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Beyond Conscientious Objection: Canadian Refugee Jurisprudence on Military Service Evasion

Martin Jones

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CRS Working Paper Series Editors: Pablo Bose and Johanna Reynolds
Centre for Refugee Studies York Lanes, York University 4700 Keele Street, Toronto, Ontario, M3J 1P3

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BEYOND CONSCIENTIOUS OBJECTION: CANADIAN REFUGEE JURISPRUDENCE ON MILITARY SERVICE EVASION

MARTIN JONES

In January 2004, a young man crossed the border into Canada along with his wife and young son. He fled participation in a conflict that was widely viewed at the time as being both based upon an illegal invasion and executed, at times, contrary to the rules of war. He claimed he was a simple Quaker who was repulsed by the conflict in which he was being ordered to participate. In many respects, he was no different than many of the 30,000 refugee claimants seeking Canada's protection every year. And yet in at least two respects he was quite different: he was an American citizen and the war he was fleeing was the American occupation of Iraq.

At least in part because of these two features of this young man, he became quite famous. His story, the story of Jermey Hinzman, has since been reported on by most of the world's major print and broadcast media outlets. This reporting has fuelled both admiration and outrage. American pundits have called for a consumer boycott of Canadian goods and services as a result of Mr. Hinzman's actions.[1] He has been described by his countrymen and by Canadians as both a coward and a hero.

In the months that have passed since Mr. Hinzman's arrival in Canada, the media attention has abated. His claim has been heard by the Refugee Protection Division of the Immigration and Refugee Board.[2] It is currently working its way through the process of judicial review.[3] However, while the public expressions of the divergent emotions that his refugee claim prompted may have become less frequent, there remains an underlying ambivalence towards individuals such as Mr. Hinzman fleeing military service. It is perhaps not surprising, that the jurisprudence in Canada, and elsewhere, is similarly divided and uncertain about whether to grant protection to individuals evading military service. Although Mr. Hinzman's claim was raised in the context of the all-volunteer force of the United States Armed Forces, in most cases, the ground of military service evasion is raised in relation to compulsory military service. For analytical ease, it is with the circumstance of compulsory military service that this paper will be concerned.[4]

By way of background, compulsory military service is practiced in about 100 countries; conscription exists as a reality in a majority of the member states of the United Nations and for an overwhelming majority of the population of the world.[5] Compulsory military service has been both denounced as nothing less than the surrender of "the most essential rights of personal liberty"[6] and praised as the *sine qua non* of full citizenship.[7] Despite a debate that continues to this date concerning its legitimacy, compulsory military service is a continuing phenomenon that affects the lives of many millions of men around the world.[8]

Many of the countries requiring military service are a significant source of refugees. Of the top ten source countries for refugees in 2002 at least eight require military service.[9] It is not surprising, therefore, that the topic of compulsory military service, and in particular the issue of the status of military service evaders, has been raised in refugee determination proceedings.[10] It will be the purpose of this paper to assess the treatment of evaders of compulsory military service in the Canadian refugee jurisprudence.

The underlying premise of this paper is that the refugee jurisprudence concerning military service evasion has been, up to the present, plagued by fragmentation, incoherence and inattention.

As contrasted with refugee law in general, the jurisprudence on military service evasion is parochial and makes very limited use of extra-jurisdictional refugee jurisprudence on the topic, municipal jurisprudence on military service evasion or international human rights jurisprudence.[11] These jurisprudential deficits have been accompanied by a lack of legislative and administrative attention to the subject.

Notwithstanding the premise of this paper, it will be suggested that the deficits in the refugee jurisprudence are not without remedy. A coherent approach to military service evasion which draws upon extra-jurisdictional refugee jurisprudence, municipal experience of conscription and international human rights jurisprudence can yet be formulated. It is the project of this paper to attempt to establish a framework of analysis within which the jurisprudence can be organized and understood. However, it must be noted at the outset that such an approach to the status of military service evaders in refugee law, in particular, cannot succeed without recognition of the underlying debate about the legitimacy of military service raised by the topic of military service evasion in general.

This paper will be divided into three parts. Firstly, the framework of the definition of refugee will be outlined in the context of the Canadian statutory and jurisprudential framework, including the basic elements as relevant to the determination of claims involving military service evasion. Secondly, the Canadian jurisprudence thus far on the ability of military service evaders to gain refugee protection will be surveyed and organized. Thirdly, some specific deficits of the Canadian jurisprudence to date will be discussed and suggestions will be made on how to bring the jurisprudence into line with various international human rights instruments and various municipal standards.

However, before proceeding to an assessment of the jurisprudence, a few words should be said about the Canadian focus of this paper.

SIGNIFICANCE OF CANADIAN JURISPRUDENCE

This paper will only systematically consider the jurisprudence of Canada – although reference will be made to cases determined in other jurisdictions where appropriate, in particular the jurisprudence of the United States, Australia and the United Kingdom. The focus on Canadian jurisprudence is coincidental, but not without significance.

Coincidentally, it is the Canadian jurisprudence with which the author is most familiar and it was the Canadian jurisprudence that first brought the complexities of military service evasion to the attention of the author. Furthermore, the working paper series of which this paper is a part is published by a Canadian centre and, in some measure, for a Canadian audience.

However, there are also additional non-coincidental reasons why the study of the Canadian jurisprudence is significant. Canada possesses a well-developed judicial and administrative structure to determine refugee status on an individualized basis.[12] Its refugee determination policies have been the subject of much praise; in particular, the Canadian approach to gender-based claims, civil-war situations and child refugee claimants have been recognized for their progressive nature. Canadian jurisprudence has been widely quoted in the jurisprudence of other countries and in scholarly literature as a guiding light in the interpretation of the definition of refugee.[13] Furthermore, the Canadian jurisprudence is largely in keeping with the international jurisprudence on many issues raised by military service evasion.

Also, the Canadian jurisprudence generally refers to international jurisprudence quite frequently – thus it would appear to provide a useful indicator of emerging issues in the international military service evasion jurisprudence.

For all of these reasons, the present paper explores the Canadian jurisprudence on military service evasion. It is hoped that the present paper will establish a benchmark which can be used to assess the jurisprudence of other countries. In this respect, the present paper is an arbitrary starting point in the larger project of assessing the common-law refugee jurisprudence on military service evasion, including in addition to Canada, the jurisprudence of Australia, the United Kingdom and the USA.

One final word should be said about the focus of the paper on the Canadian jurisprudence. As the earlier comments on the case of Mr. Hinzman suggest, the Canadian jurisprudence on military service evasion is in the midst of a fairly active period of development. As such, it should be noted that this paper represents the current state of the jurisprudence. It is anticipated that the Federal Court of Appeal, and possibly the Supreme Court of Canada, will weighing in on Mr. Hinzman's refugee claim. Obviously, these future judicial pronouncements may significantly affect the direction of the jurisprudence with respect to military service evasion.[14]

AN OVERVIEW OF THE CANADIAN REFUGEE FRAMEWORK AS IT RELATES TO MILITARY SERVICE EVADERS

The sequence of determination and appeal in Canada in relation to refugee matters is as follows: a determination by the Refugee Protection Division of the Immigration and Refugee Board (the "Board");[15] an application for leave and for judicial review to the Federal Court of Canada (formerly, the Trial Division of the Federal Court); an appeal to the Federal Court of Appeal (formerly the Appeal Division of the Federal Court); and, an appeal to the Supreme Court of Canada.[16] Not surprisingly the bulk of the jurisprudence on military service evasion comes from the Board and the Federal Court.[17] While details of the Canadian refugee determination system have been altered recently through new immigration legislation, the core statutory definition of "refugee" in Canadian law remains unchanged.[18]

One of the stated goals of the refugee determination process is "to fulfil Canada's international legal obligations with respect to refugees"[19] To this end, Canada essentially uses the definition of refugee found in Article 1(A) of the 1951 Convention:

> ***A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion who (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country."***[20]

The definition of refugee can be broken down, for the purpose of the present discussion, into three components: (a) the requirement of a well-founded fear of being persecuted; (b) the requirement that the persecution in question be for one of the five proscribed reasons; and, (c) the requirement that a claimant's government be unable or unwilling to offer protection. The interpretation of each of these requirements in the Canadian jurisprudence as they relate to military service evasion will be briefly discussed in sequence.

A. REQUIREMENT OF PERSECUTION

The definition of refugee does not define what it means to have a "well-founded fear of being persecuted". Drawing upon scholarly analysis, the jurisprudence has come to define "persecution" as a key denial of a core human right. As stated by the Supreme Court of Canada, "[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way."[21] Reference is made in the Canadian jurisprudence to both internationally and municipally defined human rights.[22] While repetition and persistence are frequently characteristics of persecution, a serious violation of an individual's human rights need not be repeated in order to constitute persecution.[23] However, by all accounts, not just any violation of an individual's human rights will constitute persecution; only serious violations of an individual's human rights will qualify. At issue with the issue of military service evasion is not only whether forced military service *per se* constitutes a denial of a core human right but also whether the punishment that is meted out to an individual who evades compulsory military service is severe enough to amount to persecution.

B. REQUIREMENT OF NEXUS

However, not all claimants who are at risk of persecution are considered by law to be refugees. Only those claimants whose risk arises "for reasons of race, religion, nationality, membership of a particular social group or political opinion"[24] The requirement that persecution occur "for reasons of" one of the five enumerated grounds is often referred to as the requirement of "nexus".

The Canadian jurisprudence generally interprets nexus quite broadly. Mixed motives or perceptions do not preclude a nexus, as long as some motives or perceptions are tied to an enumerated ground.[25] Ultimately, it is the perception of the agent of persecution, which may or may not conform with reality, that is the most important aspect of the analysis.[26]

However, in cases of military service evasion, the motivation of the claimant may also be considered. In the Canadian jurisprudence, neutrality may be a political opinion.[27]

Unlike the jurisprudence of other jurisdictions, particularly the American jurisprudence, the Canadian jurisprudence does not spend much time on the technicalities of nexus.[28]

Although related to the requirement of a well-founded fear of persecution insofar as it links the fear to an enumerated reason, the requirement of nexus is an independent and necessary condition for a successful refugee claim. While in some cases, a nexus may be a component of persecution (as in the case where a finding of an "arbitrary arrest" may require proof of an improper motive for the arrest), it is not a condition precedent for a finding of persecution. Notwithstanding this statement, some of the jurisprudence continues to link persecution and nexus.[29] As will be seen in the assessment of the jurisprudence, the undue linkage of persecution and nexus plagues, *inter alia*, the military service evasion jurisprudence.

Political opinion and religion are often cited grounds of nexus in military service evasion cases. While a few military service evasion cases also make use of membership in a particular social group this is a decidedly underdeveloped part of the jurisprudence.[30] In addition, it has yet to become apparent whether the expansion of the jurisdiction of the Board to include "persons in need of protection" (who do not require a nexus) will significantly affect the military service evasion jurisprudence.[31]

C. REQUIREMENT OF AN INABILITY OF THE STATE TO OFFER PROTECTION

State protection is seldom explicitly discussed in the context of military service evasion. However, it is an important concept to remember in assessing the claims of military service evaders.

“There is a vast Canadian refugee jurisprudence on military service evasion […] Unfortunately, despite the significant body of jurisprudence, there has been very little, if any, scholarly analysis of military service evasion jurisprudence.”

The latter half of the Canadian statutory definition of refugee addresses the need for a failure of state protection: a refugee must be “unable or, by reason of [his] fear, unwilling to avail [himself] of the protection of [his country of nationality].”[32]

Generally, there is a presumption that a state can protect its citizens. In order to rebut this presumption, a claimant must present “clear and convincing evidence” of a state’s inability to offer protection.[33] Such evidence can include evidence of the state’s past failure to offer protection to the claimant or the state’s failure to offer protection to similarly situated individuals. However, notwithstanding a state’s obligation to provide protection, there is neither an obligation nor an expectation that the state can offer perfect protection.

The requirement of state protection is seldom dealt with explicitly in the military service evasion jurisprudence. Yet state protection is an important consideration in many military service evasion cases. To take but two of the most obvious examples, claims based upon fear of conscription by guerillas and claims based upon the availability (or lack thereof) of alternate military service for conscientious objectors both require a careful analysis of the steps taken by the state in question to protect the claimants in question from persecution. In a broader sense, the issue of state protection in a broader sense, lies at the heart of military service evasion and the underlying issue of compulsory military service: how should the state reconcile its competing obligations to itself and its citizenry?

As will be seen in the assessment of the Canadian jurisprudence, the issue of state protection has been dealt with all too inadequately.[34] The case-law more often deals with state protection implicitly; there have been all too few explicit incorporations of the requirement of the state’s inability to offer protection into the determinations of the case-law.

III. SURVEY OF CANADIAN JURISPRUDENCE[35]

There is a vast Canadian refugee jurisprudence on military service evasion.[36] Although it is difficult to generalize, the most significant countries of origin for military service evaders as reported in the jurisprudence are, in no particular order, Israel, Russia, Algeria, Colombia, Iraq, and Afghanistan.

Unfortunately, despite the significant body of jurisprudence, there has been very little, if any, scholarly analysis of military service evasion jurisprudence.[37] Hathaway’s brief, and now quite dated, comments on military service evasion provide the only scholarly guidance regularly quoted by the jurisprudence.[38] Indeed, the jurisprudence as a whole has not been systematically analyzed by even the judiciary itself since the Court of Appeal’s decision in *Zolfagharkhani*. Unfortunately, the jurisprudence frequently displays this lack of attention while acknowledging it all too infrequently.[39]

In organizing the cases, it is useful to categorize based upon the underlying nature of the claim: whether the fear of military service itself is the basis of claim or whether an ancillary aspect of military service is the basis of the claim. An intermediate category of claims based upon what is conventionally labelled as “conscientious objection” will also be canvassed. Each of these categories will be dealt with in sequence.[40]

A. REFUGEE CLAIMS BASED UPON PROHIBITED FORMS OF MILITARY SERVICE

It has often been said that compulsory military service *per se* cannot provide the basis for a successful refugee claim. I do not believe this to be entirely true. Compulsory military service may *per se* provide a basis of claim where the military service in question is in some way a prohibited form of compulsory military service.

Returning to the root of "persecution" in international human rights law, according to the *ICCPR*, no person "shall be required to perform forced or compulsory labour".[41] However, the *ICCPR* grants an exemption from the prohibition for "[a]ny service of a military character".[42] Therefore, by definition, any military service that does not fall within the exception is a violation of a claimant's right to be free of forced labour – and can consequently be viewed as potentially persecutory.

While the brief wording of the exception for "any service of a military character" can be seen as fairly broad, in fact the refugee jurisprudence has interpreted it fairly restrictively.

Consequently, there are several categories of *prima facie* "service of a military character" that will be found to be improper. Forced performance of such military service automatically constitutes persecution.[43] In other words, performance of such military service would be persecutory even if the claimant performed such service or had no particular objection to such service.[44]

The persecutory nature of such conscription lies in its basic illegal character and is independent of the claimant's actions and motives:

> We are all of the view that the Board erred when it concluded that the appellant's fear was of "prosecution" rather than "persecution". Simply stated, the refusal to carry out military orders, which have no legal foundation, cannot give rise to a fear of prosecution – which implies one is dealing with a valid law of general application. Rather, such inaction on the part of the appellant could well be regarded as giving rise to persecution . . .[45]

While such *per se* persecution would normally nonetheless require a nexus to the enumerated grounds of the 1951 Convention, it would appear, as discussed further below, that some of the jurisprudence considers these categories of prohibited compulsory military service to have an automatic nexus to political opinion. The terminology used by the jurisprudence embodies the idea of an implicit nexus (albeit as much to religion as to political opinion): "selective conscientious objector".[46]

The automatically prohibited forms of compulsory military service can be categorized according to the source of the prohibition: military service prohibited due to the nature of the conscripted action; military service prohibited due to the nature of the conscriptor; and, military service prohibited due to the fundamental nature of the conscriptee. Each of these categories of prohibited military service will be discussed in sequence below.

i. COMPULSORY MILITARY SERVICE PROHIBITED DUE TO THE NATURE OF THE MILITARY ACTION

Firstly, some forms of compulsory military service are prohibited due to the nature of the military action that the conscript will be required to perform. The most clear example of excluded military service is military service where the conscript will be forced to perform an act which is "condemned by the international legal community as contrary to basic rules of human conduct".[47]

This category clearly includes participation in military actions in violation of established international law, including the use of chemical weapons and the widespread commission of "atrocities".[48] Some jurisprudence also holds that this category includes participation in a war of aggression explicitly condemned by the Security Council – although we shall see that this proposition has recently been criticized.[49] However, this category may also include actions not necessarily in violation of international law but otherwise "condemned" by the international community, including the commission of "reprehensible acts against one's countrymen"[50] and the senseless perpetuation of a civil war.[51]

Arguably the leading case on military service evasion, *Zolfarghkahni*, falls into this later type of condemned but not necessarily illegal actions.[52]

It is unclear whether evidence must establish that the claimant will personally be party to the performance of such prohibited military service or simply that the military in question generally performs such prohibited actions.[53] The Board's recent ruling in the matter of *Hinzman* certainly suggests that a close personal connection akin to complicity in the prohibited actions will be required. In the *Hinzman* matter the Board quoted Lord Justice Potter of the Supreme Court of Judicature, Court of Appeal (Civil Division) in *Krotov v. Secretary Of State for the Home Department*[54]:

> It was the view of Lord Justice Potter that the crimes listed, if committed on a systemic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the 1951 Convention. His second observation in respect of the test, propounded in *B v. SSHD*, is that he would substitute the words "in which he may be required to participate" for the words "with which he may be associated" as emphasizing that the grounds should be limited to reasonable fear on the part of the objector that he will be personally involved in such acts, as opposed to a more generalized assertion of fear or opinion based on reported examples of individual excesses of the kind that almost inevitably occur in the course of armed conflict, but which are not such as to amount to the multiple commission of inhumane acts pursuant to or in furtherance of a state policy of authorization or indifference.[55]

The ruling in *Hinzman* continues a line of the jurisprudence suggesting that a degree of complicity in the actions which underlie the prohibited nature of the conflict will be required in order to render conscription into such a conflict improper. The nature of the underlying actions, the degree of complicity required, and a critique of the use of the concept of complicity (or, in the phrasing of *Hinzman*, personal association) will provide the outline for the remainder of the discussion of conscription into a prohibited military action.

Regardless of whether the "personal association" requirement in *Hinzman* is adopted, it is already fairly clear that the "normal" sporadic occurrence of prohibited actions in war, unrelated to the claimant, will not render the military service prohibited.[56] Some of the jurisprudence requires a claimant to establish that the state condones the illicit military activity in question.[57] The jurisprudence on complicity (arising out of the application of the exclusion clauses) would presumably apply to this determination: only if the claimant would be complicit in prohibited military actions would the compulsion of his military service be prohibited.[58] However, the jurisprudence has thus far made no explicit linkage of the prohibition of this type of military service to complicity in the actions in question. The implications of linking this type of prohibited military service with the notion of complicity will be discussed below at length.

The Canadian jurisprudence invites the application of the doctrine of complicity to this category of prohibited military service since the jurisprudence itself frequently cites the need to avoid forced complicity as the policy rationale for finding this category of military service to be prohibited. However, the law on complicity is not very helpful to a claimant fearing prohibited military service. Historically, complicity will generally not be attributed to those "who were drafted by the State for membership"[59] While mere membership in an organization may sometimes render an individual complicit, this should be seen as an exception and does not generally apply to a conscript in the conscripted armed forces of a state.[60] The facts of *Zolfarghani* have been interpreted as requiring "reasons of an extremely serious nature" in order for a finding of prohibited military service.[61] This is not to say that this condition can never be satisfied; given the horrific actions of many militaries around the world the unfortunate reality is that service in many militaries may qualify. [62]

The law governing complicity differentiates between "continuous and regular" acts and "isolated incidents."[63] In both cases, complicity will occur only through "personal and knowing participation" in the acts in question. However, in the former case

of widespread prohibited actions, such participation will be inferred from mere membership in the organization:

> As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with safety for himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist.[64]

However, applying the doctrine of complicity to the determination of when conscription into the military is prohibited is not without problems. The test for complicity has been developed in exclusion jurisprudence – a jurisprudence which is generally favorable to the claimant given the gravity of excluding an individual who would otherwise be offered protection as a refugee. However, in applying the complicity test to a category of prohibited military service, the test is being moved from the determination of exclusion to the determination of inclusion. The sympathy to the claimant which is appropriate for exclusion is less appropriate for inclusion. It is possible that a claimant who deserts midway through a conflict could be found not complicit for the purposes of exclusion but nonetheless complicit for the purposes of inclusion through a prohibited form of compulsory military service.[65] In addition, some of the prohibited acts in question are acts in which it is very difficult to have personal complicity. For example, with respect to types of actions "condemned by the international legal community", it is analytically difficult to apply the doctrine of complicity to conscripts engaged in the waging of a "non-defensive incursion into foreign territory".[66]

Nonetheless, complicity is a useful concept when evaluating a claim of persecution based upon conscription into a prohibited military action. However, returning to the view that the forced performance of a prohibited category of military service is *per se* persecutory, it would be useful to apply the tool of state protection in conjunction with complicity rather than relying solely upon that of complicity. As noted previously, state protection need not be perfect. Thus, where a state does not condone or facilitate the prohibited actions and there is an established mechanism for preventing, reporting and punishing the commission of prohibited acts, it would appear very difficult to establish a risk of prohibited military service due to the nature of military action. In order to succeed, in such a situation, a claimant would have to present, in the language of *Ward*, "clear and compelling evidence" of the state's inability to prevent the claimant from becoming complicit in such prohibited actions.

However, in situations where the state condones, encourages or acquiesces in the prohibited actions, the presumption of state protection is automatically rebutted due to the nature of the persecutor: the state itself. In such a case, the claimant would merely have to establish that there is a serious possibility of becoming complicit in such prohibited actions in order to render his compulsory military service prohibited.

Needless to say, the difference between the first and second categories of situations is one of degree rather than category. In all cases, a determination of complicity must be performed in a pragmatic manner[67] - in other words such a determination should give the benefit of any doubt to the claimant.

There is also some suggestion that *any* punishment for refusal to participate in this type of prohibited military service will constitute persecution.[68] However, a more conventional approach would be to consider whether the punishment in question is a serious violation of the claimant's human rights. Given the context of punishment for failing to comply with prohibited conscription – the punishment of an essentially "innocent" man for failing to comply with an illegal act – it is likely that anything more than brief imprisonment would constitute persecution. In any case, this issue is usually moot as punishment for failure to comply with prohibited conscription usually also includes renewed forced enrollment in the military.

As for nexus, as noted at the outset of this discussion, the jurisprudence often reads political opinion into evasion of prohibited forms of compulsory military service. This most often happens through the assumption that the state would impute a political opinion to an opponent of such prohibited military service. Such was the case in *Zolfgharkhani*:

> There can be no doubt that the appellant's refusal to participate in the military action against the Kurds would be treated by the Iranian government as the expression of an unacceptable political opinion.[69]

This direct equation of refusal to perform prohibited military service and a nexus to political opinion has been repeated in subsequent jurisprudence.[70] Such an imputation is logical given the desperate circumstances – and heightened political passions - which produce prohibited conscription; such an environment fosters a "your either with us or against us" mentality. However, some of the jurisprudence also suggests that any opposition to a prohibited form of military service will be in some way inherently political. Even *Zolfagharkhani* at times suggests this possibility:

> The probable use of chemical weapons, which the Board accepts as a fact, is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion.[71]

The linkage between prohibited military service and political opinion in the jurisprudence can be traced back to the *Ciric* decision of the Federal Court Trial Division whereby the refusal of a Serbian couple to be conscripted into their country's horrific civil war was found to be an inherently political act:

> Accordingly the issue before the panel in Ciric was whether there was evidence of the conflict being "condemned by the international community as contrary to basic rules of human conduct" as set out in paragraph 171 of the UNHCR Handbook. On this basis, the refusal to serve in Ciric was an expression of political opinion and the conscription law was viewed not as a law of general application but a law of persecutory effect.[72]

This line of cases finds support in the remarks of Goodwin-Gill.[73] However, this line of cases is likely to come under increasing challenge in the future.[74] Furthermore, insofar as the Canadian jurisprudence interprets all enumerated grounds fairly broadly, the lack of an implicit political opinion is not necessarily fatal to such claims.[75]

ii. COMPULSORY MILITARY SERVICE PROHIBITED DUE TO THE NATURE OF THE CONSCRIPTOR

Secondly, there is some Canadian jurisprudence to suggest that some forms of military service are prohibited due to the nature of the conscriptor.[76] Recalling my previous remarks regarding the human rights framework governing military service, compulsory military service is allowed as an exception to the prohibition of forced labour and servitude only when required by a government. In keeping with this framework, the jurisprudence generally holds that while national governments may have a *prima facie* right to conscript individuals within their territory, such a right does not extend to non-state actors.[77] However, the Canadian jurisprudence is far from unanimous on this topic.[78] It is the non-state nature of the conscriptor that leads to the prohibition of their conscription; notwithstanding the prohibited nature of the conscriptor, the internationally condemned nature of the military action in which it is engaged may also result in the prohibition of conscription.[79]

With respect to conscriptors, the jurisprudence provides no guidance on how to determine whether a particular conscriptor is legitimate – whether it can be considered as a "state" conscriptor. As of the present time, the jurisprudence in support of this prohibition has involved conscription by groups that are clearly not recognized governments: the South Lebanese Army, the LTTE guerillas of Sri Lanka, and the Colombian FARC rebels. The jurisprudence regarding groups of more ambiguous status is decidedly mixed.[80] There is also some jurisprudence to suggest that even military service compelled by national governments will not be considered "state" conscription if the government is acting outside of its municipal legislative or executive framework.[81] Under this approach, "impressment" would constitute *per se* persecution.

"On the facts, most non-state conscriptors view individuals who do not agree to be conscripted as political opponents."

The comments made with respect to nexus for military service prohibited by the nature of the action also apply to the present situation. However, as noted previously, membership in a particular social group is also commonly cited in the jurisprudence for this category of prohibited conscription.[82] Furthermore, the Canadian jurisprudence, as noted in the initial discussion of nexus, allows "neutrality" to provide a nexus to political opinion.[83] On the facts, most non-state conscriptors view individuals who do not agree to be conscripted as political opponents.

Punishment for resisting this type of conscription is almost never an issue as the nature of the conscriptor renders all punishment extrajudicial. Generally, on the facts, "punishment" for resisting conscription consists either of death or enforced conscription under even more unfavorable conditions.

iii. COMPULSORY MILITARY SERVICE PROHIBITED DUE TO THE NATURE OF THE CONSCRIPT

Thirdly, some forms of military service are prohibited due to the nature of the individual being targeted for conscription.[84] The only category of individuals who have thus far been clearly identified in the jurisprudence as absolutely prohibited from being conscripted are children. The conscription of children constitutes *per se* persecution:

> I believe that there is a reasonable chance the younger claimant [17 years of age] would be forcibly recruited by either the military or the guerillas and hence there is a reasonable chance that he would face persecution if he returns to his country of nationality. Thus I am satisfied that this claimant's fear of persecution in his country of nationality is well-founded by reason of his membership in a particular social group, namely, Salvadoran minors who are at risk of forcible and unlawful recruitment.[85]

Surprisingly, the jurisprudence on this topic makes no reference to the recent developments on the topic in international law nor to the plethora of international research, instruments and resolutions on this topic.[86] Although seldom explicitly stated, the nexus in the case of child soldiers is their membership in a particular social group.

Conscientious objectors can also be seen as a subtype of individuals whose compelled military service is prohibited due to the nature of the conscriptee. In the case of a conscientious objector, the prohibition arises out of the beliefs of the conscriptee. However, unlike child soldiers, the beliefs of the conscientious objector are not inherent and immutable. For this reason, and the more practical reason that the jurisprudence deals with conscientious objectors as a separate type of military service evader, conscientious objectors to military service will be dealt with separately. For similar reasons, those individuals who face the targeted enforcement of conscription due to, *inter alia*, their political opinions or religious beliefs will be dealt with separately.[87]

It is not completely clear whether the prohibition of the conscription of children relates to their special status in law as children or simply to particular international instruments prohibiting their conscription. The aforementioned lack of reference to international law in the jurisprudence on conscription of children suggests the latter. If this is indeed the case, the prohibition may also be extended to include other special groups identified in international law, including the mentally and physically disabled[88]; indigenous peoples; and the elderly.

There is some support in international law for prohibiting the conscription of mentally and physically disabled individuals.[89] Of course, for practical reasons of military efficiency, the disabled are highly unlikely to be the focus of military recruitment efforts. The situation with respect to indigenous peoples is more ambiguous. While international law requires that "special measures" be taken to ensure governmental actions "[safeguard] the persons, institutions, property, labour, cultures and environment of the peoples concerned,"[90] international law also allows for "compulsory personal services", presumably such as compulsory

military service where it is required of the citizenry in general.. . . in cases prescribed by law for all citizens".[91] Furthermore, notwithstanding a large number of cases involving the conscription of indigenous individuals, no mention has been made in the jurisprudence of indigenous status as a ground of prohibition of conscription.[92] With respect to the elderly, the situation is analogous to that of the disabled: there is some support for the prohibition of conscription of the elderly,[93] but military efficiency suggests that it is unlikely to occur in any case.[94]

B. CONSCIENTIOUS OBJECTORS

Notwithstanding the state's general right to compel an individual to perform military service, there is a category of individuals who may not be compelled to perform such service. These individuals are known in the jurisprudence as "conscientious objectors" – although the term and its usage is fraught with inconsistency. The term conscientious objector in this section will be used to refer to the subset of military service evaders who articulate their evasion of military service in terms of their underlying political and religious views.[95]

The ability of an individual, including a refugee, to claim conscientor objector status is the subject of much debate in the scholarly literature, in international law and in the jurisprudence of other jurisdictions.[96]

Notwithstanding the controversy, the Canadian jurisprudence quietly assumes – but also heavily restricts – the right to conscientiously object to military service.[97]

The first mention of conscientious objection in the refugee case-law is a good illustration of this approach. In its decision in *Musial* the Court of Appeal both implicitly recognizes conscientious objection as a valid ground of refugee protection and rejects the claimant's attempts to bring himself within the narrow limits of the term:

> While the Board's reasons, which were dated some three weeks after the decision was pronounced, are perhaps ineptly expressed and give the impression that in the Board's view army deserters and conscientious objectors do not fall within the definition, I do not read the reasons as meaning anything more than that army deserters and conscientious objectors are not, as such, within the definition. That is, as I see it, far from saying that because a person is an army deserter or a conscientious objector he cannot be a Convention refugee and I do not think the Board has made any such ruling. What the Board appears to me to have done is to point out that army deserters and conscientious objectors are not dealt with as such by the definition and then to go on to consider the applicant's case on its merits, including the applicant's motives, and to conclude that in the case before it, the applicant's objection to serving in Afghanistan, if called upon to do so, was not sufficient to differentiate his case from the case of any other draft evader and thus to form its opinion that there were not reasonable grounds to believe that the applicant's claim for Convention refugee status could be established.[98]

The significance, and drawbacks, of this quiet assumption of a right to conscientious objection will be discussed further in the analysis.

i. DEFINITION OF "CONSCIENCE" AND "OBJECTION"

According to the Canadian jurisprudence, the right to conscientious objection requires a deep seated ethical or religious objection to all forms of military service:

> The panel begins its assessment of the claimant's assertion that he is a conscientious objector in need of protection with a few general observations about the panel's understanding of what is meant by the term "conscientious objection". "Conscience", in the panel's opinion, refers to a person's genuine convictions which spring from one's political opinion, religious beliefs or philosophical tenets.[99]

Although not directly addressed in the jurisprudence, atheism may preclude conscientious objection.[100]

With respect to the meaning of "objection", the jurisprudence suggests that it must total. The right to conscientious objection exists only in absolute form; a "partial" conscientious objection will not bring a claimant protection. As noted previously, while the case-law makes mention of "partial objection", this label is applied not to situations where the claimant believes the particular war is against his conscience but rather to situations where the military action is "condemned by the international community." [101] In other words, "partial conscientious objection" has been removed from the realm of conscience and placed into the realm of an objective assessment of the validity of military action.

The conscientious objection must have an extra-personal foundation; fear of death or combat is insufficient to found a claim of conscientious objection.[102] However, oddly, despite the preclusion of conscientious objection based upon fear of death during service, fear of death while on leave or otherwise *hors de combat* may allow a successful refugee claim:

> He also fears persecution in Algeria at the hands of armed Islamic extremists who have particularly targeted university educators with death and are still capable of carrying out such threats. They had also targeted persons responding to conscription with death. He believed that his only option was to leave the country and abandon his family and his university employment in order to avoid both groups.[103]

Ultimately, the distinction between in-service and out-of-service risk is a legalistic distinction; for a claimant, both types of risk of death are equally daunting. The only way it can be understood is through the unstated presumption that while armed and performing service a conscript is receiving as much state protection as theoretically possible whereas while unarmed the conscript is receiving (on the facts in Algeria, or other countries in similar situations) inadequate state protection. However this reasoning presupposes that risk of death while in military service would constitute persecution – a supposition that the jurisprudence has, to date, vehemently rejected. The reasoning in the above-quoted claim and similar claims is perhaps the closest that the Canadian jurisprudence has come to consistently understanding those targeted for conscription as a particular social group.

Since conscientious objection is an objection to military service it exists only where there is no alternate civilian service available for conscientious objectors: "[i]f and when available, as here, alternative compulsory military service also does not a Convention refugee make".[104] Often, the Board has required the claimant to avail himself of alternate service before seeking protection as a refugee – although this can also be seen as a test of the claimant's credibility and subjective fear.[105] More will be said about the topic of alternate service below.

ii. PROOF OF CONSCIENTIOUS OBJECTION

In practice, it is necessarily difficult to assess the truth of a claimant's statement of conscience. Consequently, the Canadian jurisprudence has developed a process of assessment based largely upon (i) a claimant's ability to articulate his objection, and (ii) his past actions. With respect to the former, the claimant's articulation of his beliefs, any articulation of conscience will be assessed for coherence and detail:

> The claimant testified that his religious beliefs preclude military service, but when asked (several times) to be specific about this, the claimant was hesitant in the extreme and was only able to offer rather vague generalities. Such being the case, we do not believe that the claimant has any genuine religious convictions that preclude military service.[106]

Notwithstanding the general importance of the articulation of his beliefs, in some cases, usually to the detriment of the claimant, this articulation is considered secondary to the tenets of the organized religion to which he belongs.[107]

With respect to the latter, a claimant's past actions, there is an emerging line of cases that suggest that an claimant whose past actions knowingly places himself in a situation where military service will be required cannot claim protection as a refugee on that basis.[108] These cases largely emerge out of the usually unsuccessful refugee claims of emigrants to Israel from the former Soviet Republics. Such claims inevitably cite prospective military service in Israel as a basis of claim.[109] In one such case, the Court noted that migrants who freely immigrate to a country requiring military service cannot then claim persecution on that basis:

> As the Board clearly pointed out, and as the transcript shows, the applicants knew that there was compulsory military service in Israel and nonetheless decided to immigrate to that country.[110]

This exclusion would rationally also apply to both individuals who have previously served in the military[111] and individuals who volunteer for military service and then, midway through their service, seek conscientious objector status.[112]

Ironically, it is often as a result of prior experience in the military that conscientious objectors form their objections.[113]

An exclusion from basing a claim on compulsory military service when the compulsion was self-inflicted makes sense as an evidentiary presumption. The deliberate infliction of compulsory military service may indicate a subjective agreement with such service incompatible with the subjective fear required for a successful refugee claim. Such a presumption is consistent with the similar presumption that an individual who has previously performed compulsory military service has no subjective fear of such service.[114] However, while a logical presumption, such an exclusion makes no sense as a legal principle. Unlike matters of equity, there is no requirement that a claimant come before the Board with "clean hands".[115]

Unfortunately, this emerging exclusion is similar to the Canadian jurisprudence on *sur place* refugee claims based upon actions which knowingly create a risk of persecution.[116] However, there remains hope that the exclusion of individuals who knowingly inflict compulsory military service upon themselves will become simply an evidentiary presumption.[117] It is unclear whether this emerging prohibition of claims based upon military service evasion applies to claims based upon prohibited forms of military service.[118] Policy grounds alone would suggest that any exclusion should not be extended to include those claims.

Other past actions which are assessed to determine the credibility of a claimant's conscientious objection include the degree to which the claimant actively seeks to avoid compelled military service,[119] the degree to which the claimant complies with directives to perform military service.[120]

iii. DENIAL OF CONSCIENTIOUS OBJECTION AMOUNTING TO PERSECUTION

The breach of the right to conscientious objection gives rise to refugee status only where the breach is serious enough to amount to persecution.

The breach normally takes the form of compelled service despite the conscientious objection or punishment for the conscientious objection must be serious enough as to amount to persecution. With respect to compelled service, it would be logical that anything more than a minimal amount of compelled service would amount to persecution. Such a rule would be in keeping with the rule that a prohibited form of military service is *per se* persecutory. However, the case-law has been much less eager to extend this proposition to conscientious objectors.

With respect to punishment, imprisonment for seven to forty-five days in humane conditions does not amount to persecution.[121] Nor does a small fine, re-education and forced labour in addition to the compelled military service.[122] An extension of service for three to six months is not persecutory.[123] An extension of punishment from 10 to 24 months is persecutory.[124] Repeated prosecution for failing to perform compulsory military service may be persecutory.[125] Were military service evaders are rarely prosecuted, the claimant will not be able to gain status as such.[126] Imprisonment for up to ten years is persecutory.[127]

The recent decision from the bench by the Federal Court of Appeal in the matter of *Ates* serves to further cloud the issue.[128] In that case, the Court of Appeal received the following certified question:

> In a country where military service is compulsory, and there is no alternative thereto, do repeated prosecutions and incarcerations of a conscientious objector for the offense of refusing to do his military service, constitute persecution based on a Convention refugee ground?[129]

Despite the almost tautological nature of the question, the Court of Appeal answered the question in the negative.[130] One can only hope that the factual context of the case can serve to distinguish it. On the facts as found by the Board, Mr. Ates faced an unspecified (but implicitly not excessive) period of imprisonment at or exceeding international standards.[131] If such a period of imprisonment were to be repeated, it would not *necessarily* constitute persecution. Equally it would not necessarily *not* constitute persecution. It is hoped that the Court of Appeal, in issuing its written decision, will take steps to limit it's finding in this way.

iv. STATE PROTECTION

As always in refugee claims, the claimant must establish that his conscientious objections will not be recognized by the government of the country of reference. This can be demonstrated by a previous decision to refuse him status as a conscientious objector or by the refusal of the government to grant conscientious objector status to other similarly situated individuals.[132]

A claimant's failure to seek conscientious objector status can be cited as a failure to establish that he would be denied such status:

> What is more, there is no evidence that the Applicant claimed exemption from military service in Israel on the ground that he was a conscientious objector and was refused exemption from military service. One would not be surprised to find that there are in Israel alternative methods of service for individuals falling into that category. But that aside, we simply do not know and as I have said there is no evidence that he objected to serving in the military as a conscientious objector when he was in Israel, so what disposition might be made by the Israeli government in such a case is not known.[133]

Such a failure to make enquiries about conscientious objector status may also indicate a lack of subjective fear by the claimant and bring into doubt the genuineness of his conscientious objection.[134]

C. REFUGEE CLAIMS BASED UPON ANCILLARY FEATURES OF MILITARY SERVICE

The remainder of military service evaders fall into the general category of individuals facing *prima facie* legitimate conscription. The determination of whether the purportedly legitimate conscription is legitimate in each particular case rests on the particular facts of the case.

The framework of analysis that is applied is that derived from *Zolfagharkani*. In arriving at its decision, the Court of Appeal enunciated four principles of analysis that have been taken up and frequently reiterated by the subsequent jurisprudence:

(1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.

(2) But the neutrality of an ordinary law of general application, vis-a-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.

(3) In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe, be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.

(4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.[135]

With due respect to the Court of Appeal and to the subsequent jurisprudence, these four principles do not significantly advance or explain the jurisprudence on compulsory military service. In some regards, these principles are contradicted by the jurisprudence. Certainly, conscientious objection is a good example of a law being judged improper because of *effect* rather than *intent* as suggested by the first rule. Fortunately, the jurisprudence, adheres to these principles more in their quotation than in their application. As delicately noted in the Board's own review of the jurisprudence applying the *Zolfgaharkhani*: "[t]he reader should bear in mind these ambiguities in the case law when reviewing the following observations on reasons-of-conscience claims".[136]

Thus, in approaching the issue of military service evasion, the law requiring conscription (and punishing its avoidance or any subsequent desertion) is *prima facie* an ordinary law of general application. It is presumed, in the absence of evidence to the contrary, to be neutral with respect to the five enumerated grounds for refugee protection. It is also assumed not to constitute persecution. It is up to claimant to demonstrate, with respect to the law governing conscription or the actions of the government with respect to conscription, that the law or the government will discriminate in its actions on the basis of one of the five enumerated grounds for refugee protection and will thereby place the claimant at risk of persecution. Surprisingly, although not inappropriately, nexus is often the key variable in the determination of refugee claims based upon ancillary features of military service.

The first step in the rebuttal of the presumption that compulsory military service is a law of general application is establishing some form of discriminatory mistreatment. Logically, this mistreatment can occur before, during or after the compelled military service. Each of these categories of discriminatory mistreatment have been discussed in the jurisprudence and will be discussed in sequence.

i. DISCRIMINATORY RECRUITMENT

The temporally earliest form of discriminatory treatment that can occur is discrimination in recruitment. Such discrimination has been found to occur where the "law of general application" in fact targets "non-natural" groups within the society for conscription.[137] The targeting of rural and/or poor males for recruitment will constitute prohibited discrimination.[138] Of course, where such discrimination is so severe as to constitute extralegal forced recruitment, the analysis of "impressment" as a form of prohibited compelled military service would be more appropriate.

One seldom discussed feature of compulsory military service is the gendered nature of its object: the conscription of young males.[139] Despite the obviously male focus of conscription, the gender bias of conscription is seldom raised as a discriminatory basis for recruitment.[140]

This is perhaps a consequence of the previously noted failure of the jurisprudence to consider membership in a particular social group as providing nexus. Implicitly, military necessity is invoked to explain the military's focus on men: women are physically unable to perform military service. However, given the increasing integration of men and women in volunteer-based militaries, the fatuity of the military necessity argument is becoming more and more obvious. The case law usually implicitly adopts this argument through its refinement of the law of general application framework;

> In Syria, military service is compulsory for all males. In our opinion, this constitutes an ordinary law of general application. Females are exempt, but this moans [sic] only that it is not an ordinary law of uniform application -- it remains an ordinary law of general application.[141]

Notwithstanding this general failure of the jurisprudence, there are some cases in which the putative nature of conscription as a "law of general application" is brought into question due to the particularly male nature of its focus.

A reading of recent Australian jurisprudence suggests that this analysis while largely ignored in Canada has been adopted elsewhere. There is also significant municipal jurisprudence on this topic arising from the USA's *Selective Service Act* which applies to only men. Unfortunately, the assessment of whether men suffering conscription constitute a particular social group is beyond the scope of this paper. However, especially given the relative generosity of the Canadian interpretation of particular social group, it is a subject to which the jurisprudence ought to pay more attention.

Discrimination during recruitment can also occur where certain categories of individuals are automatically provided with access to alternate service. This occurs most frequently for women (in the state of Israel) and established religious groups (where the military service law enumerates members of certain religious groups as automatically being conscientious objectors). However, as always, this discrimination must rise to the level of persecution in order to qualify the claimant for protection.

ii. DISCRIMINATION DURING MILITARY SERVICE

After enrollment in the military, discriminatory treatment can occur during actual military service. Such discrimination has been found to occur when a particular tribal group or gender is left unarmed and forced to perform menial tasks.[142] Similarly, discriminatory treatment can occur if an ethnic group in the military is deliberately subjected to greater danger than other ethnic groups.[143]

In addition to increased risk of death, discrimination can occur during military service. Not surprisingly, this mistreatment during military service often follows the same pattern as discrimination in society in general. Thus, minority ethnic and religious groups are often the target of harassment during military service. However, the military setting often allows the mistreatment to occur with both increased severity and often impunity. Furthermore, mistreatment while in the military will seldom allow for an internal flight alternative and often, by definition, negates any possibility of state protection.

Unfortunately, the military service jurisprudence seems to accept during military life what would not otherwise be accepted during non-military life. This is particularly surprising given the lengthy duration and consequent repetition which is frequently a characteristic of in-service discrimination. The following circumstances were not found to constitute a sufficient level of mistreatment:

> When the claimant indicated that the military authorities kept him for an extra month, the explanation given to him at that time was that they needed his services. The claimant did not believe this explanation and associated this extension of his service with his refusal to serve or enlist in the armed forces. He frequently referred to the fact that he was treated like an "animal," that he was "fed like an animal." He speaks of scorpions and snakes in Messaad, where he was forced to go to live.[144]

"The analysis of military service, perhaps more than any other area of refugee law, depends on an accurate understanding of the current laws and policies of conscription."

iii. DISCRIMINATION IN LENGTH OF SERVICE

After enrollment in the military, discriminatory treatment can occur in the setting of the length of service or addition periods of subsequent "reserve" service. If the length of a claimant's service increases significantly due to an enumerated ground, such an increase in the length of service can qualify the claimant for protection as a refugee:

> Following these incidents [wherein the claimant expressed his opposition to Israeli government policies] and I accept the claimant's assertion that as a consequence of them, he received a new call up for military service in which the length of time he was required to serve had been increased from ten to twenty-four months. I find that the period of time which the claimant was required to serve in the army was increased by fourteen months as a means of punishing him for his lack of cooperation and his perceived political dissidence. . . . I find further that increasing the claimant's service time by fourteen months is a punishment which is sufficiently serious as to constitute persecution. [145]

While not addressed in the jurisprudence, discrimination in length of service can also arise where the military service in question is the "alternate service" of conscientious objectors. Recent international human rights jurisprudence suggests that the imposition of a lengthier alternate service period – as a putative test of the conscientious objector's genuity – constitutes unlawful discrimination. However, in the context of refugee law, only an extreme lengthening of the period of alternate service would constitute persecution.

D. OTHER ISSUES

A few issues raised in the jurisprudence remain to be canvassed. A claim as a military service evader must be made by an individual currently at risk of conscription.[146] A fear of future conscription will not be accepted where a significant period of time will lapse until conscription – as would be the case with a child fearing military service upon reaching adulthood.[147]

The analysis of military service, perhaps more than any other area of refugee law, depends on an accurate understanding of the current laws and policies of conscription. The military nature of systems of conscription often results in a certain secrecy about military service policies. The problems of determining current country conditions with respect to conscription occur even regarding whether conscription is enforced in a particular country.[148] The lack of reliability of information about a country's compulsory military service regime is underscored by the previously noted inaccuracies found in reports about the Canadian conscription regime (or lack thereof).

IV. CONCLUSIONS AND RECOMMENDATIONS

Many conclusions and recommendations of this paper are implicit in the foregoing analysis. The organization of the jurisprudence adopted in the foregoing survey is almost completely absent from the jurisprudence itself. Implicitly, the primary recommendation of this paper is that the jurisprudence more explicitly reflect on its own organization. In this regard, the jurisprudence of the Board and the Court is in desperate need of clarity.

In this sense, clarity is used to describe a jurisprudence which applies an explicit framework of analysis and explicitly states its premises and conclusions. Clarity will have both abstract and concrete benefits. Abstractly, clarity will allow for a more coherent development of the jurisprudence – and allow developments in the area of claims based upon military service evasion to occur in unison with developments in other areas of refugee law. On a more concrete level, a clear jurisprudence will facilitate the presentation of claims by advocates – and will provide claimants with a clear understanding in advance of whether their evasion of military service is likely to ground a claim for protection as a refugee. The organization of the jurisprudence adopted in this paper is a preliminary attempt to nudge the jurisprudence towards clarity.

Secondly, the jurisprudence must pay explicit attention to international law. Modern refugee law was born of the 1951 Convention; the 1951 Convention was truly an international agreement between states. As such, refugee law is a subset of public international law. As a subset of public international law, refugee law necessarily overlaps with other areas, particularly international human rights law and international humanitarian law. While in other types of claims the refugee jurisprudence draws upon these subsets of international law, reference to international human rights and humanitarian law are desperately absent in the military service evasion jurisprudence.

With respect to international human rights law, there is a tangled web of international human rights instruments, resolutions and pronouncements concerning, directly or indirectly, freedom of conscience, freedom of opinion and conscription. Furthermore, international human rights law has engendered much scholarly debate over the extent of the state's right to conscript and conscientious objection. It is intolerable that the jurisprudence makes almost no reference to this body of law and commentary. Certainly, the solitude of refugee law's assessment of military service evasion needs to end. Refugee law's analysis of the issue needs to be seen increasingly as a part of the larger international human rights debate. In particular, the volumous jurisprudence of the UN Human Rights Committee and the European Court of Human Rights on military service evasion

"Refugee law's analysis of the issue needs to be seen increasingly as a part of the larger international human rights debate."

needs to be incorporated into the analysis of refugee law.

International humanitarian law provides a well-developed body of law which facilitate the determination of the legality of a conflict or an action within a conflict. It has recently been suggested that refugee jurisprudence in general pays little attention to this body of law. What is true in general of refugee jurisprudence, is especially true for Canadian refugee jurisprudence on military service evasion: with the exception of claims involving exclusion, none of the case-law involving military service evasion draws directly upon international humanitarian law in order to determine the validity of conscription. As noted previously, proof of a serious breach of international humanitarian law is sufficient to establish that the conscription in question is prohibited. Thus, any analysis of whether a conscription is prohibited due to the nature of the military action should begin with an analysis of the conflict *vis-à-vis* international humanitarian law.

Thirdly, the Canadian jurisprudence needs to end its parochialism. The jurisprudence would benefit from the use of foreign analyses of military service evasion. In particular, the House of Lord's decision in *Sepet* and the Australian High Court's decision in *Applicant S. v. Australia (M.I.M.A.)*[149] could inform the jurisprudence's analysis of, respectively, conscientious objection and the application of membership in a particular social group to military service evaders. Only very recently, in the matter of *Hinzman* for example, has the Board begun to seriously discuss jurisprudence from other common law jurisdictions. In addition, more generally, attention to the focus of the American jurisprudence on nexus would force the Canadian jurisprudence to make explicit some of its implicit assumptions about nexus.

Thus, the use of extra-territorial jurisprudence provides both an opportunity for the importation of new ideas into the Canadian jurisprudence and a requirement that the jurisprudence more explicitly outline its findings and assumptions.

Fourthly, although largely not discussed in this paper, the use of other municipal jurisprudence on conscription would likely benefit the Canadian jurisprudence. While conscription is no longer practiced in Canada, the existence of conscription during both the First and the Second World War produced a significant body of case-law delimiting the extent of conscription. At the very least, an appreciation of the domestic turmoil caused by the imposition of conscription in Canada would perhaps decrease the number of condescending remarks in the jurisprudence to conscription being simply a "law of general application" and an ordinary requirement of citizenship.

The prevalence of the issue of military service in refugee jurisprudence is not likely to decrease in the future. It is therefore a worthwhile exercise for the judicial and administrative bodies responsible for refugee case-law to revisit the underlying principles and structure of the jurisprudence on this topic. What is now a confusing and, at times, contradictory body of law can yet be rehabilitated. In the end, there is yet hope that the jurisprudence will move beyond its current ambivalence and troublesome terminology. There is yet hope that the jurisprudence will move beyond the "conscientious objector".

[1] Peter Worthington "Their Fears May Cost US: Fox Host Talks Boycott" The *Toronto Sun*, 1 May 2004, News Section, page 25.
[2] *Hinzman et al. v. Canada (Minister of Citizenship and Immigration)* [2005] RPD 1 (TA4-01429 et al.) (16 March 2005) (final decision) and *Hinzman et al. v. Canada (Minister of Citizenship and Immigration)* [2004] RPD 122 (12 November 2004) (interlocutory decision).
[3] *Hinzman et al. v. Canada (Minister of Citizenship and Immigration)* Federal Court of Canada, Court File No. IMM-2168-05 (filed 7 April 2005).
[4] The focus of this paper on compulsory military service is one rooted in expedience. Given the necessarily limited scope of this paper, it was decided that it would be best to focus on the factually more common situation of evaders of compulsory military service. Despite this focus, this paper does not necessarily accept that the common popular distinction between compulsory and voluntary military service is meaningful.
[5] There are serious methodological issues that prevent any enumeration of the total number of countries requiring compulsory military service to be exact. Although these issues are beyond the scope of this paper, they include, *inter alia*, difficulty in gathering accurate data on municipal rules governing conscription; the difficulty of ensuring that all data gathered refers to a contemporaneous period of time; and, the chronically extra-legal nature of some conscription regimes.
[6] Philip Bobbitt "National Service: Unwise or Unconstitutional" in Martin Anderson, ed. *Registration and the Draft: Proceedings of the Hoover-Rochester Conference on the All-Volunteer Force* (Hoover Institution, Stanford University, 1982) at 61 quoting Daniel Webster's address to the US Congress in 1814.
[7] George Q. Flynn *Conscription and Democracy: The Draft in France, Great Britain and the United States* (Greenwood Press, Westport CN, 2002) at 15 (referring to the Constitution of the French First Republic which declared "[T]ous les français sont en requisition permanente pour la service des armies".
[8] The male gender will be used to refer to military service evaders and objectors. It is accepted wisdom that language shapes as well as reflects our thinking. While this observation may usually suggest the use of inclusive language, it also requires that inclusive language should not be used where such language would obscure the underlying reality. In the case of military service, almost all of those conscripted into the military every year are male. Only one country (Israel) out of the one hundred countries imposing conscription consistently requires females to perform military service.
[9] The top ten source countries for refugees in 2002 were Afghanistan, Burundi, Angola, Sudan, Somalia, the Democratic Republic of the Congo, Iraq, Bosnia-Herzegovina, Vietnam, and Eritrea. Conscription was reported to occur in all countries except Somalia. See UNHCR *Refugees by Numbers: 2003* (UNHCR, Geneva, 2003) at 9 and Bart Horeman and Marc Stolwijk *Refusing to Bear Arms: a world survey of conscription and conscientious objection to military service* (War Resisters International, London, 1998) (hereafter "*Refusing to Bear Arms*") *q.v.* entries for each of the top ten source countries.
[10] The term "conscientious objector" is avoided in this paper. While much of the literature employs this term, its meaning is not consistent; the definition of "conscience" varies between authors. Furthermore, it is often used to distinguish those who would evade military service on religious grounds from those who would evade military service on other grounds - suggesting a moral or spiritual priority that belies the conclusion that the authors would have us draw both about the worthiness of such objectors to receive protection and the unworthiness of other objectors to receive protection. In order to avoid this confusion and the appearance of bias, the terms "military service evaders" have been used throughout this paper. The use of this term also allows the debate to be expanded beyond an argument over the definition of "conscience".
[11] Indeed, refugee jurisprudence has been generally characterized as being both open to and valuing a diverse range of influences: "In our view, the future of the Convention definition must be linked to the future of international law, and calls for a principled and intellectually creative interpretation by adjudicators. The careful use of refugee law learning from other jurisdictions is already contributing to a transnational refugee law jurisprudence, and there is value in creating an accessible and comprehensive international database of refugee decisions." (A. M. North and Nehal Bhuta "The Future of Protection: The Role of The Judge" 15 *Geo. Immigr. L.J.* 479 (2001) at 496).

This characterization is adopted not only by scholars and decision-makers, but also by the jurisprudence itself, which in places go so far as to require the consideration of foreign jurisprudence in the interpretation of refugee law: "The exercise I have gone through demonstrates that to construe the statute with a view to [a particular interpretation of membership in a particular social group] requires the weighing of credible evidence in the form of foreign jurisprudence and learned commentary." (*Canada (MEI) v. Mayers* [1993] 1 F.C. 154 (F.C.A.) at ¶ 26)

[12] While group determination can occur (and has occurred) in all four jurisdictions in special cases, the general rule in each jurisdiction is that each refugee claim is individually determined.

[13] While the generality of this comment may leave room for debate, this statement is at least valid for the interpretation of the areas at issue with the areas of refugee law at issue in military service evasion: the definition of persecution, nexus, laws of general application and state protection.

[14] As an indicator of the speed with which the jurisprudence is developing, between the first presentation of this paper (January 2005) and the present date (October 2005) more than a dozen significant decisions on the topic of military service evasion have been issued by the Federal Court and the Refugee Protection Division of the Immigration and Refugee Board. Just yesterday (5 October 2005), the Federal Court of Appeal issued an oral decision from the bench concerning a certified question dealing with military service evasion (*Erkan Ates v. M.C.I.* Federal Court of Appeal file A-592-04 (5 October 2005) (oral)).

[15] The Refugee Protection Division (the "RPD") replaced the Convention Refugee Determination Division (the "CRDD") as the division of the IRB responsible for the determination of refugee claims; this change was a result of the immigration reforms of the *Immigration and Refugee Protection Act* (2001, c. 27) (the "*IRPA*") and took effect on 28 June 2002. With respect to refugees, the RPD and the CRDD apply the same legislative definition (taken from the 1951 Convention) in order to determine whether to grant protection as a refugee. However, see fn. 13 *surpa*, for comments concerning the RPD's additional jurisdiction over "persons in need of protection".

[16] See, respectively, *IRPA* Part II (ss. 95 to 116) and Part IV (ss. 151 to 186); *IRPA* ss. 72 to 74 and *Federal Courts Act* (R.S., 1985, c. F-7) (the "*FCA*") ss. 17 to 18.2; *IRPA* s. 74(d); and the *Supreme Court Act* (R.S., c. S-19) (the "*SCA*") ss. 37 to 40.

[17] Until the *Ates* decision, see fn 14 *supra*, there have been only two reported cases directly involving military service evasion decided by the Federal Court of Appeal (*Zolfagharkhani v. Canada (M.E.I.)*, [1993] F.C.J. No. 584 and *Musial v. Canada (M.E.I.)*, [1982] 1 F.C. 290 – hereafter, respectively, "*Zolfagharkani*" and "*Musial*") and no cases involving directly involving military service evasion decided by the Supreme Court of Canada. In the lack of a leading case determined by the highest judicial body on military service evasion Canada is unusual. The ultimate judicial bodies of the United Kingdom, Australia and the United States have all determined a military service evasion case: *Sepet and another v. U.K. (Secretary of State)*, [2003] UKHL 15 (the United Kingdom) (hereafter "*Sepet*"); *Applicant S v. Australia (M.I.M.A.)* [2004], HCA 25 (HCA) (the High Court has also recently granted leave to appeal in the matter of *SHBB v Australia (M.I.M.A.)* (A257/2003, leave granted on 24 August 2004) (Australia) ; and *USA (I.N.S.) v. Elias-Zacarias* (1991), 502 U.S. 478 (SC) (USA).

[18] The most significant recent change is the RPD's additional jurisdiction to grant subsidiary protection in addition to refugee protection – or protection as a result of potential mistreatment in violation of Canada's obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (the "*CAT*") and *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) (the "*ICCPR*").

[19] *IRPA,* s. 3(2)(b)

[20] *IRPA*, s. 96. The wording of this definition is viryally identical to that found in Article 1(A) of the 1951 Convention.

[21] *Chan v. Canada (M.C.I.)* [1995] 3 S.C.R. 593 (La Forest, in dissent) While LaForest's remark was *obiter dicta*, as the case was decided by both himself and the majority on a different ground, his encapsulation of the meaning of persecution remains accurate.

[22] *Ibid*.
[23] *Muthuthevar v. Canada (M.C.I.)* [1996] F.C.J. No. 207 at ¶12: "I think it is settled law that, in some instances, even a single transgression of the applicant's human rights would amount to persecution."
[24] Article 1(A) of the 1951 Convention.
[25] *Zhu v. Canada* (M.E.I.) [1994] (FCA).
[26] *Zolfagharkhani v. Canada (M.E.I.)*, [1993] 3 F.C. 540. See also *Rizkallah v. Canada (M.E.I.)*, [1992] 156 N.R. 1 and *Canada (A.G.) v. Ward*, [1993] 2 S.C.R. 689 at 747.
[27] Insofar as neutrality may be perceived as opposition to a political interest it can provide a nexus. This can be contrasted with the commonly understood denial of neutrality as providing nexus represented by the US Supreme Court's decision in *USA (INS) v.Elias-Zacharias* (see above at fn. 17) (involving a Guatemalan man who fled recruitment by the guerillas). However, I think that *Elias-Zacahrias* can be understood better as a case of judicial appellate deference to a finder of fact than as precluding actual neutrality as a political opinion. With respect to this interpretation, see for example *Adhiyappa v. United States (I.N.S).*, 58 F.3d 261 (6th Cir. 1995).
[28] The Canadian jurisprudence has spent a lot of time parsing the meaning of each particular enumerated ground, e.g. the meaning of "political opinion" or "membership in a particular social group", but has spent very little time considering the significance of the causal element of nexus ("by reason of") in the definition of refugee. In this respect, the Canadian jurisprudence pales in comparison with the complexity of analysis (and debate) within the American jurisprudence (in particular, seen in the tension between the view of nexus expressed by the 9th Circuit and the rest of the country).
[29] *Mousavi-Samani v. M.C.I.* Federal Court Trial Division file no. IMM-4674-96.
[30] This is not to say that none of the Canadian jurisprudence categorizes military service evaders as members of a particular social group. See for example, *T89-03954* (CRDD, 16 March 1990) and, for further discussion on the Canadian approach to membership in a particular social group, Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group" (1993) 26 *Cornell International Law Journal* 505 at 539. However, the Canadian jurisprudence has largely not adopted the particular social group approach for military service evaders. In this respect, it can be distinguished from the Australian jurisprudence which has dealt with the issue of whether military service evaders have a nexus through membership in a particular social group on several occasions: see for example *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411; *Applicant M v Minister for Immigration & Multicultural Affairs* [2001] FCA 1412 (5 October 2001); and, *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30 (31 May 2001).
[31] "Persons in need of protection" are defined, in short, as individuals at personal risk of (i) torture; (ii) risk to life; or, (iii) risk of cruel and unusual punishment (see. *IRPA* s. 97). However, the exemption of risks under category (ii) and (iii) of any risk "inherent or incidental to lawful sanctions" would seem to undermine the utility of the category of persons in need of protection to military service evaders. Furthermore, the threshold of mistreatment appears to be higher than that required for persecution. To date, no military service evaders have been granted protection as "persons in need of protection" *qua* military service evaders.
[32] *IRPA*, s. 96
[33] This often quoted phrase is taken from *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 725.
[34] Interestingly, the *Hinzman* case may be the most recent and most notable exception to this premise (although the facts on the issue of state protection were surprisingly muddled given the ease of gathering information about the American process of in-service objection and appeal).
[35] It is acknowledged at the outset that an assessment of the jurisprudence is not in and of itself a neutral act. An assessment necessarily involves the organization of the jurisprudence according to various underlying principles. As in the present case, the underlying principles by which the organization is accomplished are seldom explicitly expressed in the jurisprudence. Thus, the line between the survey of the jurisprudence and the subsequent analysis of the jurisprudence is tenuous. The significance of the selection of these principles will be discussed at further length in the analysis of the jurisprudence that follows this survey.

[36] A search of the reported decisions of the Immigration and Refugee Board (the "IRB") since its inception lists almost one thousand reported refugee determination decisions discussing military service evasion. A review of these cases reveals that in about 100 of these cases the status of an evader of military service was a determinative issue. Reported IRB decisions are limited to cases that are "correct" in law and of "interest" to the Board or the public. A search of Federal Court of Canada (and appellate) decisions reveals about 24 decisions discussing the evasion of military service. The IRB decisions date back to its creation in 1989; the Federal Court decisions date back to a similar date.

[37] The two exceptions to this statement are a case note by Edward Corrigan (Edward Corrigan "Refusal to Perform Military Service as a Basis for Refugee Claims in Canada" 8 *Imm. L. R. (3d)* 272-286 (2000)) and a section of a larger work comparing US and Canadian refugee jurisprudence by Mark R. Von Sternberg (*The grounds of refugee protection in the context of international human rights and humanitarian law : Canadian and United States case law compared* (M. Nijhoff Publishers, The Hague, 2002) at 126 to 143). Additionally, several articles have been published recently that make passing reference to military service evaders in the Canadian jurisprudence, including the fairly cursory treatment of the subject in Olugbenga Shoyele "Armed Conflicts and Canadian Refugee Law and Policy" *I.J.R.L.* 16:4 , 547 (December 2004).

[38] Goodwin-Gill's comments are also quoted, albeit much less frequently.

[39] It is hoped that the Court of Appeal may soon have an opportunity to remedy this defect – beyond its all too brief recent comments in *Ates*.

[40] See fn. 6 above for a more detailed overview of the critique of this term.

[41] *ICCPR*, Article 8(3)(a).

[42] *Ibid.* Article 8(3)(c)(ii).

[43] Of course, this statement assumes forced performance of a more than a minimal amount of military service. This presumption is consistent with the vast majority of military service regimes in place in the world. However, in the alternative that performance of such improper military service is not forced, any punishment or mistreatment for failure to perform such service must still be serious and persistent enough to rise to the level of persecution. In other words, while forced performance of such service is persecution an alternative insignificant punishment for failure to perform such service is not persecution.

[44] The lack of an objection to such service could however negate the required subjective fear of persecution required in order to qualify as a refugee. Also, the performance of such service could lead to complying conscript being excluded from protection as a refugee under Article 1(F) of the 1951 Convention. For a case questioning this proposition, see *Sladoljej v. Canada (M.E.I.)* [1995] (FCTD).

[45] *Mohamed v. Canada (MEI)* [1994] F.C.J. No. 1654 (FCA) (orally) at ¶ 2.

[46] See fn.101, *infra*. Most recently, see *Bakir v. Canada (M.C.I.)* [2004] F.C.J. No. 57 (FC) at ¶ 30. In my view, the term "selective conscientious objector" (sometimes referred to as a "partial objector") is inappropriate. Unlike "absolute" conscientious objectors, the focus of the analysis of "partial" is external to the claimant: the nature of the military action and the nature of the conscriptor. As noted previously, it is even doubtful that, in law, the claimant need to oppose the conscription in question (although the claimant's flight from his or her country of origin would seem to, in practice, require this)

[47] *UNHCR Handbook* para. 171 quoted with approval in *Zolfagharkhani* at ¶ 30 in the decision of MacGuigan, J.A.

[48] *Zolfagharkhani* (See fn. 52 *infra* for a critique of this categorization; notwithstanding this critique, at the present time the use of chemical weapons is prohibited by treaty if not by customary international law.)

[49] Compare *Al-Maisri v. Canada (MEI)*, [1995] F.C.J. No. 642 (FCA) (holding that forced participation in such a conflict does constitute persecution) to *Hinzman et al. v. Canada (Minister of Citizenship and Immigration)* [2004] RPD 122 (12 November 2004) (interlocutory decision) (holding that the status of the conflict is irrelevant to the issue of persecution).

[50] *Ciric v. Canada (M.E.I.)* [1993] F.C.J. No. 1277 (FCTD) (at ¶23: "sickening activity") and *Bouchaib v. Canada (M.C.I.)* [2000] F.C.J. No. 1839 (FCTD) (at ¶7: "reprehensible acts"), respectively.

[51] *Basic v. Canada (M.C.I.)* [1994] F.C.J. No. 1368 (FCTD) (the claimant feared conscription into the Croatian military, at ¶ 5: "He told the Board 'there is a foolishness going on there and I do not want to participate in that'").

[52] The Court of Appeal is ambiguous as to whether the use of the chemical weapons in question in an internal conflict was actually a violation of international law at the time of the events in question. The Court of Appeal states at ¶ 29 that "[o]n the basis of the evidence in the record, it is impossible to say with scientific certainty that the gases in question in the case at bar would be included in these Convention definitions . . . I believe that all that is necessary to dispose of the instant case, however, is evidence of the total revulsion of the international community to all forms of chemical warfare". However, the Court of Appeal later notes, almost in passing, at ¶ 30, that " the use of chemical weapons should now be considered to be against international customary law". Ironically, in support of this latter proposition the Court of Appeal cites the negotiation of the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction* (A/RES/47/39). However, the Convention had only been opened for negotiations six months previously and entered into force four years after the Court of Appeal's decision and many years after the events giving rise to the claimants flight from his country. While it can be argued that the Court of Appeal was nonetheless correct with respect to its argument that chemical warfare was nonetheless in violation of customary international law, the Court of Appeal's cursory attention to the subject strongly suggests that it was indeed applying the less rigorous standard of "revulsion of the international community" rather than the stricter standard of violation of international law.

[53] *Radosevic v. Canada (M.C.I.)* [1995] F.C.J. No. 74 (FCTD) (suggests that a conscript unlikely to be forced to commit atrocities that are otherwise commonplace will not receive protection, at ¶ 2, quoting with approval the Board's decision, "Even if the panel were to accept that if the claimant returned to Serbia that he would be required to serve as a reservist in the Serbian army, based on the overall reading of the evidence, the panel does not find that there is a serious possibility that the claimant would be forced to commit crimes against humanity in Serbia today.")

[54] [2004] EWCA Civ. 69 at pages 13 and 14.

[55] *Hinzman* at ¶ 117 and 118 (referring to *B v Secretary of State for the Home Department* [2003] UKIAT 20).

[56] *Popov v. Canada (M.E.I.)* [1994] F.C.J. No. 489 (at ¶ 5: It is true that the evidence contains accounts of violations from time to time, or allegations, at least, of violations from time to time. And one would not be too surprised if the allegations were substantiated. But an isolated incident or incidents of the violation of international standards is not the kind of activity which the Federal Court of Appeal was referring to in the jurisprudence which has been cited. One is talking about military activity which is condoned in a general way by the state, by the military forces. One thinks of places like El Salvador.")

[57] *T99-04510* (CRDD, 2 November 1999) (at ¶ 10: "The panel notes that military operations are not characterized as contravening international standards if there are only isolated violations of these standards. Instead, the panel notes that there must be offending military activity by the military forces which is condoned in a general way by the state.")

[58] The exclusion clauses of the 1951 Convention (Articles 1(F)(a) and 1(F)(c)), as imported into Canadian law by s. 98 of *IRPA*, bar from protection as a refugee anyone who has committed a crime against peace, a war crime, a crime against humanity; or anyone who has, been guilty of acts contrary to the purposes and principles of the United Nations. As a result of these exclusion clauses, a significant jurisprudence has emerged outlining the circumstances which a claimant can be found to be "complicit" in an excluded activity and thereby barred from protection as a refugee.

[59] Grahl-Madsen referring to the post-Second World War International Military Tribunal, as quoted in Ramirez v. Canada (M.C.I.), [1992] 2 F.C. 306 (FCA); followed in *Canada (M.C.I.) v. Ashedom*, [2001] F.C.J. No. 1350 (FCTD).

[60] *Moreno v. Canada (M.E.I.)* 1 F.C. 298 (FCA).

[61] *T93-09377* (CRDD, 4 January 1997) (adopting the model of "partial objector", the Board states "the partial service to which the conscientious objector opposes must be for reasons of an extremely serious nature").

[62] Fear of conscription into military service in a military committing widespread prohibited actions is enough to establish a refugee claim without any further proof of the conscripts likely involvement in these prohibited actions according to *TA0-05919* (CRDD, 30 April 2001) at ¶4 and ¶5 (the Board seems to accept compelled service in the Rwandan military as a valid basis of claim; however, the Board did not believe that the claimant would be subject to conscription, at ¶ 15).
[63] *Penate v. Canada (MEI)* [1993] F.C.J. No. 1292 at ¶ 6.
[64] *Ibid*. at ¶ 6. The test set out in *Penate* also requires the individual to "[lend] his active support to the group". However, in the case of a conscript, this aspect of the test is irrelevant since the entire purpose of conscripting an individual is to require him to take an active role in the organization in question. A conscript is almost never an inactive member of the military.
[65] This was the case in *T99-02481 et al.* (CRDD, 29 May 2000) where the claimant was found not be excluded due to his involvement in the siege of Vukovar by the Yugoslav army but was found to be at risk of a prohibited form of conscription in relation to the conflict in Kosovo.
[66] *Al-Maisri v. Canada (MEI)* [1995] F.C.J. No. 642 at ¶ 6 (quoting Hathaway's use of the term).
[67] This comment flows from the Court of Appeal's criticism of the Board in *Zolfagharkhanbi* for its "naïve and unrealistic" distinction it between "participation and non-participation in military activity" (at ¶ 26).
[68] *T99-04510* (CRDD, 2 November 1999) (at ¶ 11: "Nor is there persecution if the penalties for refusing to serve are not harsh, *except perhaps where the refusal to serve occurs in the context of a military operation condemned as contrary to basic rules of human conduct*." [Emphasis added])
[69] *Zolfagharkhani* at ¶ 32. See also fn. 5 in *Moreno v. Canada (MEI)* [1994] 1 F.C. 298 (FCA). Most recently, this point has been reiterated in *Ates v. Canada (MCI)* [2004] F.C.J. No. 1599 (FC) at ¶ 16 et seq.
[70] In *T95-06356* (CRDD, 30 September 1997) the Board, referring to an inherent nexus to political opinion, states at ¶ 37: "[I]n *Zolfagharkhani* the Federal Court of Appeal specifically recognized that persecution which a claimant faces because of a refusal to perform military service is linked to the ground set out in the definition of Convention refugee."
[71] *Ibid.* at ¶ 30.
[72] *Varga v. Canada (M.E.I.)* [1995] F.C.J. No. 888 (FCTD) referring to *Ciric v. Canada (MEI)* [1993] F.C.J. No. 1277 (FCTD). As noted in the quotation, *Ciric* was arguably decided on an evidentiary issue (the appropriate evidentiary threshold for establishing that a conflict is "condemned by the international community") and not directly on the issue of whether some types of military service evasion is inherently political.
[73] Goodwin-Gill states in *The Refugee in International Law* (1983) at 33 and 34: "Military service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority, it is a political act." This comment by Goodwin-Gill has been approvingly referenced in *Zolfagharkhani*. See also *T95-06356* (CRDD, 30 September 1997).
[74] This gap in the Canadian jurisprudence has been noted in proceedings in other jurisdictions: "One might ask . . . [whether] some particularly objectionable form of conflict . . . may be an extra fact that allows the punishment for refusing to be called up as perhaps being characterised as having a political opinion, or as being for reasons of political opinion. . . . [But] some of the authorities, particularly the Canadian ones, do not discuss how one makes that causal link" (Mr. Beech-Jones, Counsel for the Respondent in *Szaog et al. v MIMIA* [2005] HCA 558 (Transcript of hearing of 5 August 2005). The questioning of the existence of an inherent nexus in cases of prohibited compulsory military service may be a side-effect of the RPD's expanded jurisdiction which now allows the Board to grant relief to military service evaders without nexus to an enumerated ground. An example of how this expanded scope of relief may affect judicial reasoning on this issue, see *Volovich; Ustaoglu v. Canada (M.C.I.),* [2003] F.C.J. No. 1285 (FC) at ¶ 11 and *Kilic v. Canada (M.C.I.)*, [2004] F.C.J. No. 84 (FC) at ¶ 29.

[75] As noted at the outset of this discussion of nexus and prohibited conscription, an explicit nexus can often be found to political opinion given the heightened political perceptions that often coexist with prohibited conscription. In addition, the category of "membership in a particular social group" can be used as a nexus for some individuals fearing prohibited conscription, see implicitly in *T92-02882* (CRDD, 23 June 1992), *U95-04027* (CRDD, 27 August 1996) and *Andrade v. Canada (M.C.I.)*, [2002] F.C.J. No. 69 (FCTD) and *T87-9024*, (IAB, 29 July 1987). However, it would seem from the jurisprudence that membership in a particular social group is more often cited in cases where conscription is prohibited due to the nature of the conscriptor. For a contrary view, see *V91-00261* (CRDD, 28 June 1991) (orally).
[76] It is unclear whether the second and third categories of prohibited military service are sub-categories of "contrary to the basic rules of human conduct" (see for example *T99-09172* (CRDD, 1 August 2001) at ¶49) or separate categories.
[77] *A95-01130* (CRDD, 7 February 1997) (concerning the South Lebanese Army at ¶16: "Given the SLA's lack of legal status, there is no issue in regard to enforcement of a law of general application.")
[78] See *Diab v. Canada (MEI)* [1994] F.C.J. No. 1277 (FCA), VA0-00816 (CRDD, 19 February 20001), *Nagendiran v. Canada (MCI)*, [2003] F.C.J. No. 807, *M89-04337* (CRDD, 26 June 1990) and *T90-04331* (CRDD, 17 October 1990) for cases where the illegitimacy of the conscriptor rendered the required military service unlawful. However, see *T99-09172* (CRDD, 1 August 2001) for a decision regarding conscription by the Taleban in Afghanistan that did not cite its illegitimacy as a reason for conscription to constitute persecution and also U91-08581 et al. (CRDD, 19 February 1992) for a decision that found conscription by the Mujadehin in Afghanistan not to constitute persecution.
[79] *T99-09172* (CRDD, 1 August 2001) (at ¶ 49: "In this case, the claimant objects to forced conscription by the Taliban . . . The panel considered his objection to be serious given that the military actions objected to are judged by the international community to be contrary to basic rules of human conduct"). However, non-state actors will not be presumed by their nature to be committing condemned acts (or acts leading to exclusion). See *El-Hasbani v. Canada* (M.E.I.), [2001] F.C.J. No. 1269 at ¶ 42 ("The respondent submits that armed liberation organizations such as the SLA fall within the category of the type of organizations which have committed crimes against humanity as part of their mandate and incidental to their regular operations. . . . This is not proof of anything!").
[80] See for example the jurisprudence on Afghanistan noted in fn. 78, *supra*. See also *TA1-15461* (RPD, 18 February 2003) at ¶33 et seq. (finding the unelected government of Hamid Karzai in Afghanistan to be a legitimate conscriptor).
[81] T89-05508 (CRDD, 28 March 1991) and *T90-07001 et al.* (CRDD, 22 November 1991, S. G. Sri-Skanda-Rajah) ("Compulsory military service . . . is not a lawful requirement" where no special law had been promulgated despite a constitutional provision requiring such a law to be promulgated). However, for a contrary view, see *V89-00064* (CRDD, 8 June 1989, C. Groos) ("However, even an illegal act [random arrest and detention] in apprehending the claimant does not necessarily mean his obligation to perform military service was avoided or that any subsequent steps taken by the Honduran military were illegal")
[82] See fn. s75 above.
[83] Again, see comments at fn. 17 and 27 *supra* concerning the American matter of *Elias-Zacharias.*
[84] See comment at fn. 76, *supra*.
[85] *T90-07001 et al.* (CRDD, 22 November 1991, D. Walker). See also *Poologanathan v. Canada (MEI)* [1996] F.C.J. No. 987 (FCTD) (although dealing with errors of fact by the Board, the Court's analysis assumed that the conscription of a nine year old, albeit by guerillas, provided the basis for a refugee claim); and, V98-01920 (CRDD, 13 March 2000) and A99-00710 (CRDD, 19 February 2002). See also *Mohammed v. Canada (MCI)* [1995] F.C.J. No. 1457 (FCTD) where it was strongly suggested that the conscription of children was contrary to international law (and certainly otherwise contrary to the purposes and principles of the UN). The recent decision in *Suresh v. Canada (M.C.I.)* [2000] F.C.J. No. 5 (F.C.A.) at ¶ 38 to 40 also identifies the conscription of children, *inter alia*, as an indicator of unlawful activity (while the Federal Court of Appeal's decision was subsequently overturned by the Supreme Court of Canada, [2002] S.C.J. No. 3 (SCC), the Supreme Court did not disagree with the Court of Appeal's finding on this matter).

[86] Developments in international law include the ILO's *Convention 182: On the Worst Forms of Child Labour* 38 I.L.M. 1207 (1999) (entered into force 19 Nov. 2000), the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000) (entered into force 12 February 2002) and Articles 8(2)(xxvi) and 8(2)(e)(vii) of the *Rome Statute of the International Criminal Court* U.N. Doc. 2187 U.N.T.S. 90 (entered into force 1 July 2002).. For a review of these developments, see UNICEF *The State of the World's Children 2005: Childhood Under Threat* (UNICEF, Geneva, 2005) esp. Chapter 3 (39 to 66), Amy Beth Abbott "Child Soldiers: The Use of Children as Instruments of War" *Suffolk Transnational Law Review* 499 (Summer 2000), Michael S. Gallagher "Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum" 13 *Int J Refugee Law* 310 (July 2001), and Wendy Perlmutter "An Application of Refugee Law to Child Soldiers" 6 *Geo. Public Pol'y Rev.* 137 (Spring 2001). Interestingly, the scholarly treatment of child soldiers seeking asylum similarly presumes persecution without any explicit linkage to international law.

[87] Although it is theoretically possible that military service will be compulsory only for specified "dissident" or otherwise disadvantaged groups, the jurisprudence suggests that in practice such a goal is almost always pursued by way of *de facto* enforcement rather than *de jure* conscription.

[88] The term "disabled" is taken, without comment on its appropriateness, from the international instruments.

[89] See the emphasis on the rehabilitation and special accommodation of the disabled in *Declaration on the Rights of Mentally Retarded Persons*, G.A. res. 2856 (XXVI), 26 U.N. GAOR Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971); the *Declaration on the Rights of Disabled Persons*, G.A. res. 3447 (XXX), 30 U.N. GAOR Supp. (No. 34) at 88, U.N. Doc. A/10034 (1975); and, Part I and II of the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, A/RES/48/96, 85th Plenary Meeting 20 December 1993. Insofar as compulsory military service may interfere with the rehabilitation and special accommodation of the disabled, it may be prohibited.

[90] See Article 4 of the *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991.

[91] *Ibid*. Article 11.

[92] See for example *U95-04027* (CRDD, 27 August 1996) where the claimant claimed a fear of conscription "as a young male Guatemalan fearing forced conscription". While mistreatment during military service was feared as a "member of the Maya Quiche", his indigenous status was not linked to his fear of conscription *per se*.

[93] See Article 3 of *United Nations Principles for Older Persons,* G.A. Res. 46/91, U.N. GAOR, 46th Sess., 74th plen. mtg., Annex 1 U.N. Doc. A/RES/46/91 (1991) which allows the elderly "to participate in determining when and at what pace withdrawal from the labour force takes place". Insofar as compulsory military service can be understood as contradicting the elderly individual's determination to retire from the workforce, it may be understood as prohibited.

[94] Military inefficiency may not be a complete bar to the recruitment of the elderly. In the matter of *Nagendiran v. Canada (M.C.I.)* [2003] F.C.J. No. 807 the Federal Court overturned the Board's finding that it was "implausible" that the elderly would be recruited. No mention was made of a prohibition of the recruitment of the elderly in either the Board's decision or the decision of the Court. However, the "elderly" man in this case was only 52 years of age.

[95] While the Board must not be restricted in its determination of a claim to the particular pleadings of the claimant, in the case of conscientious objectors it is impossible to conceive of a situation where the Board could confer refugee status on a claimant on the basis of being a conscientious objector without the claimant having specifically articulated such objections.

[96] Such a complex and extended debate is impossible to summarize. In essence, there is some controversy over whether the Article 18 of the *ICCPR* along with the UN Human Rights Committee's General Comment No. 22 on the right to freedom of thought, conscience and religion (which interprets Article 18 of the *ICCPR* to restrict the right of states to conscript under Article 8(3)(c)(ii) of the *ICCPR)* overrides a state's sovereign customary ability to conscript individuals into military service. With respect to the refugee jurisprudence of other jurisdictions, and for a contrary view of the existence of a right to conscientious objection, see most notably *Sepet*.

[97] An exception to this proposition is the matter of *T93-09377* (CRDD, 4 January 1995) which reviews briefly the international legal basis of conscientious objection.
[98] *Musial v. Canada (M.E.I.)* [1982] 1 F.C. 290 (FCA) at ¶ 7. In an immigration context, conscientious objection was raised many years before *Musial* in the matter of *Boulis v. Canada (M.M.I)* [1974] S.C.R. 875 (SCC) (on the issue of whether a statutory body had properly exercised its discretion in refusing a stay of deportation to a conscientious objector).
[99] *T93-09377* (CRDD, 4 January 1995).
[100] See *VA2-02269* (RPD, 23 September 2003) where the claimant, an atheist, was found not to be credible about his conscientious objection.
[101] See fn. 46, *supra*. See for example *T93-09377*, (CRDD, 4 January 1995): "The purely pacifist conviction holds that it is morally wrong in all circumstances to bear arms and to kill; the partial pacifist conviction objects to the use of force in some circumstances depending upon the purposes or means used. . . . In the panel's opinion, to succeed on this leg [partial objection], the claimant must not only show that he holds the conviction that it is morally wrong to serve in the Occupied Territories but in addition, he must be able to demonstrate that the purposes for being sent to the Occupied Territories or the methods employed there would be condemned by the international community". See also *T92-01693 et al.* (CRDD, 2 June 1993): "[T]his subjective finding would be sufficient to characterize the husband as a partial conscientious objector, and proceed to the next step in the analysis. . . . the next issue would be whether the type of military action engaged in by the IDF in the Occupied Territories is condemned by the international community as contrary to basic rules of human conduct." Most recently, see Bakir v. Canada (M.C.I.) [2004] F.C.J. No. 57 (FC) at ¶ 30.
[102] *T90-07001* (CRDD, 22 November 1991, decision of D. Winkler); *T93-11144 et al.* (CRDD, 14 June 1994) ("The male claimant testified that he does not want to kill or be killed. To me this represents a fear of combat and . . . does not form the basis of a well-founded fear of persecution."); VA1-04412 (RPD, 9 April 2003) (at ¶30: "What is clear is that the claimant is genuinely afraid of participation in the military sicne the recent Intifada. In this the claimant has the sympathy of the panel. However, this does not ground his claim for refugee status.")
[103] V96-01788 (CRDD, 15 October 1997) at ¶ 5. The claim was accepted, *inter alia*, on the basis of the quoted fear. See also *Mouazer v. Canada (M.C.I.),* [2000] F.C.J. No. 423 which at ¶ 18 implicitly accepts fear of death while on leave as a basis of claim.
[104] *Kioreskou v. Canada (M.C.I.),* [1995] F.C.J. No. 457 at ¶ 15.
[105] *VA1-04412* (RPD, 9 April 2003) (at ¶ 22: "In the panel's view there are means the claimant could have utilized – but did not – to have avoided participation in the Israeli military from the very beginning."); upheld by *Volovich v. Canada (M.C.I.),* [2004] F.C.J. No. 342 (at ¶ 5 and ¶ 6: "The Board notes, in addition, that despite his alleged fear, the applicant did not explore any alternatives to his military service and he never expressed his objection to that effect. As a result, the Board did not err in finding that the applicant's allegations on this point are unfounded. . . . he Board did consider that the applicant objected to the Israeli policy towards Palestinians. The Board did not ignore this element of the applicant's claim. Rather, the Board found that the applicant had neither expressed his objection to the Israeli policy nor had he established that it led to his personal persecution.". See also *VA1-04412* for a linkage of a claimant's failure to avail himself of alternate service possibilities with his subjective fear (at ¶ 28: "What is significant with respect to this case is that the claimant did not at any time seek the advice of conscientious objectors' organisations in order to see if there was a way in which he could avoid service in the military. Equally significant is that he never raised an objection with the military about performing his service . . . In the panel's view this is an indication that the claimant was not a conscientious objector. It also provides a basis for doubting whether his currently stated reasons for not wishing to serve in the reserve are for reasons of conscience.")
[106] *T93-01297* (CRDD, 17 November 1993); see also *T91-01081* (CRDD, 2 January 1982) ("The claimant had never manifested his belief and had not done anything to avoid military conscription, in spite of the fact that he . . . had been of draft age for six years. The claimant also gave vague and inconsistent explanations of his beliefs . . . ").

[107] *V89-00977 et al.* (CRDD, 25 June 1990) (where the claimant's belief that she should not participate in front-line military service conflicted with the stated beliefs of her church, the Seventh Day Adventists).
[108] *Talman v. Canada (Solicitor General)* [1995] F.C.J. No. 41 (FCTD) (hereafter "*Talman"*) (at ¶ 17 and 20: "I do not believe that the Refugee Division erred in its assessment of the evidence relating to the applicants' obligation to do military service. As the Board clearly pointed out, and as the transcript shows, the applicants knew that there was compulsory military service in Israel and nonetheless decided to immigrate to that country. . . . While recognizing the applicants' frustration, their conduct seems to me to have been simply a manoeuvre to establish the grounds for their claims. I would say the same about their objections to military service even before they knew the rules and the exceptions."). See also *Agranovski v. Canada (M.C.I.)* (FCTD, 1996). While *Agranovski* reached a different conclusion, it nonetheless applied the same test of whether the claimant knowingly immigrated to a country with compulsory military service.
[109] The frustratingly identical nature of the claimants' pleadings in these cases is matched only by the Board's exceedingly generic responses to these claims. The Israeli military service evasion cases include a quintet of decisions released within six months of each other that are almost completely *verbatim* identical: *T93-02756 et al.* (CRDD, 24 Noevmber 1993); *T93-06478 et al.* (CRDD, 1 December 1993); *T93-11519 et al.* (CRDD, 11 May 1994); *T93-11144 et al.* (CRDD, 14 June 1994); and, *T93-04356* (CRDD, 17 June 1994). Any reference in the notes to any of these cases can be read as a reference to all of these cases.
[110] *Talman* at ¶ 17.
[111] This line of cases emerges out of *Popov v.Canada (M.E.I.)* [1994] F.C.J. No. 489 and *Prokopenkp* [2000] F.C.J. No. 752 (FCTD) (implicitly at ¶ 5) See also *T93-11519 et al.* (CRDD, 11 May 1994) for an example of linking (albeit through a concomitant failure of the claimant to explain his objection) prior military service with an inability to claim conscientious objector status ("The male claimant testified that he served in the Red Army in the former Soviet Union from 1971 to 1973. . . . [h]e is not therefore a conscientious objector"). More recently, see also *VA1-04412* (RPD, 9 April 2003) (at ¶25, in distinguishing a positive decision from the present case, the Board noted that the claimant "did serve and continued to do so right up until the time of the recent Intifada"); upheld by *Volovich v. Canada (M.C.I.)*, [2004] F.C.J. No. 342. See also *T93-09377* (CRDD, 4 January 1995) (where past military service is mentioned disparagingly).
[112] At the present time in Canada this type of claim has attracted a considerable amount of popular attention. In addition to Mr. Hinzman, several other US soldiers have sought protection in Canada in recent months as a result of, *inter alia*, their conscientious objection to participation in the war in Iraq.
[113] *T93-09377* (CRDD, 4 January 1995) ("Between 1975 and 1977, the claimant served in the Soviet army in East Germany. He testified that during this period he formed the view that bearing arms is morally wrong.")
[114] See *supra*, at fn 17.
[115] The 1951 Convention explicitly recognizes this lack of a requirement by outlining, in Articles 1(E) and 1(F), categories of individuals who should be excluded from the protection they would otherwise deserve. The analogy of this requirement to a new ground of "exclusion" is also found in the jurisprudence, see *Talman* at ¶ 8.
[116] However, see also *U91-01411* (CRDD, 11 June 1991) (where the Board found the claimant's *sur place* protests against, *inter alia*, conscription into a civil war sufficient to bring him protection as a refugee).
[117] *Frisher v. Canada (M.C.I.)* [1999] F.C.J. No. 603 (FCTD) (the reference to *Talman* at ¶ 5 is linked with a negative assessment of credibility). *T93-09377* (CRDD, 4 January 1995) (the claimant's alleged ignorance of Israeli compulsory military service when he immigrated was, *inter alia*, "not consistent with deeply held convictions against bearing arms in all circumstances").
[118] In his defense, the claimant in *Talman*, *supra* at fn. 110, asserted that he did not know that the military service in question was a prohibited form of military service (in his words, "directed against women and children" at ¶ 17). The Court did not directly address this defense.
[119] *T93-09377* (CRDD, 4 January 1995) ("He failed to find out more information from the military; he did not approach peace groups and he did not seek legal advice as to his position. In the panel's opinion, it was incumbent upon the claimant to investigate the options open to him."

[120] *T93-09377* (CRDD, 4 January 1995) ("The panel also considered the extent to which the claimant participated in the call-up process itself. bile he refused to attend for a medical and was forcibly examined by military doctors, he cooperated with the authorities when asked to come in for an interview on two occasions.")
[121] *T92-092-01693 et al.* (CRDD, 2 June 1993).
[122] *V99-02917* (CRDD, 22 December 1999) (the possible punishment is discussed at ¶ 32 to 37; the Board concluded at ¶53 that, in the alternative the claimant would be subject to conscription, the punishment "is not inordinate or beyond that acceptable within a human rights context for a law of general application.")
[123] *C90-00462 et al.* (CRDD, 16 October 1991) (out of a total period of service of 24 months).
[124] *VA1-04412* (RPD, 9 April 2003) at ¶ 25 (referring to *T95-06356*).
[125] Repeated prosecution refers to repeating the cycle of conscription and prosecution for failure to be conscripted. *T93-09377* (CRDD, 4 January 1995) ("repeat prosecution might in certain circumstances become persecution.")
[126] *T90-01685* (CRDD, 24 December 1990).
[127] *T89-07396* (CRDD, 17 May 1990).
[128] See above at fn.121.
[129] Order of Harrington, J. in the matter of *Ates v. Canada (M.C.I.)* Federal Court file no. IMM-150-04 (12 October 2004, as amended 25 October 2004) (unreported).
[130] The decision in the matter of *Ates* has not yet been issued. The result of the appeal were communicated to the author by the appellant, Mr. Ates (Personal communication by email, 6 October 2005).
[131] As noted in the Federal Court's decision, this characterization of the Board was "hotly contested" by Mr. Ates and his counsel. However, ultimately the Court deferred to the Board on this issue.
[132] However, with respect to similarly situated individuals, simply showing that the government "often" refuses to grant requests for conscientious objector status does not necessarily indicate it will do so in the case of the claimant (see *Slavkovic v. Canada (M.C.I.)*, [1995] F.C.J. No. 975 (FCTD) at ¶ 5).
[133] *Popov* at ¶ 8.
[134] *Vakiriak v. Canada (M.C.I.),* [2001] F.C.J. No. 1682 (FC) at ¶ 3 and ¶ 4.
[135] *Zolfagharkhani*, at ¶ 19 to 22.
[136] IRB *Interpretation of the Convention Refugee Definition in the Case Law* (Immigration and Refugee Board, Legal Services, Ottawa, December 2002) (as revised December 2003) at § 9.3.6.
[137] *T92-01693 et al.* (CRDD, 2 June 1993) "Without entering into the quagmire of determining whether the inclusions and exclusions in the statute are reasonable and appropriate to its purposes, we do not believe that the class 'Druze and Jews who are not Orthodox Jew full time Torah scholars' can reasonably be characterized as natural. It is a law arbitrary . . . . It does not flow from the inherent nature of military service, but contains a myriad of political, religious and ethnic considerations". However, see *T93-13420* (CRDD, 3 April 1996) at ¶ 66 for a different conclusion on the same law.
[138] *T90-07001 et al.* (CRDD, 22 November 1991, S. G. Sri-Skanda-Rajah) ("The poor and rural Salvadoran males between the ages of 14 and 30 are differentially targeted for forcible recruitment into the military service."); *V89-00064* (CRDD, 8 June 1989, G. S. Chrysomilides) ("[H]e is also a member of a social group composed of citizens who because of their economic conditions and social class (family of peasants) are unable to resist forced recruitment by the army.")
[139] This gendered characteristic is particularly strong in *prima facie* legitimate conscription. While guerilla groups sometimes conscript females (although generally in smaller numbers than males), national governments rarely extend compulsory military service to females. Of course, Israel is the notable exception to this rule.
[140] The only extensive analysis of males as a particular social group in relation to military service is the now dated decision of the Board in *V89-00074* (CRDD, 5 June 1990).
[141] *T96-03054 et al.* (CRDD, 8 July 1997) at ¶ 42.
[142] *A94-01191 et al.* (CRDD, 30 July 1996) (at ¶ 35 "Therefore the alleged military conscription was in actuality a form of involuntary manual labour that was, in itself, a form of persecution and was not the enforcement of a law of general application.")

[143] *Varga v. Canada (M.E.I.)*, [1995] F.C.J. No. 888 (FCTD) (the claimant was a Yugoslavian of Hungarian ethnicity; on the facts, his fear was found not be objectively well-founded).
[144] *M90-06319 (T)* (CRDD, 21 January 1991). The Board went so far as to impeach the claimant for being "detatched from a reasonable sense of reality" because of these allegations of mistreatment.
[145] *T95-06356* (CRDD, 30 September 1997) at ¶24 and 26.
[146] *T94-05552* (CRDD, 3 March 1995) (A mother cannot fear the conscription of her children: "Does fear for one's children – however genuine and however profound – amount to persecution? The panel finds that it does not."). However, where complicity in the military service evasion may result from a close familial relation, the relative will also receive protection on the same basis as the military service evader (see *T99-02481 et al.* (CRDD, 29 May 2000) (at ¶ 43: "[T]he panel finds . . . the female claimant would be targeted by the FRY authorities because of her husband's draft evasion and her perceived or actual assistance of the desertion of military service. For the same reasons as with her husband, this targeting would amount to persecution.")
[147] *T93-13420* (CRDD, 3 April 1996) (Thirteen year old minors fearing conscription as adults).
[148] *T89-05161* (CRDD, 26 March 1990) (Sudan).
[149] [2004] H.C.A. 25 (HCA).