhuman treatment, forced labour and enslavement/servitude.[44]

15. In assessing the risk of persecution, it is important to take into account not only the direct consequences of one's refusal to perform military service [for example, prosecution and punishment], but also any negative indirect consequences. Such indirect consequences may derive from non-military and non-State actors, for example, physical violence, severe discrimination and/or harassment by the community. Other forms of punitive retribution for draft evasion or desertion may also be evident in other situations, such as suspension of rights to own land, enrol in school or university, or access social services.[45] These types of harm may amount to persecution if they are sufficiently serious in and of themselves, or if they would cumulatively result in serious restrictions on the applicant's enjoyment of fundamental human rights, making their life intolerable.

16. Claims relating to military service may arise in various situations. This section outlines five common types of claims, albeit with some overlap.

(i) Objection to State Military Service for Reasons of Conscience [absolute or partial conscientious objectors]

17. In assessing what kinds of treatment would amount to persecution in cases where the applicant is a conscientious objector [see V. A. below on issues relating to credibility and genuineness of the applicant's conviction(s)], the key issue is whether the national law on military service adequately provides for conscientious objectors, by either: (i) exempting them from military service, or (ii) providing appropriate alternative service. As mentioned in Part III above, States can legitimately require that citizens perform military or alternative service. However, where this is done in a manner that is inconsistent with international law standards, conscription may amount to persecution.

18. In countries where neither exemption nor alternative service is possible, a careful examination of the consequences for the applicant will be needed. For example, where the individual would be forced to undertake military service or participate in hostilities against their conscience, *or* risk being subjected to prosecution and disproportionate or arbitrary punishment for refusing to do so, persecution would arise. Moreover, the threat of such prosecution and punishment, which puts pressure on conscientious objectors to change their conviction, in violation of their right to freedom of thought, conscience or belief, would also meet the threshold of persecution.[46]

19. The protection threshold would not be met in countries that do not make provision for alternative service, but where the only consequence is a theoretical risk of military service because in practice conscription is not enforced or can be avoided through the payment of an administrative fee.[47] Similarly, where a draft evader is exempted from military service, or where a deserter is offered an honourable discharge, the issue of persecution would not arise, unless other factors are present.

20. Where alternative service is available, but punitive in nature and implementation, because of the type of service involved or its disproportionate duration, the issue of persecution may nonetheless be at issue. A disparity in the length of alternative service will not, in itself, be sufficient to meet the threshold of persecution. If, for example, the duration of alternative service is based on objective and reasonable criteria, such as the nature of the specific service concerned, or the need for special training in order to accomplish that service, persecution would not arise.[48] However, where alternative service is merely theoretical, for instance, because

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[41] See, UNHCR, *Note on the Burden and Standard of Proof*, 16 December 1998*, ("Note on the Burden and Standard of Proof"),* available at: http://www.refworld.org/docid/3ae6b3338.html, para. 10; UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001, *("UNHCR Interpreting Article 1")*, available at: http://www.refworld.org/docid/3b20a3914.html, paras. 16-17.

[42] Article 33(1), 1951 Convention.

[43] See, *UNHCR Handbook*, para. 51-53, see note 1 above. See also, UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, HCR/GIP/06/07, 7 April 2006, available at: http://www.refworld.org/docid/443679fa4.html, para. 14, and UNHCR Handbook, paras. 54-55, see note 1 above.

[44] See, for example, IACHR, "*Fourth report on the situation of human rights in Guatemala*", OEA/Ser.L/V/II.83, Doc. 16 rev., 1 June 1993, chap. V.

[45] See, for example, UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, April 2009, available at: http://www.refworld.org/docid/49de06122.html, pages 13-14.

[46] See, UN Commission on Human Rights, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention*, E/CN.4/2001/14, 20 December 2000, recommendation No. 2, available at: http://www.refworld.org/docid/3b00f54d18.html, paras. 91-94.

[47] Excessive administrative fees designed to deter genuine conscientious objectors from opting for alternative service or which are considered punitive would be considered discriminatory and may on a cumulative basis meet the threshold of persecution.

[48] See the HRC's approach in *Foin v. France*, see note 12 above. See similarly, Richard *Maille v. France,* CCPR/C/69/D/689/1996, 31 July 2000, available at: http://www.refworld.org/docid/3f588efd3.html, and *Venier v. France*, see note 12 above.

the relevant legislative provision has never been implemented; the procedure for requesting alternative service is arbitrary and/or unregulated; or the procedure is open to some but not all, further inquiries need to be undertaken. In cases where the applicant has not availed him or herself of the exising procedures it would be important to understand their reasons for not doing so. If found that the reasons relate to a well-founded fear of being persecuted for publicly expressing his or her convictions, this would need to be factored into the overall analysis.

(ii) Objection to Military Service in Conflict Contrary to the Basic Rules of Human Conduct

21. Refugee claims relating to military service may also be expressed as an objection to (i) a particular armed conflict or (ii) the means and methods of warfare (the conduct of a party to a conflict). The first objection refers to the unlawful use of force [*jus ad bellum*], while the second refers to the means and methods of warfare as regulated by international humanitarian law [*jus in bello*], as well as human rights and criminal law.[49] Collectively such objections relate to being forced to participate in conflict activities that are considered by the applicant to be contrary to the basic rules of human conduct.[50] Such objections may be expressed as an objection on the basis of one's conscience, and as such can be dealt with as a case of "conscientious objection" [see (i) above]; however, this will not always be the case. Individuals may, for example, object to participating in military activities because they consider this is required to conform to their military code of conduct, or they may refuse to engage in activities which constitute violations of international humanitarian, criminal or human rights law.

22. Recognizing the right to object on such grounds and to be granted refugee status is consistent with the rationale underlying the exclusion clauses in the 1951 Convention. Articles 1F(a) and 1F(c) exclude from protection individuals in respect of whom there are serious reasons for considering that they have committed crimes against peace, war crimes or crimes against humanity or are guilty of acts contrary to the purposes and principles of the United Nations, and who are therefore considered undeserving of international protection as refugees. The obligation on individuals under international humanitarian and criminal law to refrain from certain acts during armed conflict would find reflection in international refugee law in the case of individuals who are at risk of being punished for exercising the restraint expected of them under international law [see paragraph 14]. In this regard, it is important to note the absence of a defence of superior orders which are manifestly unlawful.[51]

Objection to Participating in an Unlawful Armed Conflict

23. Where an armed conflict is considered to be unlawful as a matter of international law [in violation of *jus ad bellum*], it is not necessary that the applicant be at risk of incurring individual criminal responsibility if he or she were to participate in the conflict in question, rather the applicant would need to establish that his or her objection is genuine, and that because of his or her objection, there is a risk of persecution. Individual responsibility for a crime of aggression only arises under international law for persons who were in a position of authority in the State in question.[52] Soldiers who enlisted prior to or during the conflict in question may also object as their knowledge of or views concerning the illegality of the use of force evolve.

24. In determining the legality of the conflict in question condemnation by the international community is strong evidence, but not essential for finding that the use of force is in violation of international law. Such pronouncements are not always made, even where objectively an act of aggression has taken place. Thus, a determination of illegality with regard to the use of force needs to be made through the application of the governing rules under international law. The relevant norms are the obligation on States to refrain from the threat or use of force against other States; the right of individual or collective defence; and the authorization of the use of force in line with the UN Security Council's powers to maintain peace and security.[53]

25. If the conflict is objectively assessed not to be an unlawful armed conflict under international law, the refugee claim will ordinarily fail unless other factors are present. Likewise, where the legality of the armed conflict is not yet settled under international law, the application may be assessed pursuant to (i) above as a conscientious objector case.

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[49] *Jus ad bellum* refers to the constraints under international law on the use of force, whereas *jus in bello* governs the conduct of the parties to an armed conflict. Traditionally, the latter refers to international humanitarian law but relevant standards are also found in applicable provisions of international human rights law and international criminal law.

[50] See, *UNHCR Handbook,* paras. 170-171, note 1 above. With regard to para. 171: "Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft evasion could, in light of all other requirements of the definition, in itself be regarded as persecution." See also, at a regional level, Council of the European Union, "*Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted"*, OJ/L 304/12, 30 Sept. 2004, available at: http://www.refworld.org/docid/4157e75e4.html. Article 9(2)(e) which includes as a form of persecution: "[p]rosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)."

[51] See, for example, Article 33, ICC Statute, see note 33 above.

[52] See, for example, International Criminal Court, *Elements of Crimes*, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Article 8 bis, available at: http://www.refworld.org/docid/4ff5dd7d2.html.

[53] See respectively, Articles 2(4), 51 and 42 UN Charter. See also, UN General Assembly, *Non-interference in the internal affairs of States*, A/RES/34/101, 14 December 1979, available at: http://www.refworld.org/docid/3b00f01740.html .

Objection to the Means and Methods of Warfare (Conduct of the Parties)

26. Where the applicant's objection is to the methods and means employed in an armed conflict [that is, the conduct of the one or more of the parties to the conflict], it is necessary to make an assessment of the reasonable likelihood of the individual being forced to participate in acts that violate standards prescribed by international law. The relevant standards can be found in international humanitarian law [*jus in bello*], international criminal law, as well as human rights law, as applicable.

27. War crimes and crimes against humanity are serious violations which entail individual responsibility directly under international law [treaty or custom]. Developments in the understanding of the elements of such crimes must be taken into account in determining what kinds of conduct or methods of warfare constitute such crimes.[54] Moreover, when assessing the kinds of acts an individual may be forced to commit in an armed conflict, other violations of international humanitarian law may also be relevant on a cumulative basis. The relevance of international human rights law in international or non-international armed conflict situations is also important to bear in mind.

28. Determining whether there is a reasonable likelihood that the individual would be forced to commit acts or to bear responsibility for such acts which violate the basic rules of human conduct will normally depend on an evaluation of the overall conduct of the conflict in question. Thus, the extent to which breaches of the basic rules of human conduct occur in the conflict will be relevant. However, it is the risk of being compelled to become involved in the act(s), rather than the conflict alone that is at issue, so the individual circumstances of the applicant must thus be examined, bearing in mind the role in which he or she will be engaged.

29. If the applicant is likely to be deployed in a role that excludes exposure to the risk of participating in the act(s) in question – for example, a non-combatant position such as a cook, or logistical or technical support roles only – then a claim of persecution is unlikely to arise without additional factors. Additional factors might include the link between the applicant's logistical or technical support role and the foreseeability of [or contribution to] the commission of crimes in violation of international humanitarian/criminal law. Further, the applicant's reasons for objecting – regardless of the foreseeability or remoteness of the commission of crimes linked to his or her activities – may be sufficient to qualify him or her as a conscientious objector [see (i) above].

30. By contrast, where there is a reasonable likelihood that an individual may not be able to avoid deployment in a combatant role that will expose him or her to the risk of committing illegal acts, his or her fear of being persecuted would be considered well-founded [see paragraph 14]. In some cases the conflict in question may be one that is not generally characterized by violations of international law. However, the individual in question may be a member of a unit whose particular duties mean that it is specifically, or more likely, to be implicated in violations of basic rules of human conduct. In such circumstances there may be a reasonable likelihood that the individual concerned will be forced to commit, for example, war crimes or crimes against humanity. Where options are available to be discharged, reassigned [including to alternative service] or to have an effective remedy against superiors or the military which will be fairly examined and without retribution, the issue of persecution will not arise, unless other factors are present.[55]

(iii) Conditions of State Military Service

31. In cases involving conditions within the State armed forces, a person is clearly not a refugee if his or her only reason for desertion or draft evasion is a simple dislike of State military service or a fear of combat. However, where the conditions of State military service are so harsh as to amount to persecution the need for international protection would arise.[56] This would be the case, for instance, where the terms or conditions of

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[54] For an overview, see UNHCR's *Background Note on Exclusion,* 4 September 2003, available at: http://www.refworld.org/docid/3f5857d24.html, paras. 30-32. Examples of war crimes in the context of an international armed conflict are wilful killing of civilians, soldiers hors de combat or prisoners of war; torture; killing or wounding treacherously individuals belonging to the hostile army; intentionally directing attacks against the civilian population; rape; recruitment of children under the age of fifteen years into the armed forces or using them to participate actively in hostilities; and use of poisonous weapons. In a non-international armed conflict, war crimes include intentionally directing attacks against civilians; killing or wounding treacherously a combatant adversary; rape; recruitment of children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

[55] See, for example, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights,* see note 4 above, concerning the practice in some States of allowing enlisted soldiers to move to a different non-combatant unit if they develop a conscientious objection to a particular conflict or bearing arms altogether, paras. 26-27. Such an option may not be available though for an individual whose objection to a particular conflict is not based on conscientious objection.

[56] See, for example, *Yasin Sepet, Erdem Bulbul v. Secretary of State for the Home Department*, C/2777; C/2000/2794, United Kingdom: Court of Appeal (England and Wales), 11 May 2001, available at: http://www.refworld.org/docid/3ffbcb024.html, para. 61. See UN Working Group on Arbitrary Detention, Opinion No. 24/2003 (Israel), E/CN.4/2005/6/Add.1, 19 November 2004, available at: http://www.refworld.org/docid/470b77b10.html. Similarly, HRC, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (Article 14), 23 August 2007, available at: http://www.refworld.org/docid/478b2b2f2.html, stating that, "Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience", para. 55; see also UN Commission on Human Rights, Resolution 98/77, para. 5, see note 5 above. Subsequent to the HRC's ruling on Article 18 and a right to conscientious objection in *Yoon and Choi v. Republic of Korea*, see note 15 above, the UN Working Group on Arbitrary Detention has stated that the imprisonment of a conscientious objector for refusing to take up military service constitutes arbitrary detention as it is a violation of the rights guaranteed in Article 18 ICCPR as well as Article 9 ICCPR: Opinion No. 16/2008 (Turkey), A/HRC/10/21/Add.1, 4 February 2009, available at: http://www.refworld.org/docid/5062b12e2.html. See also the European Court of Human Rights that held that the cumulative effect of repeated prosecution and punishment of conscientious objectors for desertion was their "civil death" amounting to degrading treatment in violation of Article 3 of the ECHR. See *Ülke v. Turkey*, Application No. 39437/98, 24 January 2006, available at: http://www.refworld.org/docid/4964bd752.html as well as *Savda c. Turquie*, note 13 above and *Tarhan c. Turquie*, note 21 above, and *Feti Demirtaş c. Turquie*, see note 7 above.

military service amount to torture or other cruel or inhuman treatment,[57] violate the right to security[58] and integrity of person,[59] or involve forced or compulsory labour,[60] or forms of slavery or servitude [including sexual slavery].[61]

32. Such cases may in particular involve discrimination on the grounds of ethnicity, or gender. Where the ill-treatment feared is carried out within the State armed forces by military personnel, it is necessary to assess whether such practices are systemic and/or in practice authorized, tolerated or condoned by the military hierarchy. An assessment has to be made regarding the availability of redress against such ill-treatment.

33. Under international law the prohibition of "forced or compulsory labour"[62] does not encompass military or alternative service. Nevertheless, where it can be established that compulsory military service is being used to force conscripts to execute public works, and these works are not of a "purely military character" or not exacted in the case of an emergency, and do not constitute a necessity for national defence or a normal civic obligation, such work constitutes forced labour.[63] According to the International Labour Organization, the condition of a "purely military character" is aimed specifically at preventing the call up of conscripts for public works.[64] In situations of emergency, which would endanger the existence of the State or well-being of the whole or part of the population, conscripts may nevertheless be called upon to undertake non-military work. The duration and extent of compulsory service, as well as the purposes for which it is used, need to be confined to what is strictly required in the given situation.[65] Using a conscript to gain profit through his or her exploitation [e.g. slavery, sexual slavery, practices similar to slavery, and servitude] is prohibited by international law and criminalized in the national legislation of a growing number of States.

34. As with other refugee claims outlined above (i) - (ii), if the applicant has the possibility of discharge, reassignment [including appropriate alternative service] and/or an effective remedy, without retribution, the issue of persecution will not arise, unless other factors are present.

(iv) Forced Recruitment and/or Conditions of Service in Non-State Armed Groups

35. As far as forced recruitment in non-State armed groups is concerned, it is recalled that non-State armed groups are not entitled to recruit by coercion or by force.[66] A person who seeks international protection abroad because of feared forced recruitment, or re-recruitment, by non-State armed groups, may be eligible for refugee status provided the other elements of the refugee definition are established; in particular that the State is unable or unwilling to protect the person against such recruitment [see paragraphs 42-44 and 60-61 below]. Likewise, forced recruitment by non-State groups to carry out non-military works could amount to, *inter alia*, forced labour, servitude and/or enslavement and constitute persecution.[67]

36. Where the applicant would be subjected to conditions of service that constitute serious violations of international humanitarian or criminal law,[68] serious human rights violations or other serious harm, persecution would arise.[69]

(v) Unlawful Child Recruitment

37. Special protection concerns arise where children are at risk of forced recruitment and service.[70] The same is true for children who may have "volunteered" for military activities with the State's armed forces or non-State armed groups. A child's vulnerability and immaturity make him or her particularly susceptible to coerced recruitment and obedience to the State's armed forces or a non-State armed group; this must be taken into account.

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[57] See, Article 7 ICCPR.

[58] See, Article 9 ICCPR.

[59] See for an interpretation, Articles 7, 9 and 17 ICCPR.

[60] See, Article 8(3) ICCPR and Article 1(b) of the Abolition of Forced Labour Convention, 1957 (No. 105).

[61] See, Article 8(1) ICCPR and Article 6 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").

[62] See, Article 8 ICCPR.

[63] 1930 ILO Convention No. 29 concerning Forced or Compulsory Labour. See also, IACHR, "*Fourth report on the situation of human rights in Guatemala*", OEA/Ser.L/V/II.83, Doc. 16 rev., 1 June 1993, chap. V.

[64] It has its corollary in Article 1(b) of the Abolition of Forced Labour Convention, 1957 (No. 105), which prohibits the use of forced or compulsory labour "as a method of mobilizing and using labour for purposes of economic development."

[65] ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), *CEACR: Individual Direct Request concerning Forced Labour Convention, 1930 (No. 29) Eritrea* (ratification: 2000), 2010.

[66] See, para 7 above.

[67] See, Article 8(3) ICCPR, Article 1(b) of the Abolition of Forced Labour Convention (No. 105), 1957; Article 8(1) ICCPR; and Article 6 CEDAW.

[68] See, Article 3 common to the four Geneva Conventions of 1949; Article 8, Rome Statute of the ICC (last amended 2010), 17 July 1998, available at: http://www.refworld.org/docid/3ae6b3a84.html.

[69] For example, torture or other cruel, inhuman or degrading treatment or punishment (see Article 7, ICCPR), violations of the right to security (see Article 9 ICCPR) and integrity of person (see for an interpretation Article 7, 9 and 17 ICCPR), forced or compulsory labour (see Article 8(3) ICCPR and Article 1(b) of the Abolition of Forced Labour Convention, 1957 (No. 105)) or forms of slavery (including sexual slavery, see Article 8(1) and Article 6 CEDAW).

[70] *UNHCR Guidelines on Child Asylum Claims,* see note 37 above.

38. As outlined at III.C. above, there are important restrictions on the recruitment and participation in hostilities of children under international human rights law and international humanitarian law, whether related to an international or a non-international armed conflict, and relating to both State armed forces and non-State armed groups.[71] Children need to be protected from such violations; as such, a child evading forced recruitment or prosecution and/or punishment or other forms of retaliation for desertion would generally have a well-founded fear of persecution.

39. There may be cases where children "volunteer" under pressure, or are sent to fight by their parents or communities. Such cases can similarly give rise to refugee status. The key question is the likelihood of risk that the child will be recruited and/or forced to fight, and this needs to be assessed on the basis of up-to-date country of origin information, taking into account the child's profile and past experiences, as well as the experiences of similarly situated children. Importantly, in refugee claims concerning violations of the restrictions on the recruitment and participation of children in hostilities, there is no additional requirement to consider the issue of conscientious objection.

40. Persecution may also arise from the nature of the treatment the child would be subjected to whilst in the military or armed group. In this respect, it is important to note that in addition to taking an active part in hostilities, children are also used as spies, messengers, porters, servants, slaves [including sex slaves], and/or to lay or clear landmines. Regardless of the function held by the child, they may be exposed to serious or multiple forms of harm, including being put in a position to witness heinous crimes.[72]

41. Persecution may also arise where there is a risk of ill-treatment on return to the country of origin, for example, because of the child's history of being involved with State armed forces or non-State armed groups, whether as a soldier/combatant/fighter or in another role. They may be considered as an "enemy" by respectively the State or the non-State armed group and as a result be at risk of retaliation, including physical attacks, or being ostracized by the community to such an extent that their life is intolerable. In all such cases, special consideration needs to be given to the particular vulnerabilities and best interest of child applicants.[73]

Agents of Persecution

42. There is scope within the refugee definition to recognize both State and non-State agents of persecution. In countries undergoing civil war, generalized violence, situations of insurgency, or State fragmentation, the threat of forced recruitment often emanates from non-State armed groups. This may result from the State's loss of control over parts of its territory. Alternatively, the State may empower, direct, control or tolerate the activities of non-State armed groups [for example, paramilitary units or private security groups]. The congruity of interests between the State and a non-State armed group involved in forced recruitment may not always be clear. Other non-State actors may also be the perpetrators of persecution in forms other than forced recruitment, for example, through violence and discrimination by family members and neighbours against former child soldiers perceived as having aided the enemy.

43. In all cases involving harm by non-State armed groups and other non-State actors, it is necessary to review the extent to which the State is able and/or willing to provide protection against such harms.

44. Where the refugee claim is based on the risk of being forced to commit acts that violate basic rules of human conduct, it is necessary to examine the extent to which such violations are taking place, as well as the ability and/or willingness of the authorities, in particular the military authorities, to prevent future violations. Isolated breaches of*jus in bello* which are effectively investigated and dealt with by the military authorities will indicate the existence of available and effective State protection. State responses of this nature would involve action being taken against those responsible and measures being put in place to prevent repetition.

45. With respect to ill-treatment by other soldiers, such as serious bullying or hazing, it is necessary to determine whether such acts are condoned by the military authorities and whether effective methods of redress are available through the military system or elsewhere in the State structure.

Amnesties

46. When a conflict ends, a State may offer amnesties to persons who evaded military service, in particular to conscientious objectors. Such initiatives may guarantee immunity from prosecution or offer official recognition of conscientious objector status, thereby removing the risk of harm associated with such prosecution or punishment. Nevertheless, the impact of an amnesty on an individual's fear of persecution requires careful

[71] See generally, UN Committee on the Rights of the Child, CRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, ("CRC General Comment No.6"), CRC/GC/2005/6, 1 September 2005, available at: http://www.refworld.org/docid/42dd174b4.html, para. 59.

[72] See, note 69 above; see also *UNHCR Guidelines on Child Asylum Claims,* para. 23, see note 37 above.

[73] *UNHCR Guidelines on Child Asylum Claims,* paras. 4 and 5, see note 37 above, and the CRC General Comment No.6, see note 71 above.

assessment. Amnesties may not cover all deserters and draft evaders. Moreover, it is necessary to examine whether the such protection is effective in practice; whether the individual may still face recruitment into the armed forces; whether he or she may be subjected to other forms of persecution apart from any criminal liability quashed by the amnesty; and/or whether the person is at risk of being targeted by non-State actors – including community groups for being considered a traitor, for example – irrespective of the legislation adopted by the State. In particular, individuals who have witnessed the commission of war crimes or other serious acts, and have deserted as a result, may be able to establish a well-founded fear of persecution under certain circumstances if, for instance, they were required to act as witnesses in criminal proceedings upon return which would expose them to serious harm.

B. The Convention Grounds

47. As with all claims to refugee status, the well-founded fear of persecution needs to be related to one or more of the grounds specified in the refugee definition in Article 1A(2) of the 1951 Convention; that is, it must be "for reasons of" race, religion, nationality, membership of a particular social group or political opinion. The Convention ground needs only to be a contributing factor to the well-founded fear of persecution; it need not be shown to be the dominant or even the sole cause. Further, one or more of the Convention grounds may be relevant; they are not mutually exclusive and may overlap.

48. The intent or motive of the persecutor can be a relevant factor in establishing the causal link between the fear of persecution and a Convention ground but it is not decisive, not least because it is often difficult to establish.[74] There is no need for the persecutor to have a punitive intent to establish the causal link; the focus is rather on the reasons for the applicant's predicament and how he or she is likely to experience the harm. Even where an individual is treated in the same way as a majority of the population this does not preclude persecution being for reasons of a Convention ground. Similarly, if the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link. Where the persecutor is a non-State armed actor, the causal link is established either where the persecutor harms the applicant for a Convention-related reason, *or* the State does not protect him or her for a Convention-related reason.[75]

Religion

49. The religion ground is not limited to belief systems ["theistic, non-theistic and atheistic"],[76] but covers also notions of identity, or way of life.[77] It dovetails with Article 18 ICCPR and includes broader considerations of thought and conscience, including moral, ethical, humanitarian or similar views. The religion ground is thus particularly relevant in cases of conscientious objection, including those expressed through draft evasion or desertion, as explained at III. B. With respect to claims by conscientious objectors, the *UNHCR Handbook* states that:

> Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.[78]

50. The religion ground may also be relevant in cases based on military service other than in situations of conscientious objection. Recruits may be subject to detention, ill-treatment (such as physical beatings or severe psychological pressure) and serious discrimination on account of their religious beliefs, identity or practices. They may also be pressured to renounce their beliefs and convert.

Political Opinion

51. The political opinion ground is broader than affiliation with a particular political movement or ideology; it concerns "any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged."[79] Moreover, it covers both the holding of an actual political opinion and its expression, political neutrality as well as cases where a political opinion is imputed to the applicant even if he or she does not hold

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[74] *UNHCR Handbook*, para. 66, see note 1 above.

[75] See, *UNHCR, Guidelines on International Protection No.2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02, 7 May 2002, ("UNHCR Guidelines on Social Group")*, available at: http://www.refworld.org/docid/3d36f23f4.html, para. 23.

[76] *UNHCR Guidelines on Religion-Based Claims*, para. 6, see note 15 above.

[77] *Ibid*, paras. 4 and 8.

[78] *UNHCR Handbook*, para. 172, see note 1 above.

[79] UNHCR, *Guidelines on International Protection No. 1: Guidelines on Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees,* HCR/GIP/02/01, 7 May 2002, ("*UNHCR Guidelines on Gender-Related Persecution*"), available at: http://www.refworld.org/docid/3d36f1c64.html, para. 32.

that view.[80] The latter can arise in cases where the State, or a non-State armed group, attributes to the individual a particular political view.

52. Cases involving objection to military service may be decided on the basis that there is a nexus with the political opinion ground in the 1951 Convention. Depending on the facts, an objection to military service - especially objections based on a view that the conflict violates basic rules of human conduct (see IV. A. (ii) above) – may be viewed through the prism of actual or imputed political opinion. In relation to the latter, the authorities may interpret the individual's opposition to participating in a conflict or in act(s) as a manifestation of political disagreement with its policies. The act of desertion or evasion may in itself be, or be perceived to be, an expression of political views.

53. The political opinion ground may be relevant in other circumstances. For instance, a refugee claim by a soldier who becomes aware of and objects to criminal activity being conducted or tolerated by military personnel in the context of a conflict, such as the illicit sale of weapons, extortion of civilians or trafficking of drugs or in persons, and who fears persecution as a result of his or her opposition to such activities, may be considered under the political opinion ground. Whether or not the soldier is a whitsleblower, attempts to flee military service may be perceived by the authorities as evidence of political opposition. Objection to recruitment by non-State armed groups may also be an expression of political opinion.

54. Political opinion may also be the applicable ground in relation to family members of a conscientious objector, draft evader or deserter who is identified by the State or non-State armed group as having an allegiance to a particular political cause. In such cases, persecution may be linked to imputed political opinion, on the basis that the family member is assumed to hold similar views as those ascribed to the conscientious objector, draft evader or deserter. The relevant ground in such cases may also be "family" as a social group (see below paragraph 56).

Race or Nationality

55. Race and nationality, in the sense of ethnicity, are often factors in cases connected with military service. The well-founded fear of persecution may be directly based on the applicant's race, for example where conscripts from a particular racial group face harsher conditions than other recruits, or are the only ones actually subject to the draft. Similarly, children may face forced recruitment because they belong to a targeted ethnic group. Cases based on the conditions of military service arising to persecution may also relate to discrimination on the basis of race and/or ethnicity, and could invoke this ground.

Membership of a Particular Social Group

56. The 1951 Convention does not include a specific list of particular social groups. Rather, "the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[81] UNHCR defines a "particular social group" as:

> A particular social group involves a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[82]

57. The two approaches - "protected characteristics" and "social perception" - to identifying "particular social groups" reflected in this definition are alternative, not cumulative, tests. The "protected characteristics" approach examines whether a group is connected either by an immutable characteristic, or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic "may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status)."[83] The "social perception" approach considers whether a particular social group shares a common characteristic which makes it cognizable or sets the group's members apart from society at large. The latter approach does not require that the common characteristic be easily identifiable by the general public, or visible to the naked eye. An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group.[84] Moreover, irrespective of which approach is adopted, a particular social group can arise even

[80] See UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, available at: http://www.refworld.org/docid/4fc369022.html, para. 8.

[81] *UNHCR Guidelines on Social Group*, para. 3, see note 75 above.

[82] *Ibid*, para. 11.

[83] *Ibid*, para. 6.

[84] *Ibid*, para. 17.

where this covers a large number of people.[85] Nevertheless, everyone falling within a particular social group is not necessarily a refugee; a well-founded fear of persecution because of membership of that group is required.

58. Under either of these approaches, "conscientious objectors" are a particular social group given that they share a belief which is fundamental to their identity and that they may also be perceived as a particular group by society. Individuals with common past experience, such as child soldiers, may also constitute a particular social group. This may also be the case for draft evaders or deserters, as both types of applicants share a common characteristic which is unchangeable; a history of avoiding or having evaded military service. In some societies deserters may be perceived as a particular social group given the general attitude towards military service as a mark of loyalty to the country and/or due to the differential treatment of such persons (for example, discrimination in access to employment in the public sector) leading them to be set apart or distinguished as a group. The same may be true for draft evaders. Conscripts may form a social group characterized by their youth, forced insertion into the military corps or their inferior status due to lack of experience and low rank.

59. Women are a particular social group, defined by innate and immutable characteristics and frequently treated differently from men.[86] This may be the relevant ground in claims concerning sexual violence against female soldiers or women or girls forced to act as sex slaves; although this does not preclude the application of other grounds. Girls are a sub-set of this social group. Children are also a particular social group, and this will be a relevant ground in cases concerning fear of forced underage recruitment.[87]

C. Internal Flight or Relocation Alternative

60. Where the feared persecution emanates from, or is condoned, or tolerated by the State and/or State agents, an internal flight or relocation alternative will generally not be available, as the State actors will be presumed to have control and reach throughout the country. In the case of conscientious objectors to State military service, where the State does not provide for exemption or alternative service, and where the fear of persecution is related to these laws and/or practices and their enforcement, a consideration of an internal flight or relocation alternative (IFA) would not be *relevant* as it can be assumed that the objector would face persecution across the country.[88]

61. Determining whether an IFA is available in cases where the risk of persecution emanates from non-State armed groups, it is necessary to evaluate the ability and/or willingness of the State to protect the applicant from the harm feared. The evaluation needs to take into account whether the State protection is effective and of a durable nature, provided by an organized and stable authority exercising full control over the territory and population in question. In the particular context of non-international armed conflict, special consideration would need to be given to the applicant's profile, and whether he or she was recruited into and/or participated in activities of a non-State armed group considered to be in opposition to the government, and any likely reprisals from the government.It would often be unreasonable to expect former non-State recruits to relocate into government-controlled territory in a situation of an ongoing conflict, especially if the conflict has religious or ethnic dimensions.

V. PROCEDURAL AND EVIDENTIARY ISSUES

A. Establishing the Relevant Facts

62. The credibility assessment refers to the process of determining whether, in light of all the information available to the decision maker, the statements of the applicant relating to material elements of the claim can, on balance, be accepted as having been truthfully given for the purpose of determining refugee status eligibility. Where, notwithstanding, an applicant's genuine efforts to provide evidence pertaining to the material facts, there remains some doubt regarding some of the facts alleged by him or her, the benefit of doubt should be given to the applicant in relation to the assertions for which evidentiary proof is lacking once the decision maker is satisfied with the general credibility of the claim.[89]

63. In claims related to military service, reliable and relevant country of origin information, including the extent to which exemption from military service or alternative service are available, the manner in which conscription is enforced, and the treatment of individuals or groups within the military forces of the country of origin, can

[85] *Ibid*, paras. 18-19.

[86] *UNHCR Gender-Related Persecution Guidelines*, para. 30, see note 79 above.

[87] *UNHCR Guidelines on Child Asylum Claims*, para. 48 et seq., see note 37 above.

[88] *UNHCR Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A (2) of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, (*"UNHCR Internal Flight Guidelines"*), available at: http://www.refworld.org/docid/3f2791a44.html.

[89] *UNHCR Handbook*, para. 204, see note 1 above.

assist in the evaluation of the truthfulness of the applicant's account and the determination of the forms of treatment and their likelihood he or she may face if returned.[90]

64. Establishing the genuineness and/or the personal significance of an applicant's beliefs, thoughts and/or ethics plays a key role in claims to refugee status based on objection to military service, in particular conscientious objection (see IV. A. (i)-(ii)).[91] The applicant needs to be given the opportunity during the individual interview to explain the personal significance of the reasons behind his or her objection, as well as how these reasons impact on his or her ability to undertake military service. Eliciting information regarding the nature of the reasons espoused, the circumstances in which the applicant has come to adopt them, the manner in which such beliefs conflict with undertaking military service, as well as the importance of the reasons to the applicant's religious or moral/ethical code are appropriate and assist in determining the credibility of the applicant's statements.

65. Where the objection to military service is derived from a formal religion, it may be relevant to elicit information about the individual's religious experiences, such as asking him or her to describe how they adopted the religion, the place and manner of worship, or the rituals engaged in, the significance of the religion to the person, or the values he or she believes the religion espouses, in particular, in relation to the bearing of arms. That said, extensive examination or testing of the tenets or knowledge of the individual's religion may not always be necessary or useful, particularly as such knowledge will vary considerably depending on his or her personal circumstances. A claimant's detailed knowledge of his or her religion does not necessarily correlate with sincerity of belief and vice-versa.

66. Cases involving mistaken beliefs as to a particular religion's views on the bearing of arms occur from time to time. Where mistaken beliefs are at issue, it would need to be established that the applicant, despite the mistaken beliefs, still faces a well-founded fear of persecution for one or more of the Convention grounds.[92]

67. If the claimant is mistaken about the nature of a particular conflict, such as whether the conflict abides by international law, this does not automatically undermine the credibility of the alleged reasons for objecting to military service. The credibility assessment in such situations needs to be conducted in light of the applicant's explanations regarding why involvement in the conflict would be inconsistent with his or her religious or moral beliefs, and the reality of the situation on the ground. Nonetheless, while they may be credible in their objection, where such an objection is based on a false premise, the risk of persecution would not arise unless they face other persecutory consequences for having deserted or evaded military service and a nexus to one of the Convention grounds is established.

68. For those objectors whose reasons for their objection is a matter of thought or conscience (rather than religion), they will not be able to refer to the practices of a religious community or teachings of a religious institution in order to substantiate their assertion. They should, however, be able to articulate the moral or ethical basis for their convictions. This may be based on social or community beliefs or practices, parental beliefs or on philosophical or human rights convictions. Past behaviour and experiences may shed light on their views.

69. In cases involving individuals who volunteered for military service or responded to a call up, and who subsequently desert, it is important to recognize that religious or other beliefs may develop or change over time, as may the circumstances of the military service in question. Thus, adverse judgements as to the credibility of the applicant should not generally be drawn based only on the fact that he or she initially joined the military service voluntarily; the full circumstances surrounding the individual's espoused beliefs and situation need to be carefully examined.

B. Claims by Children

70. Given their young age, dependency and relative immaturity, special procedural and evidentiary safeguards are required for claims to refugee status by children.[93] In particular, children who spent time as soldiers/combatants/fighters or in a support role to armed groups may be suffering from severe trauma and be intimidated by authority figures. This can affect their ability to present a clearly understandable account of their experiences. Thus, appropriate interviewing techniques are essential during the refugee status determination procedure, as well as the creation of a non-threatening interview environment.

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[90] *UNHCR Handbook,* paras. 196 and 203-204, see note 1 above, and *UNHCR Interpreting Article 1*, para. 10, see note 41 above. Note the *World Survey of Conscription and Conscientious Objection to Military Service*, which provides a country-by-country analysis, see note 28 above.

[91] For a general discussion of credibility issues in claims based on freedom of thought, conscience and religion see *UNHCR Guidelines on Religion-based Claims*, paras. 28-29, see note 15 above.

[92] *Ibid,* para. 30.

[93] For a full discussion of the minimum safeguards required see *UNHCR Guidelines on Child Asylum Claims,* paras. 65-77, see note 37 above. See also ExCom, *Conclusion on Children at Risk*, No. 107 (LVIII), 5 October 2007, available at: http://www.refworld.org/docid/471897232.html, para. g(viii). Whether a claimant is a child for the purposes of such safeguards will depend on the age at the date the claim to refugee status is made.

71. In cases concerning children, a greater burden of proof will fall on the decision makers than in other claims to refugee status, especially if the child is unaccompanied.[94] Given their immaturity, children cannot be expected to provide adult-like accounts of their experiences. If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his or her claim, a decision must be made on the basis of all known circumstances.

72. Age assessments may be particularly important in claims to refugee status based on military service where the age of the applicant is in doubt. This is the case not just with claims regarding conscription but also where a child considers him or herself to have "volunteered", given the limits on voluntary service set by international law (see III.B. above). Age assessments, which may be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual, are to be conducted in a safe, child- and gender-sensitive manner with due respect for human dignity.[95] Where the assessment is inconclusive, the applicant must be considered a child. Prior to the assessment, an independent guardian should be appointed to advise the child on the purpose and process of the assessment procedure, which needs to be explained clearly in a language that the child understands. DNA testing should, in normal circumstances, only be done if permitted by law and with the informed consent of the relevant individuals.

[94] *UNHCR Guidelines on Child Asylum Claims*, para. 73, see note 37 above.

[95] See further, *UNHCR Guidelines on Child Asylum Claims*, paras. 75-76, see note 37 above.