

**MORAL INJURY AND CONSCIENTIOUS OBJECTION:
SAYING NO TO MILITARY SERVICE**

by Alice Lynd with the assistance of Staughton Lynd

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INTRODUCTION

If you are in the military and believe that what you are doing conflicts with your sense of right and wrong; or if you are a veteran and are suffering from what you experienced while in the military; or if you are troubled by what we as a society are sending young men and women to do, we hope it will be worth your time to read all or parts of this article.¹

This is a revision of an article by the same name that was posted online by Historians Against the War. A friend, a man who was a draft resister and counselor during the Vietnam War, recommended that I reconstruct the entire article and begin with “moral injury” and personal accounts.² I have done so.

“Moral injury” is an emerging concept, increasingly recognized by the Armed Forces and the Department of Veterans Affairs. When men and women in the military believe they did or saw something that offends their deeply held sense of right and wrong, it can create inner conflict and self-blame, and shake up their moral foundation. They may feel that what they did or saw is unforgivable. They experience “moral injury.”

While in the military, some men and women instinctively respond to concepts in international law of which they may not even be aware: don’t kill civilians; don’t use disproportionate or indiscriminate force; collective punishment is unfair and wrong. One former Army Ranger said he wished he had had the information on international law when he was applying for conscientious objection: “The urge to resist war starts as a feeling or an emotion. When you are surrounded by aggressive soldiers who reject your developing thoughts on the morality of what you are doing, it is extremely difficult to begin to present and articulate an argument detailing why you need to leave. . . . I needed to see that there was authority in what I was trying to tell my chain of command beyond simple Bible passages. It is so easy to doubt yourself in such a situation.”³

¹ The Lynds wish to thank Carl Mirra and Luke Stewart for providing some of the personal accounts, and Monica Benderman, Kerry Berland, Rory Fanning, David Finke, Lynn Newsom, and Ethan Vesely-Flad for their encouragement and suggestions. Carl Mirra has granted permission to reprint material copyrighted by himself; and Brian Willson has granted permission to reprint material from his book, *Blood on the Tracks*. Excerpts from *Road From ar Ramadi: The Private Rebellion of Staff Sergeant Camilo Mejía* - Copyright © 2007 by Camilo Mejia, are reprinted by permission of The New Press. www.thenewpress.com, and Haymarket Books. All online citations were last accessed on March 15, 2015, except as otherwise noted.

² Kerry Berland, email to Alice Lynd, April 30, 2015. Kerry Berland was a member of Chicago Area Draft Resisters (CADRE) during the Vietnam War, and served as a counselor at the Midwest Committee for Draft Counseling (regional office of the Central Committee for Conscientious Objectors). His assistance with this project has been invaluable.

³ Rory Fanning, email to Alice Lynd, Feb. 18, 2015.

International law supports “selective” conscientious objection. “Selective” or “particular war” objectors include individuals who object to participation in what they consider to be an unjust or illegal war, or who object to participation in certain “methods or means” of combat, such as destruction of civilian villages and their inhabitants, the practice of torture, or the use of drones. Selective objectors would presumably fight in some other war, especially an attack on their homeland, but not the one in which they are ordered to participate.

The United States recognizes conscientious objection only when it is based upon religious training and belief, and only if the individual objects to participation in all wars. Now that the United States has an all-volunteer military service, why would anyone volunteer for military service if it would be contrary to his or her religious training and belief? And what about men and women who would defend their country but regard what they have experienced while in the military as a betrayal of what is morally acceptable? Experience in the military may compel the volunteer to reconsider what he or she believes and why. The chapter on the United States explains the criteria and procedures that currently apply to men and women in the military who may be seeking discharge or re-assignment to non-combatant duty.

We include a chapter on Israel because a growing number of Israelis—who would willingly defend their country—believe that what Israel is doing in the occupied Palestinian territories is morally wrong. Israeli law does not recognize selective conscientious objection. Members of the Israel Defense Forces, like their American counterparts, have experienced the horror of killing a child, or of being ordered to demolish an area where civilians are living, or carrying out commands that they believe to be immoral. Israeli “refuseniks”—individually and in groups—are outspoken, take risks and punishments, and are publicly recognized to an extent that has not occurred in the United States.

During the Vietnam War, I counseled young men who objected to military service. A draft counselor does not tell a counselee what to do. A counselor tries to find out what questions the counselee is trying to resolve, what alternatives the counselee is considering, and offers pertinent information. The counselor should not engage in “mindbending,” because it is the counselee who has to live with the consequences of his or her decisions.

I collected personal accounts of war objectors in a book called *We Won't Go*.⁴ Those accounts were offered as background for contemplation by young men who were sifting out their thoughts and making choices on the basis of their own convictions. It is our hope that this article, like *We Won't Go*, may help men and women to reflect on what they may want to do about participation in war, or to explain to their families why they may make what would otherwise be incomprehensible decisions. We also hope that those of us who have never served in the military will take more seriously the burdens placed on those who have. It is up to all of us to find ways other than war to solve international and ethnic conflicts.

⁴ *We Won't Go: Personal Accounts of War Objectors*, collected by Alice Lynd (Boston, MA: Beacon Press, 1968).

I. MORAL INJURY

Why would a person who volunteered for military service end up saying no to military service? What is moral injury? Before trying to answer these questions, we begin with an example.

Brian Willson enlisted in the Air Force officer program in 1966.⁵ While serving in Vietnam he was asked to accompany a Vietnamese lieutenant, nicknamed Bao, to visit freshly bombed sites, to perform a quick estimate of the pilots' success at hitting their specified targets, and to conduct damage assessments.

As they approached a site in the Mekong Delta, Willson saw a water buffalo, a third of its skull gone and a three-foot gash in its belly—still alive.

My first thought was that I was witnessing an egregious, horrendous mistake. The “target” was no more than a small fishing and rice farming community. The “village” was smaller than a baseball playing field. . . . The pilots who bombed this small hamlet . . . would have been able to see the inhabitants, mostly women with children taking care of various farming and domestic chores. . . . The buildings were virtually flattened by explosions or destroyed by fire. I didn't see one person standing. Most were ripped apart from bomb shrapnel and machine gun wounds, many blackened by napalm beyond recognition; the majority were obviously children.

. . . I couldn't fathom what I was seeing, smelling, thinking. I took a few faltering steps to my left, only to find my way blocked by the body of a young woman lying at my feet. She had been clutching three small, partially blackened children when she apparently collapsed. I bent down for a closer look and stared, aghast, at the woman's open eyes. The children were motionless, blackened blood drying on their bullet and shrapnel-riddled bodies. Napalm had melted much of the woman's face, including her eyelids, but as I focused on her face, it seemed that her eyes were staring at me.

She was not alive. But at the moment her eyes met mine, it felt like a lightning bolt jolted through my entire being. . . .

I was startled when Bao . . . asked why I was crying. . . . “She is my family,” I said. . . . I felt, in my body, that she and I were one.

But Bao just smirked, and said something about how satisfied he was with the bombing success in killing communists. I did not reply. I had nothing to say. From that moment on, nothing would ever be the same for me. . . .

I could not talk about this experience for twelve years, and the thought of it still creates tremors in my body. I often find myself crying at the thought of it, and at times feel a rage that nearly chokes me. . . . Buried deeper inside me, however, was an even more radical epiphany *She is my family*. It would take me many years to understand

⁵ S. Brian Willson, *Blood on the Tracks: The Life and Times of S. Brian Willson, A Psychohistorical Memoir*, (Oakland, CA: PM Press, 2011) (hereafter, “Willson”), p. 26.

the real meaning of this experience—that we are all one—a lesson that continues to deepen and expand as I grow older.⁶

A. What Is Moral Injury?

Long before anyone began to recognize moral injury, service members were confronted with moral and ethical challenges in war:

They may act in ways that transgress deeply held moral beliefs or they may experience conflict about the unethical behaviors of others. Warriors may also bear witness to intense human suffering and cruelty that shakes their core beliefs about humanity. . . .⁷

Decades after the Vietnam War, Dr. Jonathan Shay, a psychiatrist working for the Department of Veterans Affairs, used the term “moral injury” to describe the reactions of Vietnam veterans, like Brian Willson, to atrocities commanded or condoned by their superiors.⁸ Dr. Shay begins his first book on the subject with a chapter called “Betrayal of ‘What’s Right’.” He writes: “We begin in the moral world of the soldier—what his culture understands to be right—and betrayal of that moral order by a commander.” He describes “violations of what American soldiers understood to be right by holders of responsibility and trust.” In one instance, a reconnaissance patrol became aware that three small boats were being unloaded at night on the shore of a bay. The “word came down” that they were unloading weapons. “And we opened up on them . . . constant firepower” into those boats. But, daylight came “and we found out we killed a lot of fishermen and kids.” The colonel told them not to worry about it; “you know in your heart it’s wrong, but . . . here’s your superiors telling you that it was okay.” “The lieutenants got medals . . . medals for killing civilians.”⁹

⁶ Willson, pp. 45-49.

⁷ B. T. Litz et al., “Moral injury and moral repair in war veterans: A preliminary model and intervention strategy,” *Clinical Psychology Review* (2009), 695-706, (hereafter, “Litz et al.”), <<https://msrc.fsu.edu/system/files/Litz%20et%20al%202009%20Moral%20injury%20and%20moral%20repair%20in%20war%20veterans--%20a%20preliminary%20model%20and%20intervention%20strategy.pdf>>, p. 696 (last visited June 5, 2015).

⁸ Beth Schwinn, “Moral Injury Poses Hidden Risks for Service Members,” Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury, Mar. 11, 2015, (hereafter, “Schwinn”), ascribing a first use of the term to psychiatrist Jonathan Shay, then with the Department of Veterans Affairs, <<http://www.dcoe.mil/blog.aspx?BlogTagID=86b141fa-b03d-4996-88db-da7e4b9a5008>> (last visited June 5, 2015).

⁹ Jonathan Shay, *Achilles in Vietnam: Combat Trauma and the Undoing of Character* (New York: Macmillan Publishing Company, 1994), pp. 3-4. Dr. Shay compared the sense of betrayal of American soldiers in Vietnam, and their reactions to it, to that of Achilles in the *Iliad*. On page 26, Dr. Shay uses the term “moral injury” to describe what Agamémnon inflicted on Achilles. *See also*, Jonathan Shay,

In recent years, the definition of moral injury has focused less on the betrayal of trust by higher military authority and more on acts by oneself or others that violate the person's fundamental sense of right and wrong.¹⁰

A publication by the Navy and Marine Corps comments that during the Vietnam War, combat stress must surely have contributed to the in-theater substance abuse, misconduct, and psychological disability after returning to civilian life that have come to characterize that war and its veterans. A significant number of Service members deployed to Operation Iraqi Freedom or Operation Enduring Freedom and exposed to combat or other operational stressors experience persistent, life-altering stress problems during and after deployment, even though most were not recognized as stress casualties in theater. Some postdeployment stress problems may be delayed in onset, surfacing many months after returning from a war zone.¹¹

“Everyone is at risk and no one is immune,” the Navy and Marine Corps document continues.

Studies of the causes of combat-related posttraumatic stress disorder (PTSD), for example, have shown again and again that the degree and frequency of exposure to combat and other intense stressors are a much more powerful determinant of outcome than maturity level, early life experience, or personality style.¹²

Odysseus in America: Combat Trauma and the Trials of Homecoming (New York: Scribner, 2002), p. 5: “Part Three calls for *prevention* of psychological and moral injury in military service.”

¹⁰ Moral injury is not limited to men and women in the military and veterans. *See*, Joseph M. Palmer, edited by James H. Mukoyama, Jr., “Moral Injury and the Role of Your Church: A Guide for Clergy and Lay Ministries,” *Military Outreach USA* (2014), (hereafter, “Palmer”), <http://media.wix.com/ugd/9c76c8_749e804bbceda4fc39e8a635fd35d7a23.pdf>, (last visited May 17, 2015), p. iv, for moral injury resulting not from war but in other contexts: “It is not uncommon for those in the field of law enforcement, firefighting or nursing to suffer from moral injury. In the case of an individual, a woman who had an abortion at an early age may suffer from moral injury in her later years when reflecting on her prior decision.” *See also*, Bautistas por la Paz, “What your church can do about Moral Injury of War” (hereafter “Bautistas”), <http://www.bpfna.org/mobilize/sm_files/Moral_stress_monograph.pdf> (last visited May 25, 2015), pp. 1, 5, moral stress occurs in institutional settings that do not share the person's personal values such as medical, judicial and correctional, and educational occupations, and in expectations of marriage or family.

¹¹ U.S. Navy NTTP 1-15M and U.S. Marine Corps, MCRP 6-11C, “Combat and Operational Stress Control,” Marine Corps Combat Development Command 2010 (Edition December 2010), (hereafter, “Marine Corps COS”), <<http://www.med.navy.mil/sites/nmcsc/nccosc/coscConference/Documents/COSC%20MRCP%20NTTP%20Doctrine.pdf>>, (last visited June 5, 2015), pp. 1-4 and 1-5.

¹² Marine Corps COS, p. 1-5.

The Navy and Marine Corps use the term “inner conflict.” “Inner Conflict” is one of four “combat operational stress” (COS) injuries. “Stress arises due to moral damage from carrying out or bearing witness to acts or failures to act that violate deeply held belief systems.”¹³ Those deeply held beliefs may or may not be religious. Participation in the military requires a transformation from a “civilian code” to a “warrior code,” sacrificing one’s unwillingness to kill to that of being willing to kill when ordered.¹⁴

A publication for active service members warns:

As a service member, you may encounter inner conflicts, ethical or moral challenges during deployments, special missions, or in the course of one’s duty. You may be required to act in ways that go against your moral beliefs or witness behaviors by others that make you feel uncomfortable. . . . It is the betrayal of what you may feel is morally right.¹⁵

An article published by the U.S. Department of Veterans Affairs explains:

[M]oral injuries may stem from direct participation in acts of combat, such as killing or harming others, or indirect acts, such as witnessing death or dying, failing to prevent immoral acts of others, or giving or receiving orders that are perceived as gross moral

¹³ Marine Corps COS”, p. 1-11. *See*, William P. Nash and Brett T. Litz, “Moral Injury: A Mechanism for War-Related Psychological Trauma in Military Family Members,” *Clin Child Fam Psychol Rev* DOI 10.1007/s10567-013-0146-7 (13 July 2013) (hereafter, “Nash and Litz”) <[http://cstsforum.org/assets/media/documents/general_readings/ptsd/Nash%20&%20Litz%20\(2013\)%20moral%20injury%20war-related%20trauma%20in%20military%20family%20members.pdf](http://cstsforum.org/assets/media/documents/general_readings/ptsd/Nash%20&%20Litz%20(2013)%20moral%20injury%20war-related%20trauma%20in%20military%20family%20members.pdf)> (last visited June 5, 2015), [unnumbered p. 4]: “Although defined in words similar to moral injury, the term ‘inner conflict’ is sometimes preferred for training of service members in the Marine Corps because the potential synonym, moral injury, is perceived by some to be pejorative.” (Citation omitted.)

¹⁴ Palmer, p. 3.

¹⁵ Real Warriors, “Understanding Moral Injury”, <<http://www.realwarriors.net/active/treatment/moralinjury.php>>. The Real Warriors Campaign, launched in 2009 by the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury, as an integral part of the Defense Department’s overall effort to encourage service members, veterans and military families to cope with invisible wounds. <<http://www.realwarriors.net/aboutus>>. *See also*, Shira Maguen and Brett Litz, “Moral Injury in Veterans of War,” *PTSD Research Quarterly*, Vol. 23, No. 1 (2012) (hereafter “Maguen and Litz 2012”), <<http://www.ptsd.va.gov/professional/newsletters/research-quarterly/v23n1.pdf>> (last visited June 5, 2015), p. 1: “An act of serious transgression that leads to serious inner conflict because the experience is at odds with core ethical and moral beliefs is called *moral injury*.”

violations. The act may have been carried out by an individual or a group, through a decision made individually or as a response to orders given by leaders.¹⁶

Killing or harming others, witnessing death or dying, handling human remains and being unable to help ill or wounded women and children were common experiences among soldiers and Marines in Iraq and Afghanistan:

Service members deployed to Iraq or Afghanistan have been exposed to high levels of violence and its aftermath. In 2003, 52% of soldiers and Marines surveyed reported shooting or directing fire at the enemy, and 32% reported being directly responsible for the death of an enemy combatant (Hoge et al. 2004). Additionally, 65% of those surveyed reported seeing dead bodies or human remains, 31% reported handling or uncovering human remains, and 60% reported having seen ill/wounded women and children who they were unable to help. . . .¹⁷

According to a doctor who works for the VA Medical Center in Richmond, Virginia, one fifth of soldiers kill civilians by mistake.¹⁸ Other studies indicate that during the Gulf War, 11% of veterans reported killing during their deployment, and 40% of soldiers returning from Operation Iraqi Freedom reported killing or being responsible for killing during their deployment.¹⁹

“When moral injury occurs, a soldier may be convinced what he or she did is unforgivable . . . It is the presence of inner conflict and personal guilt that cannot be forgiven.”²⁰ An Army chaplain describes moral injury as “soul damage.”²¹

¹⁶ Shira Maguen and Brett Litz, “Moral Injury in the Context of War,” PTSD: National Center for PTSD (last updated January 20, 2015), (hereafter, “Maguen and Litz 2015”), <http://www.ptsd.va.gov/professional/co-occurring/moral_injury_at_war.asp>, p. 1 (last visited June 5, 2015).

¹⁷ Litz et al. p. 698, citing Hoge et al., “Combat duty in Iraq and Afghanistan, mental health problems, and barriers to care,” *The New England Journal of Medicine*, 351 (2004), 13-22, <<http://www.nejm.org/doi/full/10.1056/NEJMoa040603#t=articleTop>> (last visited June 5, 2015).

¹⁸ Brian L. Meyer, Ph.D., “Guilt and Moral Injury in Veterans: What We Know and What We Don’t,” May 13, 2014, (hereafter, “Meyer”), <http://sites.utexas.edu/jdtr/files/2014/05/Session-12_Guilt-and-Moral-Injury-in-Veterans_Brian-Meyer.pdf> (last visited June 5, 2015), pp. 14, 18.

¹⁹ Maguen and Litz (2012), p. 4 summarizing articles by Maguen, Litz and other authors in 2011.

²⁰ Rhonda Quillen, “Army Values Keep Moral Injury at Bay,” *Army Magazine* published by the Association of the U.S. Army, Vol. 65, No. 6, June 2015, <<http://www.armymagazine.org/2015/04/20/army-values-keep-moral-injury-at-bay/>> (last visited June 5, 2015).

B. What Causes Moral Injury?

There are various theories as to what causes moral injury. One VA doctor published an article called “Guilt and Moral Injury in Veterans: What We Know and What We Don’t.”²² Much research still needs to be done on causes and treatment.

Moral injury overlaps with but is not the same as post-traumatic stress disorder. A person may experience PTSD if he or she has been the target of others’ attempts to kill or injure, or has survived when others did not. But having been a killer, or having failed to prevent death and injury, may result in moral injury.²³

The same person may suffer from both PTSD and moral injury. Camilo Mejía describes them both as he experienced them. He attributes his fear and apprehension to unspoken assumptions about the outside world: that bombs don’t explode on the road; that a dead cat is not an improvised explosive device; that kids don’t throw grenades at people even if those people are outsiders occupying their country; that mortar rounds don’t fall from the sky as he walks to the toilet or to the shower or to the mess hall; and that those appointed to positions of power are supposed to protect life, not destroy it.

PTSD appeared in my life when the world no longer was a safe place; when I realized I did not trust the roads anymore; when children became a mortal threat; when every beat of my heart pumped fear into my body, reminding me that my life was expendable and could be over at any moment; when death became real, and present, and graphic, and refused to leave my side, and forced me into isolation.

His life changed after he came back from Iraq. He became withdrawn from society so as to avoid the fear and anxiety he experienced from interacting with the outside world.

When I go to a public place, such as a bookstore, I always prefer to sit with my back to the wall, and in a place that allows me to see what’s going on around me. I like to be in clear sight of all the exits. And I always identify places that could provide cover and concealment from possible attacks.

²¹ United States Army, “Moral Injury: Unseen wounds” (Dec. 11, 2014), (hereafter, “Army, Moral Injury”), <http://www.army.mil/article/139776/Moral_Injury__Unseen_wounds/> (last visited June 5, 2015), quoting Chaplain Col. John Read at Fort Gordon, GA.

²² Meyer.

²³ Litz et al., p. 696.

Moral injury is different, Mejía says. PTSD resulted from a violation of trust between himself and the world outside himself. But moral injury violated his internal world. As he observed a young man through the sight of his rifle, a voice inside himself told him not to squeeze the trigger.

[C]onscience is the most secret place where we can see the unwritten law of morality. . . . When I opened fire that day, I violated that law and desecrated the most sacred sanctuary of my being. As I observed that young man through the sight of my rifle, I was staring at a point of no return, the very Rubicon of my life, and I crossed it.

My moral injury is the pain I inflicted upon the very core of my being when I took something I could never give back.²⁴

There is strong support among professionals for the following analysis. PTSD is based more on fear and a sense of constant threat or helplessness, while moral injury is based more on guilt, shame, anger or outrage.²⁵ A person with PTSD has lost his sense of safety; a person with moral injury has lost his ability to trust.²⁶ This is a “loss of trust in previously deeply held beliefs about one’s own or others’ ability to keep our shared moral covenant,”²⁷ or about the acts of peers and leaders who betray their expectations in grievous ways.²⁸

Two years after returning from combat tours in Iraq and Afghanistan, a Marine Staff Sergeant, Felipe Tremillo, was

still haunted by images of the women and children he saw suffer from the violence and destruction of war in Afghanistan. “Terrible things happened to the people we are supposed to be helping,” he said. “We’d do raids, going in people’s homes and people would get hurt.” . . .

²⁴ Camilo E. Mejía, “Healing Moral Injury: A Lifelong Journey” (hereafter, “Mejía, Healing”), *Fellowship Magazine*, Winter 2011, <<http://forusa.org/fellowship/2011/winter/healing-moral-injury/11606>> (last visited June 5, 2015).

²⁵ Maguen and Litz 2012, pp. 2-3; Litz et al., p. 698. *See also*, Schwinn, and *see*, Meyer, p. 26.

²⁶ Meyer, pp. 18, 26.

²⁷ William P. Nash and Brett T. Litz, “Moral Injury: A Mechanism for War-Related Psychological Trauma in Military Family Members,” *Clin Child Fam Psychol Rev* DOI 10.1007/s10567-013-0146-7 (13 July 2013) (hereafter, “Nash and Litz”) <[http://cstsforum.org/assets/media/documents/general_readings/ptsd/Nash%20&%20Litz%20\(2013\)%20moral%20injury%20war-related%20trauma%20in%20military%20family%20members.pdf](http://cstsforum.org/assets/media/documents/general_readings/ptsd/Nash%20&%20Litz%20(2013)%20moral%20injury%20war-related%20trauma%20in%20military%20family%20members.pdf)> (last visited June 5, 2015), [unnumbered p. 4].

²⁸ Maguen and Litz 2015.

American soldiers had to act that way, Tremillo recognizes, “in order to stay safe.” But the moral compromise, the willful casting aside of his own values, broke something inside him, changing him into someone he hardly recognizes, or admires.²⁹

Steve Dundas was a U. S. Navy chaplain who went to Iraq in 2007:

Seeing the devastation of Iraqi cities and towns, some of it caused by us, some by the insurgents and the civil war that we brought about, hit me to the core. . . . I felt lied to by our senior leadership. And I felt those lies cost too many thousands of American lives and far too much destruction.

Dundas returned home broken. His faith in God and in his country were shattered.³⁰

According to a retired Navy psychiatrist, patients who experience moral injury are likely to be highly moral.³¹ It is people who have strong moral beliefs who are more likely to experience moral injury: “anguish, guilt, and shame are signs of an intact conscience and self”³² As Jacob George, a veteran of three tours in Afghanistan insisted, the post-traumatic horror he experienced was not a disorder, but a natural human response to the inhumanity of war.³³

While serving in Afghanistan as a U.S. Army Sergeant, Jacob George said,

There were lots of incidents that bothered me. The interrogation of people at Bagram . . . people are stored all around Afghanistan, micro-prisons, no one knows where they are at or why they are being held; the interrogation of children, arms tied behind their backs on a flight line with helicopters blowing sand and pushing them into the wire behind them . .

²⁹ David Wood, “Healing: Can We Treat Moral Wounds?” *Huffington Post*, Mar. 20, 2014, (hereafter, “Wood, Healing”), <<http://projects.huffingtonpost.com/moral-injury/healing>>.

³⁰ David Wood, “The Grunts: Damned If They Kill, Damned If They Don’t,” *Huffington Post*, Mar. 18, 2014, (hereafter, “Wood, Grunts”), <<http://projects.huffingtonpost.com/moral-injury/the-grunts>> (last visited June 5, 2015). If one reads nothing else about moral injury, this is the article to read.

³¹ Schwinn, quoting Dr. William Nash.

³² Litz et al. p. 701.

³³ Abby Zimet, “Soldier’s Heart: Jacob George’s Sorrowful Ride Till the End,” *Common Dreams*, Dec. 27, 2014, <<http://www.commondreams.org/further/2014/09/29/soldiers-heart-jacob-georges-sorrowful-ride-till-end>>. See, Bautistas, p. 5: “Moral injury is a normal response to the extremities of war and violence” See also, Maguen and Litz 2012, p. 1: “even in optimal operational contexts, some combat and operational experiences can inevitably transgress deeply held beliefs that undergird a service member’s humanity.”

. but one incident stands out. We were in Khost. Two Apache gunships winchestered a building without knowing who was in it. My job was to carry two bags of body parts out of the building to figure out who it was. We had no idea if they were civilians or insurgents. . . . [We] never determined who the arms and legs belonged to. Total negligence. We had no idea who was in there, more than likely women and children.³⁴

The circumstances of modern warfare include fighting an enemy who cannot be clearly identified on battle lines that are constantly changing.³⁵ It is particularly hard to maintain a sense of moral balance if the goal of the war lacks moral clarity, or is opposed as unjustified or futile, or people are being killed by improvised explosive devices and there is nowhere to return fire, or when it was hard to tell who was a combatant and who was civilian.³⁶

U.S. Army Specialist Brock McIntosh recalled attacking targets without knowing whether the enemy was present: “I was confused about what we did. We didn’t know if we took out any enemy. We destroyed a building; destroyed irrigation canals; shot up a village and shot at houses and the report said we did an awesome job.”³⁷

A U.S. Marine by the name of Nick Rudolph described the following as “the worst, best experience” of his life. During a gun battle in Afghanistan, Nick spotted somebody darting around the corner of a wall firing a rifle at him and other Marines. “He sees the shooter is a child, maybe 13. With only a split second to decide, he squeezes the trigger and ends the boy’s life.” Nick has lived with the story for more than three years:

“He was just a kid. But I’m sorry, I’m trying not to get shot and I don’t want any of my brothers getting hurt, so when you are put in that kind of situation . . . it’s shitty that you have to, like . . . shoot him.

“You know it’s wrong. But . . . you have no choice.”

. . . [T]he boy’s death haunts him, mired in the swamp of moral confusion and contradiction so familiar to returning veterans of the wars in Iraq and Afghanistan.³⁸

³⁴ Jacob George, interview by Carl Mirra, 16 Dec. 2010, in Carl Mirra, “Insurgents, accidental guerrillas and valley-ism: an oral history of oppositional US soldiers’ attitudes toward the enemy in Afghanistan,” *Cambridge Review of International Affairs*, Vol. 26, No. 2 (2013) (hereafter, “Mirra, Insurgents”), p. 465, <<http://dx.doi.org/10.1080/09557571.2013.784577>>.

³⁵ Bautistas, Introduction by Zachary Moon, “What is Moral Stress?” p. 1.

³⁶ Wood, Grunts.

³⁷ Brock McIntosh, interview by Carl Mirra, 16 Dec. 2010, Mirra, Insurgents, p. 465.

³⁸ Wood, Grunts.

Brandon Bryant was a drone pilot sitting at the controls of a “cockpit” in a special Air Force unit in New Mexico. “When Bryan pressed a button in New Mexico, someone died on the other side of the world.” Bryant remembers an incident

when a Predator drone was circling in a figure-eight pattern in the sky above Afghanistan, more than 10,000 kilometers (6,250 miles) away. There was a flat-roofed house made of mud, with a shed used to hold goats in the crosshairs, as Bryant recalls. When he received the order to fire, he pressed a button with his left hand and marked the roof with a laser. The pilot sitting next to him pressed the trigger on a joystick [control column], causing the drone to launch a Hellfire missile. . . .

With seven seconds left to go, there was no one to be seen on the ground. Bryant could still have diverted the missile at that point. Then it was down to three seconds. . . . Suddenly a child walked around the corner. . . .

Bryant saw a flash on the screen: the explosion. Parts of the building collapsed. The child had disappeared. Bryant had a sick feeling in his stomach.

“Did we just kill a kid?” he asked the man sitting next to him.

“Yeah, I guess that was a kid,” the pilot replied.

“Was that a kid?” they wrote into a chat window on the monitor.

Then someone they didn’t know answered, someone sitting in a military command center somewhere in the world who had observed their attack. “No, that was a dog,” the person wrote.

They reviewed the scene on video. A dog on two legs?³⁹

What Are the Consequences of Moral Injury?

In the words of Camilo Mejía, moral injury “is a pain that redefined my life, and that not only transformed who I was, but continues to transform me.” It is not something “like a backpack that I can strap to my body and drop at any time, but something that shapes an important part of who I am as a human being.”

While I was in Iraq, when people in charge exercised poor judgment, others got badly hurt or killed. As a result, I developed a sense of suspicion of people in positions of authority and control. Today that suspicion applies to everyone from physicians to bus drivers⁴⁰

³⁹ Nicola Abé, translated from German by Christopher Sultan “Dreams in Infrared: The Woes of an American Drone Operator,” *SpiegelOnline*2012 (Dec. 14, 2012), (hereafter, “Bryant”) <<http://www.spiegel.de/international/world/pain-continues-after-war-for-american-drone-pilot-a-872726-druck.html>> (last visited June 5, 2015), p. 1.

⁴⁰ Mejía, Healing.

“Moral Injury has a slow burn quality that often takes time to manifest and to be detected.”⁴¹ As Brian Willson said, it took twelve years before he could talk about the incident that changed his life. When individual service members and units experience unanticipated moral choices and demands, they may have a delayed impact.

[M]ost service members are able to assimilate most of what they do and see in war because of training and preparation, the warrior culture, their role, the exigencies of various missions, rules of engagement and other context demands, the messages and behavior of peers and leaders, and the acceptance (and recognition of sacrifices) by families and the culture at large. However, once redeployed and separated from the military culture and context (e.g., with family or after retirement), some service members may have difficulty accommodating various morally conflicting experiences.⁴²

“[A]n individual with moral injury may begin to view him or herself as immoral, irredeemable, and un-reparable or believe that he or she lives in an immoral world.”⁴³

“If the service members feel remorse about various behaviors, they will experience guilt; if they blame themselves because of perceived personal inadequacy and flaw, they will experience shame.” Such individuals may become “convinced and confident that not only their actions, but *they* are unforgivable.”⁴⁴ They fail to forgive themselves and they expect to be judged and rejected. Then they withdraw from relationships and isolate themselves, feeling helpless and hopeless. Focusing on their own internal distress, they may have less empathy for others.⁴⁵

People with posttraumatic stress disorder and moral injury experience some of the same things: anger, depression, anxiety, insomnia, nightmares, reckless behavior and self-medication with alcohol or drugs. They recall and re-experience painful thoughts and images. Their emotional intensity may be uncontrollable and inappropriate. They may avoid situations or people that trigger memories. Close relationships with family and friends, especially those

⁴¹ Rhonda Quillin, “The Importance of Unit Climate in Effecting Moral Injury,” <<http://www.cgscfoundation.org/wp-content/uploads/2014/03/Quillen-UnitClimateinEffectingMoral-Injury.pdf>> (no longer available on line, <<http://www.cgscfoundation.org/events/ethics-symposium/ethics-symposium-archive/>>), p. 4.

⁴² Litz et al., p. 697.

⁴³ Litz et al., p. 698.

⁴⁴ Litz et al., p. 700.

⁴⁵ Litz et al., pp. 700, 701; and Army, Moral Injury.

involving intimacy, suffer and deteriorate when normal emotional responses become numb. They may respond that God is not good or there is no God.⁴⁶

But people with moral injury also experience sorrow, grief, regret, shame. Negative consequences of moral injury include distrust of others, isolation, fatalism, self-condemnation, self-destructive and self-harming behaviors, spiritual damage and loss of faith.⁴⁷

A former U.S. Marine, Stephen Canty, explained:

“We spent two deployments where you couldn’t trust a single person except the guys next to you.” Back in civilian society now, . . . “we have trouble trusting people.” . . .

“You just can’t communicate the knowledge of war to somebody else. It’s something that you know or don’t know, and once you know it you can’t un-know it and you have to deal with that knowledge.”⁴⁸

While serving as a drone pilot, Brandon Bryant observed people in Afghanistan for weeks. He felt that he got to know them. “They were good daddies.” He wanted to do something that saved lives rather than take them away. He wrote in his diary, “On the battlefield there are no sides, just bloodshed. Total war. Every horror witnessed. I wish my eyes would rot.” When he came home, he couldn’t sleep. He began talking back to his superior officers. He broke up with his girlfriend after she asked him about the burden he carries. He told her about it. But it was a hardship that neither he nor she could cope with or share. He could not “just switch and go back to normal life.”⁴⁹

According to people who work with veterans at the Soul Repair Center of Brite Divinity School, there is “no basic un-training for combat veterans.” Return to civilian life can be even more difficult than serving in war and can last a lifetime: “Who are we? How do we come to grips with what we have seen or done? Can we trust ourselves to do what is right?” While in combat,

[e]motional numbing allows the person to put aside feelings and do whatever it takes to survive or help others survive. . . . Later such numbing may include a sense of not really being a person, feelings of not fitting in, believing that no one can understand, . . . and not being able to feel emotions in situations calling for intimacy, tenderness, sexuality or grief.”

⁴⁶ Meyer, [unnumbered pp. 15, 24, 27]; and Marine Corps COS. *See also*, Maguen and Litz 2012, pp. 1-3.

⁴⁷ Meyer, [unnumbered pp. 15, 24, 27]; and Marine Corps COS. *See also*, Maguen and Litz 2012, pp. 1-3.

⁴⁸ Wood, *Recruits*.

⁴⁹ Bryant, pp. 4

“We come home to a nation that either ignores us or blindly praises us for our service, yet how can we accept such thanks when we feel ashamed, not just of what we did, but of who we are?”⁵⁰

Many veterans isolate themselves, not knowing how to respond when thanked for their service or asked about their wartime experiences:

Unable to explain, even to a wife or girlfriend, the joy and horror of combat. That *yes, I killed a child*, or *yes, soldiers I was responsible for got killed and it was my fault*. Or, *yes, I saw a person I loved get blown apart*. From there it can be an easy slide into self-medication with drugs or alcohol, or overwork. Thoughts of suicide can beckon.⁵¹

When Vince Emanuele returned from his second tour as a Marine in Iraq, he was badly addicted to drugs, alcohol and violence. “The act of killing someone is not simply traumatic and brutal,” he says, “it’s also invigorating and powerful.”

If someone didn’t say “thank you” at the supermarket, I thought about the various ways in which I could torture them. When someone at the local gas station wouldn’t hold the door open for the next patron, I fantasized about killing them. Their lack of discipline and manners made me physically ill. Sometimes, when I drove around town, I’d find myself dreaming about a confrontation with someone, *anyone*. I wanted to show them what *war* was all about. I wanted to release my anger through violence, often imagining the most gruesome scenarios. Really, I wanted them to feel the same anxiety and anger that I felt during those days. My thinking was shallow: Why should they go through life unscathed by *war*?

Of course, all of this had a tremendously negative impact on my life. . . . Each day is a struggle. The more I try and put the war behind me, the more the dog of war bites at my heels as I run away from the grief. One day, my mother asked me to stop smoking in her and my father’s garage. I picked up a garbage can, threw it at the wall and threatened to kill her. Two hours later I was sobbing, head in hands, trying to explain to my friend what happened. He didn’t know what to say. How could he?⁵²

⁵⁰ Soul Repair Center at Brite Divinity School, “Moral Injury Meeting: A Twelve-Step Program toward Recovery from Moral Injury for Veterans and Their Families and Friends,” (no date) (hereafter, “Twelve-Step Program”), <<http://brite.edu/wp-content/uploads/2013/07/12Step-Moral-Injury-Meeting-Book.pdf>> (last visited June 5, 2015), pp. 5, 10. For lists of books, essays, and other resources on moral injury, *see* <<http://www.brite.edu/academics/programs/soul-repair/resources/#top>> (last visited June 5, 2015). *See also*, Rita Nakashima Brock and Gabriella Lettini, *Soul Repair: Recovering from Moral Injury after War* (Boston: Beacon Press, 2012), title of chapter 3, “Coming Home Is Hell.”

⁵¹ Wood, Grunts.

⁵² Vince Emanuele, “All of My Friends are Dying,” *TeleSur TV*, 5 Nov. 2014 (hereafter “Emanuele”), <<http://www.telesurtv.net/english/opinion/All-of-My-Friends-are-Dying-20141105-0014.html>>, [unnumbered p. 3].

“We habitually let other people determine how we act, what we value, who we are,” says the Soul Repair Center: “When I hit people, I am announcing I’m powerless and I don’t know how to get along with people.” “If I want control, I will blame someone else. I want others to change first.”⁵³

Suicide is the ultimate self-punishment.⁵⁴ “One of the leading causes of completed suicides in the DoD are relationship failures, so if someone is already withdrawing from relationships that have meant a lot to them, then they are already at greater risk.”⁵⁵

There appears to be a link between suicide and guilt for having killed, or failing to prevent death or injury. A significant percentage of suicidal veterans killed women and children while emotionally out of control due to fear or rage. Killing results in “more easily being able to turn the weapon of destruction onto oneself.” In theory at least, a suicidal person feels that he or she does not belong with other people, is a burden on others or society, and has the ability to overcome the fear and pain of suicide.⁵⁶

The suicide rate for veterans has been more than double the suicide rate for civilians. “Records from 48 states show the annual suicide rate among veterans is about 30 for every 100,000 of population, compared to a civilian rate of about 14 per 100,000.” Between 2005 and 2011, 49,000, nearly one in five suicides nationally, was a veteran.⁵⁷

Additional research is needed to clarify what circumstances seem to be related to suicide. A study by the Defense Department’s National Center for Telehealth and Technology based on all troops who served from October 2001 to December 2007 found that deployment to Iraq and Afghanistan was not in itself associated with an increased risk of suicide, although multiple deployments appeared to influence the suicide rate somewhat (19.92 per 100,000). Significantly, the highest risk for suicide was among those who served in the military for less than a full enlistment (2.5 times the active-duty rate), especially those discharged under less-than-honorable circumstances. As of 2015 there is a lack of data to explain why these people are at higher risk.⁵⁸

⁵³ Twelve-Step Program, p. 11.

⁵⁴ Nash and Litz, [unnumbered page 8].

⁵⁵ Army, Moral Injury, p. 2.

⁵⁶ Maguen and Litz 2012, p. 2.

⁵⁷ Jeff Hargarten, Forrest Burnson, Bonnie Campo, and Chase Cook, *Center for Public Integrity*, Aug. 30, 2013, updated May 19, 2014, <<http://www.publicintegrity.org/2013/08/30/13292/suicide-rate-veterans-far-exceeds-civilian-population>> (last visited June 5, 2015).

⁵⁸ Patricia Kime, “Study: No link between combat deployment and suicides,” *MilitaryTimes*, April 1, 2015, <<http://www.militarytimes.com/story/military/benefits/health-care/2015/04/01/suicide-troops->

Military spouses and children may be as vulnerable to moral injury as military service members. Military spouses and children can experience moral injury directly when they hear stories or see images of death and carnage, especially of women and children, and indirectly when the military parent withdraws or resorts to violence or self-destructive behavior. Children may seriously act out at home or in school. They may blame themselves for changes in their parents' behavior, or divorce, or the death of a family member. "To the extent members of families are interdependent, moral injuries resulting from betrayals of trust within the family can be transmitted and retransmitted between family members like waves generated by the fall of a rock in a small pond."⁵⁹

D. What Is Needed to Heal?

The Department of Defense does not formally recognize moral injury, but the Pentagon is funding a program to explore ways to adapt PTSD therapies for Marines suffering from moral injury. It is unknown whether evidence-based treatments for PTSD can sufficiently reduce war-related moral injury.⁶⁰ "New forms of therapy for moral injury are being explored, and moral injury as a concept is increasingly being discussed in military treatment facilities."⁶¹

At the Naval Medical Center in San Diego there is a residential program called Overcoming Adversity and Stress Injury Support (OASIS). The mission statement in the Patient Handbook explicitly expresses the intent to return troops to active duty:

- Improve outcomes for active duty service members with combat stress reactions
- Utilize evidence based therapies, discipline, hard work, family involvement and shared experiences for optimal therapeutic benefit
- Facilitate the return of troops to full duty with improved self esteem, resilience, and capacity for relationships.

Its general strategy includes family members as participants:

Through a variety of experiences, patients are taught how to work through conflict for the good of themselves and those around them; they are challenged to clarify their values and

veterans-combat-study-says-no-link-between-combat-deployment-suicides/70771276/> (last visited June 5, 2015).

⁵⁹ Nash and Litz, [unnumbered pp. 7, 9].

⁶⁰ Maguen and Litz 2015, p. 3.

⁶¹ Svanderwerff, "Navy Medicine Perspective: Moral Injury (April 2, 2015), <<http://navymedicine.navylive.dodlive.mil/archives/8437>>, (last visited June 5, 2015).

goals; they learn to bond in positive ways. Through individual and group therapies, patients learn more effective ways to communicate with each other and learn to support one another as they move toward resilience.⁶²

A battalion chaplain in Iraq at the end of a twelve-month combat tour gathered the troops together for a kind of ritual of forgiveness: “He asked the soldiers to jot down everything they were sorry for, ashamed of, angry about or regretted. The papers went into a makeshift stone baptismal font, and as the soldiers stood silently in a circle, the papers burned to ash.” “The idea was to leave all the most troubling things behind in Iraq.”⁶³

At an Armed Forces Public Health Conference, methods and goals of treatment for moral injury were listed as

- Rationally assessing own or others culpability
- Making or seeking amends
- Compassionate forgiveness of self and others⁶⁴

There appears to be general agreement that self-forgiveness and forgiveness of others is central to healing from moral injuries. But little is known about what treatments best promote forgiveness.⁶⁵

Because of shame, guilt and anger, and the expectation of being judged or shunned, it is likely that the person experiencing moral injury has not wanted to talk about it. Yet talking, re-experiencing moral injury memories, may be a necessary first step.⁶⁶ It is important for the individual to be able to express remorse and to reach his or her own conclusions about the causes of the events. The person’s judgments and beliefs about the transgressions may be quite appropriate and accurate.⁶⁷ While guilt and shame can help a person to see his or her own

⁶² Naval Medical Center San Diego, “Patient Handbook,” updated July 26, 2013, *Oasis Program – Overcoming Adversity and Stress Injury Support*, <<http://www.med.navy.mil/sites/nmcscd/Patients/Documents/oasis/OASIS%20Patient%20Handbook%20JUL2013.docx>> (last visited June 5, 2015).

⁶³ Wood, Healing.

⁶⁴ William P. Nash, Richard J. Westphal, and Brett Litz, “Trauma, Loss, and Moral Injury: Different Approaches for Prevention and Treatment,” Armed Forces Public Health Conference (23 March 2011), <http://www.pdhealth.mil/education/2011_Presentations/AFPCH%2011%20Trauma,%20Loss,%20and%20Moral%20Injury.pdf> (last visited June 5, 2015), p. 10.

⁶⁵ Nash and Litz, [unnumbered page 7].

⁶⁶ Nash and Litz, [unnumbered page 8], and Litz et al., pp. 702.

⁶⁷ Litz et al., pp. 702-703.

culpability, according to a military chaplain, these emotions can have adverse effects when the person experiencing them is not also connected with a stable source of compassion.⁶⁸

The service member or veteran is asked to “think of someone who has always had his or her back and who has been and will be in his or her corner no matter what.”⁶⁹ The Soul Repair Center describes what it calls “deep listening”: “The goal of deep listening is to hear beyond the words of the other person and yourself, to the essence of what the words and feelings are pointing to.”⁷⁰ Mental health experts say, the listener (whether a chaplain, therapist, or other compassionate moral authority) must be able to imagine caring for someone who has done morally questionable acts and to listen without revulsion. An expression of disgust or fear may be experienced as condemnation, and detachment is not helpful. It is thought that

focused emotional reliving is a necessary pre-condition to change; service members and veterans will be unable to reconsider harmful beliefs stemming from deployment unless they “stay with the event” long enough for their beliefs to become articulated and explicitly discussed.⁷¹

They may be encouraged rationally and fairly to apportion blame; making amends for one’s own share of blame may be necessary for self-forgiveness.⁷² What is needed is

a new way to view the world and that self that takes into account the reality of the event and its significance without giving up too much of what was known to be good and just about the world and the self prior to the event (and what can be revealed in the future). . . and to work towards accepting an imperfect self. . . . [E]ven if a particular act is “bad” or “wrong”, it is still possible to move forward and create a life of goodness and value. *One does not need to accept the act to accept the imperfect self that committed the act.*

. . . [T]he goal is for individuals to reclaim good parts of themselves and to examine and accept—but not be defined by—what they did, what they saw, what others did, and so forth.⁷³

To make amends means to change.

⁶⁸ Bautistas, Introduction by Zachary Moon, p. 1.

⁶⁹ Litz et al., p. 704.

⁷⁰ Twelve-Step Program, p. 18.

⁷¹ Litz et al., p. 703.

⁷² Nash and Litz, [unnumbered p. 8].

⁷³ Litz et al. p. 703.

[T]he idea is not to try and fix the past, but rather to draw a firm line around the past and its related associations, so that the mistakes of the past do not define the present and the future. . . . Making reparations can help morally injured service members or veterans begin to reconnect with the values, as well as allow them to feel like a contributing member of society.⁷⁴

Camilo Mejía came to believe “that the transformative power of moral injury cannot be found in the pursuit of our own moral balance as an end goal, but in the journey of repairing the damage we have done onto others.” “I no longer view the suffering of others as alien to my own experience. I view hunger, disease, and the brutality of war and occupation as global-scale issues, not as issues of individual nations.” And, repairing the damage “within ourselves will require a life-long commitment to atone for the wrongs we have committed against others.”⁷⁵

Experiences of having killed others or having failed to prevent death can weaken religious faith.⁷⁶ Being part of a religious, spiritual, or community group may help to construct meaning and purpose that goes beyond the self.⁷⁷ Phil Klay (who served in Iraq from January 2007 to February 2008) said that religion and the tradition of Catholic thought is something that “helps you to ask the right kinds of questions about these issues. . . .” The type of religious tradition that appeals to him is about “doubt and working your way towards more and more difficult questions. . . .”⁷⁸

“Spiritual practices are one way to connect with compassion,” says Zachary Moon, a military chaplain in the Marine Corps. “Compassion is often the needed balm.” A belief that suffering is punishment can “block out compassion, forgiveness and grace.” Suffering can invite repentance, but a compassionate response can be problematic where no redemption is evident. Suffering, understood as actions against God’s will, does not provide a clear vision of God’s plan and our responsibility in our own suffering.⁷⁹ “It is exceedingly difficult to compassionately

⁷⁴ Litz et al., p. 704.

⁷⁵ Mejía, Healing.

⁷⁶ Maguen and Litz, p. 5, citing Fontana & Rosenheck (2004).

⁷⁷ Litz et al., p. 704.

⁷⁸ Terry Gross, “In ‘Redeployment,’ Former Marine Explores The Challenges Of Coming Home,” interview with Phil Klay (Nov. 25, 2014), <<http://www.npr.org/2014/11/25/366538828/in-redeployment-former-marine-explores-the-challenges-of-coming-home>> [unnumbered page 8].

⁷⁹ Bautistas, Introduction by Zachary Moon, “What is Moral Stress?”, p. 2.

respond to moral stress in isolation. When reaching out to others, the time and place will need to be found to open up and let the light in.”⁸⁰

According to Chaplain Moon, “At least half of all veterans are not religious, so supporting a recovery process can be derailed if our support has hidden strings or agendas. Some vets may never return to a former faith and be unable to participate in church or traditional religious activities, but if they do, it needs to be on their terms, not ours.”⁸¹

For someone who is not religious, it is important to ask, where are the contact points?⁸² If the person does not have a religious background, or is an atheist, religious or spiritual values must not be imposed on him or her. “Reconnection with spirituality may not require religious practice,” says a doctor at the VA Medical Center in Virginia, but “the importance of community as a healing mechanism cannot be underestimated.”⁸³

The question remains whether anything other than rejection of warfare and taking action in affirmation of life can truly bring about healing. Jacob George spoke of the limitations of the Department of Veterans Affairs. The VA “isn’t designed to address the depths of the wounds we have.” The VA doesn’t “really look at the soul and how the soul has been injured in war.” He told his therapist that he had thrown back his medals at a demonstration, and that act had released something inside of him. “[T]he VA could never endorse something like that,” his therapist responded. “The VA couldn’t say, ‘Hey, look, you need to organize a protest. You need to march to the Pentagon with 100,000 veterans.’” George replied: “Do you hear what you’re saying? You’re telling me that you can’t offer me the actual healing rituals and ceremonies that I need, that an entire generation of people needs in order to heal their soul.”⁸⁴ Jacob George committed suicide on September 17, 2014.⁸⁵

⁸⁰ Bautistas, Introduction by Zachary Moon, “What is Moral Stress?”, p. 3.

⁸¹ Bautistas, p. 5, citing Soul Repair Center.

⁸² Army, Moral Injury, p. 2.

⁸³ Meyer, [unnumbered p. 49].

⁸⁴ *Truthdig*, “Beloved War Veteran Commits Suicide,” Sept. 19, 2014, <http://www.truthdig.com/avbooth/item/beloved_young_war_veteran_kills_self_after_obamas_war_announcement_20140919> (last visited June 5, 2015).

⁸⁵ Geoff Millard, “Jacob George, Hillbilly Storyteller, Survives 3 Tours in Afghanistan But Not His Road Back Home,” *Huffington Post*, Oct. 23, 2014, updated Dec. 23, 2014, <http://www.huffingtonpost.com/geoff-millard/jacob-george-hillbilly-st_b_6030246.html> (last visited June 5, 2015).

As a combat veteran who had been twice deployed to Iraq, Vince Emanuele had viewed his life as “worthless, easily discardable. Suicide was always an option. Homicide was always a fantasy.” In 2006 he became involved with the anti-war movement and linked up with Iraq Veterans Against the War. Unlike when he was in the Marine Corps, he felt comfortable in the anti-war community. “[M]any of us simply needed a new mission, a mission dedicated to peace and justice, not war and destruction.” But, he discovered, activism was not enough. His activist friends were not immune to suicide.

In the veteran community, suicide is often joked about. . . . Often, the only way to engage with *death* is to obscure the darkness with a fog of *humor*. . . . It’s the only way to deal with extreme levels of violence and death. Dark humor, as it’s often called, helps us deal with the emptiness of death. But the jokes only function as a topical ointment. At home, alone, or with loved ones, we’re reminded of this emptiness. It’s an emptiness that will not go away.

. . . Victims of US aggression, unlike US veterans and their families . . . live . . . in a constant war-zone. While veterans like myself hope to catch a decent night’s sleep, Iraqis and Afghans are lucky to have a bed to sleep in. . . . Sure, veterans have it bad. But those we occupied have it much worse. This dynamic must be recognized and confronted in a serious fashion if we ever hope to bridge the gap between justice and absurdity.

Meanwhile, my friends continue to die—my Iraqi friends, my Afghan friends, my Syrian friends, my Libyan friends, my Pakistani friends, my Palestinian friends, my Somalian friends, my veteran friends.⁸⁶

E. The Making of a Conscientious Objector

1. *Jeremy Hinzman, during basic training*

Jeremy Hinzman wanted to attend university, he didn’t have the means to do so, and he was brought up to think that the army had a higher purpose where he could transcend himself.⁸⁷ He volunteered for four years in the Army, and he chose to be in the infantry. He earned an Expert Infantryman’s Badge, and was assigned to a parachute regiment.⁸⁸

Hinzman described basic training as the collective shedding of self. During basic training (January – May 2001) trainees would march around yelling, “Trained to Kill, Kill We Will.” When they began rifle marksmanship training, during the first week they shot at black circles:

⁸⁶ Emanuele, [unnumbered pp. 4-5].

⁸⁷ Immigration and Refugee Board, Jeremy Dean Hinzman et al., claimants, File No: TA4-01429, Toronto, Canada, Dec. 6, 2004 (hereafter, “Hinzman hearing”), p. 40.

⁸⁸ Hinzman hearing, pp. 43-44, 57, 63.

“Then the second week the black circles have shoulders. The third week they have torsos . . .” It became a reflex, a target.⁸⁹

The purpose of a Parachute Airborne Regiment was to seize airfields, drop behind enemy lines: “Wipe out whatever’s on the airfield that’s preventing you from carrying out your mission. Set up a secure landing zone for allied aircraft.”⁹⁰

If there’s hindrances or enemy on the airfield you deal with that. If you need to establish a landing strip you have to find level ground. If you need to blow up stuff that’s in the way or that’s obstructing you or other people from landing then you take care of that. . . . “[Y]our sole function in the infantry is to eliminate the enemy that you encounter . . . [with] any means at your disposal.”⁹¹

When asked what caused him to apply for conscientious objector status in 2002, Hinzman responded, that it was a gradual unfolding of events, through training, and witnessing what was happening in the world at the time. “I came to the conclusion that I couldn’t kill. That all violence does is perpetuate more violence.” When asked what impact the birth of his son had on his decision, Hinzman replied that he “didn’t ever want to have the possibility of killing babies.”⁹²

2. *Geoffrey Millard, briefing on the way to Iraq*

Geoffrey Millard described a briefing when he first arrived in Kuwait. The gist of the briefing was that “[a]ll these fucking hajis are out to kill you. You can’t trust any of these fucking hajis.” Then the colonel asked a simple question:

“What do you do if one of these fucking haji kids is in the middle of the road and your convoy is going straight at this fucking kid?” And somebody yelled “Stop.” And he says, “No. You just fucking killed your entire unit because they ambushed you with this little fucking haji kid.” And so he says, “What do you do when you’ve got this little haji kid in the middle of the road and your convoy is speeding at him?” And someone else says, “Turn down another road.” And he says, “Wrong. No fucking time.”

So someone else begrudgingly says, “Run him over.” And he says, “Exactly.” “One of these little fucking haji kids is in your way, you don’t put your entire unit’s life

⁸⁹ Hinzman hearing, pp. 52, 69, 70.

⁹⁰ Hinzman hearing, p. 67.

⁹¹ Hinzman hearing, pp. 68-69.

⁹² Hinzman hearing, pp. 76, 100.

on the line. You run the little fucking haji over.” He yelled, “Hoo-rah.” We responded with a “Hoo-rah.” The briefing was over. That’s what we were left with.⁹³

The word “haji,” Millard explained, was traditionally a term of respect for someone who had completed the *Hajj*, the pilgrimage to Mecca, one of the Pillars of Islam. Yet American service members use it to racially dehumanize the Iraqi people. “Because no one can possibly see a little kid in the road and run them over. No one can possibly look through their sight post and see a human being and still pull the trigger. So we’re forced to dehumanize. And at this point it’s being used as racial dehumanization.”⁹⁴

Until he heard the colonel make the remark about hajjis, Millard thought such comments were made by the guys on the ground just trying to make it through every day. What he realized at that moment was that “it comes from the top and works its way down. That was a division level staff, the second-highest level of command in Iraq, . . . and it was pushed down directly to our units”⁹⁵

3. *Geoffrey Millard, in Iraq*

Geoffrey Millard is an example of someone who witnessed betrayals of what he felt was morally right and became an “Iraqi war refuser.” Millard was a staff sergeant for thirteen months in Iraq, filing paperwork in a rear operation center. In 2007, as a member of Iraq Veterans Against the War, Millard testified at a Citizens’ Hearing on the Legality of U.S. Actions in Iraq.⁹⁶

The turning point for him was an incident at a traffic control point in Iraq where young soldiers, who were very scared and nervous, would point heavy machine guns at civilian vehicles. Iraqis, he said, were not accustomed to sudden road blocks. They drove very quickly and would stop very quickly.

And on one particular day . . . as the vehicle sped towards this traffic control point, an eighteen-year-old kid . . . a Private First Class . . . made the split-second decision that that vehicle was a threat. He pressed the butterfly trigger on his 50-caliber

⁹³ Geoffrey Millard, in Mary Susannah Robbins, ed., *Peace Not Terror: Leaders of the Antiwar Movement Speak Out Against U.S. Foreign Policy Post 9/11* (Lanham, MD: Lexington Books, 2008), Chapter 20, “The Citizens’ Hearing on the Legality of U.S. Actions in Iraq: The Case of Lt. Ehren Watada,” Iraq Veterans Against the War, Preliminary Report, Tacoma, WA, Jan. 20-21, 2007 (hereafter, “Robbins, Millard”), p. 199.

⁹⁴ Robbins, Millard, pp. 199-200.

⁹⁵ Robbins, Millard, p. 200.

⁹⁶ Robbins, Millard, pp. 196-98.

machine gun and put more than 200 rounds into that vehicle. He then stood there and watched as the results of his decision were extracted from that vehicle: A mother, a father, and two children: boy age four, girl age three.⁹⁷

At the briefing that evening, the colonel said to the entire division level staff: “If these fucking hajis [would] learn to drive, this shit wouldn’t happen.”⁹⁸

At a certain point, Millard refused to return to his unit. “I told my unit that I would not be coming back and that I resigned from the U.S. military.”⁹⁹

4. *Camilo Mejía, in and after Iraq*

Camilo Mejía served as a staff sergeant in Iraq from April to September 2003.¹⁰⁰ At the main base in al Assad, there was a concrete structure, enclosed in concertina wire, where they held prisoners and used sleep deprivation to get them ready for interrogation:

The prisoners—called enemy combatants—were barefoot, hooded and bound with plastic ties. We were told you’re here to run this camp. We were instructed to keep the enemy combatants on sleep deprivation. . . . The way we did that was to yell at them, tell them constantly to get up and down. But sometimes yelling didn’t work because they were so tired. Someone would then hit the wall with a huge sledge hammer. . . . The prisoners were hooded, so when they hit the wall with a sledge hammer it sounded like a huge explosion. It scared the hell out of the prisoners. When that didn’t work, they produced a .9 millimeter pistol and put it to their head and cocked it. There was no bullet in it, but they made it seem like they were going to get shot in the head. The person you were doing it to would cry and scream. . . . They would let prisoners sleep for thirty seconds then wake them up to destroy their sense of time and space¹⁰¹

A lieutenant explained: “When you let them sleep thirty to forty-five seconds, after they’ve been awake for so long, you just totally fuck them up psychologically. Right now these

⁹⁷ Robbins, Millard, p. 198.

⁹⁸ Robbins, Millard, p. 199.

⁹⁹ Robbins, Millard, p. 196.

¹⁰⁰ Carl Mirra, *Soldiers and Citizens: An Oral History of Operation Iraqi Freedom from the Battlefield to the Pentagon* (New York: Palgrave Macmillan, 2008), (hereafter, “Mirra, *Soldiers*”), p. 58.

¹⁰¹ Mirra, *Soldiers*, p. 62.

hajjis, who slept for just forty-five seconds, don't know if they slept for a day, an hour, or five fucking minutes.”¹⁰²

The first time Mejía fired at a human being who died was in ar Ramadi. “[N]othing prepares you for it. You don't know what it does to you when you fire a rifle at a human being.” His platoon was responding to a political protest that had turned violent:¹⁰³

The protesters started throwing grenades at the mayor's office, and my squad had been sent to the rooftop to occupy defensive positions. Our platoon leader relayed to us the order to shoot anyone who threw anything that looked like a grenade. . . . A young Iraqi emerged from one corner of the street, all by himself, and carrying something in his right hand. The object turned out to be a grenade, and just before he threw it we all opened fire on him. The grenade exploded far from everyone and the young man was shot to death. . . . It is impossible to say exactly when I fired my weapon, I just know that I fired it. This incident stayed on my mind for many weeks. The image of the young man, killed by a rain of fire, is still fresh in my memory. Many times I have told myself that maybe the bullets from my rifle only touched his leg [or] maybe his shoulder, that maybe I missed him completely. . . . [T]he thing that troubles me the most, although this action was ordered and justified by the rules of engagement, is that I know this man we killed had no chance of hurting us, he was too far away.¹⁰⁴

In May 2003, twenty minutes after their return from a fire fight, Mejía's squad was ordered to go out again and set up a traffic control point in the vicinity of the fight.¹⁰⁵ When they had gone about two miles down the road that divided ar Ramadi north and south, they saw an object the size of a shoe box in the road. Then a blast engulfed the front of one of their vehicles, and bullets were hitting the concrete all around them. Mejía began firing in the general direction of the attackers. They made it back to their base with no injuries.¹⁰⁶

During a briefing upon their return, Mejía was asked why his squad did not stay and fight. “I had a feeling we were going to get ambushed, so I . . . told them to return fire and keep moving back to base,” Mejía responded. The briefing continued: “What we want to know . . . is why you gave the order to leave the scene instead of fighting.” “I thought the SOP [standard

¹⁰² Camilo Mejía, *Road from ar Ramadi: The Private Rebellion of Staff Sergeant Camilo Mejía, An Iraq War Memoir* (Chicago: Haymarket Books, 2008) (hereafter, “Mejía, *ar Ramadi*”), p. 53.

¹⁰³ Mirra, *Soldiers*, p. 63.

¹⁰⁴ Camilo Mejía, Application for Conscientious Objector Status (hereafter, Mejía, CO application), pp. 41-42. A lengthier description by Mejía of this event appears in Mirra, *Soldiers*, p. 63.

¹⁰⁵ Mejía, *ar Ramadi*, pp. 62, 66.

¹⁰⁶ Mejía, *ar Ramadi*, pp. 70-71.

operating procedure] for a moving ambush was to return fire and keep moving,” Mejía replied. “You sent the wrong message to the enemy,” said the commander.¹⁰⁷ “By getting away . . . you let them know that we are afraid. It was a victory for them,” added the First Sergeant.¹⁰⁸

Now we were dealing with a command that was asking us to expose ourselves unnecessarily to serious danger in order to “send the right message.” They knew damn well that we had acted according to regulations, just as we knew that it was our asses on the line while they were safe back at the base. I left the command post with my two team leaders, wondering who the real enemy was in Iraq¹⁰⁹

While in Iraq, his thoughts “had more to do with surviving than with questioning the war.” Going home on leave gave him the opportunity to listen to his conscience. People wanted to know about his experience in war. Answering them took him back to the horrors of combat, firefights, ambushes: “the time I saw that young Iraqi being dragged by his shoulders through a pool of his own blood, the time that other man was decapitated by machine gun fire, the time my friend shot a child through the chest.”¹¹⁰

He learned about conscientious objection, but he kept thinking, “How could I be a CO after I did all these things in Iraq?”¹¹¹

I have held a rifle to a man’s face, a man on the ground and in front of his mother, children, and wife, and not knowing why I did it. I have walked by the headless body of an innocent man right after our machine guns decapitated him. I have seen a soldier broken down inside because he killed a child. I have seen an old man on his knees, crying, with his arms raised to the sky, perhaps asking God why we were taking the lifeless body of his son. . . .¹¹²

It took Mejía a while to realize that there is no more compelling argument against war than war itself. “It is not what you have done, but what you are willing or unwilling to do after

¹⁰⁷ Mejía, *ar Ramadi*, pp. 73-74.

¹⁰⁸ Mejía, *ar Ramadi*, p. 76.

¹⁰⁹ Mejía, *ar Ramadi*, p. 76.

¹¹⁰ Mejía, CO application, p. 39.

¹¹¹ Mirra, *Soldiers*, p. 65.

¹¹² Mejía, CO application, pp. 44-45.

experiencing these things.”¹¹³ “I was done with violence; I was done with war. I didn’t want to hurt a human being again in my life.”¹¹⁴

After the end of his leave, in October 2003, Mejía was found to be AWOL (absent without leave). In March 2004 he declared himself a conscientious objector and applied for conscientious objector status. In May 2004, he was convicted of desertion by a military tribunal. He was sentenced to a year in military prison, was stripped in rank to private, and was issued a bad conduct discharge. Amnesty International declared him to be a prisoner of conscience, having concluded that he was a “genuine conscientious objector whose objection to war evolved in response to witnessing human rights violations in Iraq.” He was released from prison on February 15, 2005.¹¹⁵

My sense is that a lot of people in the military feel that their duties to the military and their duty to their conscience are in complete disagreement. . . . [T]hey might be afraid to act on their conscience because they could go to jail or be called cowards. But you really can’t be free unless you follow your heart. I have no regret for taking a stand against this war and against killing. There is no greater freedom than the freedom to follow your conscience.¹¹⁶

¹¹³ Mirra, *Soldiers*, p. 65.

¹¹⁴ Mirra, *Soldiers*, p. 66.

¹¹⁵ Mirra, *Soldiers*, p. 58. The month in which he went AWOL was corrected by Camilo Mejía, email, Feb. 22, 2015: “I was not officially considered AWOL until after the end of my leave, which was October 15, 2003.”

¹¹⁶ Mirra, *Soldiers*, p. 66.

II. INTERNATIONAL LAW

Where do our moral beliefs, our sense of what is right and wrong, come from? For some people it is their religious training and belief. For others, it is a comparable sense of what is moral and ethical. International law goes further than the law of the United States, Israel, and other nations in recognizing conscientious objection to military service.

Some men and women, while in military service, instinctively respond to concepts in international law such as: don't kill civilians; don't use disproportionate or indiscriminate force; and collective punishment is unfair and wrong.

In international law there are treaties, agreements, "just war" principles, and United Nations advisory memoranda, that set forth the principles and guidelines that have been developed primarily during the twentieth century in response to World Wars I and II and the holocaust. International agreements call for protection of persons who are not in a position to defend themselves such as enemy prisoners, wounded, noncombatants, or civilians; and personal responsibility for crimes against peace, or participating in war crimes or crimes against humanity. These principles legitimize objection to particular methods or means of warfare, and objections to particular wars such as wars of aggression or unjust wars. However, because there is no consensus among nations, conscientious objectors are governed by the law of the country in which they live and must find a way to stand up for emerging international values in that context.

International law recognizes "selective" as well as absolute conscientious objection. Conscientious objection to military service has recently been defined in United Nations guidelines as an objection to military service

which "derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives." Such an objection is not confined to **absolute conscientious objectors** [pacifists], that is those who object to all use of armed force or participation in all wars. It also encompasses those who believe that "the use of force is justified in some circumstances but not in others, and that therefore it is necessary to object in those other cases" [**partial** or **selective objection** to military service]. A conscientious objection may develop over time, and thus volunteers may at some stage also raise claims based on conscientious objection, whether absolute or partial.¹¹⁷

¹¹⁷ United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 10*, "Claims to Refugee Status related to Military Service within the context of Article 1A9(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (hereafter, "UNHCR Guidelines"), ¶ 3 (emphasis and brackets in original), <<http://www.refworld.org/pdfid/529ee33b4.pdf>>, citing UN Commission on Human Rights, Resolution 1998/77, "Conscientious Objection to Military Service," E/CN.4/RES/1998/77, 22 Apr. 1998, <<http://www.refworld.org/docid/3b00f0be10.html>>; and UN Conscientious Objection to Military Service, E/CN.4/sub.2/1983/30/Rev. 1, 1985, ¶ 21, <<http://www.refworld.org/pdfid/5107cd132.pdf>>.

And,

The right to conscientious objection applies to absolute, partial, or selective objectors, volunteers as well as conscripts before and after joining the armed forces; during peace time and during armed conflict. It includes objection to military service based on moral, ethical, humanitarian or similar motives.¹¹⁸

International recognition of conscientious objection to war has developed over a period of many years. The underlying rationale involves the protection of refugees, the right to freedom of expression and religious freedom, and the prohibition of conduct considered to be a war crime, including torture. At present, international law defines “conscientious objection” more broadly than do many nations including the United States and Israel.

A. Crimes Against Peace, War Crimes and Crimes Against Humanity

1. Hague Conventions

During the latter part of the nineteenth century and early twentieth century, conferences were convened at The Hague in the Netherlands to declare what were understood to be “the Laws and Customs of War on Land” according to already existing customary international law.¹¹⁹

The Hague Conventions of 1899 and 1907 and Regulations concerning the Laws and Customs of War on Land were attempts to define limits as to what warring parties were required to do or not do, for instance, to protect prisoners of war, civilians and others not engaged in the conflict. The Preamble to the Hague Convention of 1907 says:

[T]hese provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule

¹¹⁸ UNHCR Guidelines, ¶ 11 and sources cited therein; *see, ibid.* at n.27, “a number of countries do make provision for selective or partial conscientious objectors.”

¹¹⁹ International Committee of the Red Cross (hereafter, “ICRC”), “Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land,” The Hague, 18 Oct. 1907, <<http://www.icrc.org/ihl/INTRO/195>>, citing the Conference of Brussels in 1874, the First Hague Peace Conference of 1899, and the Second International Peace Conference in 1907. “The provisions of the two Conventions on land warfare, like most of the substantive provisions of the Hague Conventions of 1899 and 1907, are considered as embodying rules of customary international law. As such they are also binding on States which are not formally parties to them.”

of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.¹²⁰

For example:

- Article 4 of the Hague Regulations says that prisoners of war “must be humanely treated.”
- Article 23 of the Regulations explicitly forbids the use of “poison or poisoned weapons,” killing or wounding “an enemy who, having laid down his arms, or having no longer means of defence, has surrendered,” or to “employ arms, projectiles, or material calculated to cause unnecessary suffering,” or to “destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”
- Article 25 of the Regulations prohibits “[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended.”
- Article 27 of the Regulations says that “[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.”
- Article 28 of the Regulations prohibits “[t]he pillage of a town or place, even when taken by assault”¹²¹

Violations of the Hague Regulations later came under the umbrella of the Nuremberg Principles.

In 1946 the Nüremberg International Military Tribunal stated with regard to the Hague Convention on land warfare of 1907: “The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption ... but by 1939 these rules ... were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war”. . . . The International Military Tribunal for the Far East expressed, in 1948, an identical view.¹²²

¹²⁰ ICRC, <<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BD48EA8AD56596A3C12563CD0051653F>>.

¹²¹ <<https://www.icrc.org/applic/ihl/ihl.nsf/ART/195-200014?OpenDocument>>.

¹²² <<http://www.icrc.org/ihl/INTRO/195>>.

Where actions such as those prohibited by The Hague Conventions and Regulations are taking place, there will be conscientious objectors who refuse to participate.

2. *Kellogg-Briand Pact*

The “General Treaty for Renunciation of War as an Instrument of National Policy,” better known as the “Kellogg-Briand Pact,” was signed by fifteen parties (including Germany, Italy, Japan, France, Great Britain and the United States) on August 27, 1928 and ratified by forty-five countries as of July 25, 1929. “Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made”; and convinced that all changes in the relations between nations “should be sought only by pacific means,” the parties agreed,

- in Article I to “condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another”; and,
- in Article II “that the settlement or solution of all disputes or conflicts” among nations “shall never be sought except by pacific means.”¹²³

3. *Charter of the United Nations*

On June 25, 1945, at the end of World War II, after Germany had surrendered (shortly before the United States dropped two atomic bombs and Japan surrendered to the Allies), the Charter of the United Nations affirmed in Article 2(3) and (4) that: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”; and “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹²⁴

¹²³ League of Nations Treaty Series Vol. XCIV (1929), No. 2137, pp. 59, 61, 63-64, <<https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2094/v94.pdf>>, or, <<http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>>. In addition to binding the nations that signed it, the Kellogg-Briand Pact was one of the legal bases establishing that the threat or use of military force and territorial acquisitions resulting from it, are unlawful. “Notably, the pact served as the legal basis for the creation of the notion of crime against peace – it was for committing this crime that the Nuremberg Tribunal and Tokyo Tribunal sentenced a number of people responsible for starting World War II.” <http://en.wikipedia.org/wiki/Kellogg%E2%80%93Briand_Pact>.

¹²⁴ <<http://www.un.org/en/documents/charter/chapter1.shtml>>.

However, Article 51 of the U.N. Charter provided for self-defense: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . .”¹²⁵ Since the UN Charter came into effect, nations that have resorted to the use of force have typically invoked self-defense or the right of collective defense.

Some conscientious objectors would fight to defend their homeland, but might object to fighting a war of “collective self-defense” where the homeland is not under attack.

4. Treaty of London and Charter of the International Military Tribunal (Nuremberg Principles)

On August 8, 1945, two days after an atomic bomb fell on Hiroshima, one day before a second atomic bomb landed on Nagasaki, and a week before Japan surrendered, the Treaty of London provided for the establishment of an International Military Tribunal “for the just and prompt trial and punishment of the major war criminals of the European Axis.”¹²⁶

In the course of World War II the Allied Governments issued several declarations concerning the punishment of war criminals. On 7 October 1942 it was announced that a United Nations War Crimes Commission would be set up for the investigation of war crimes. It was not, however, until 20 October 1943, that the actual establishment of the Commission took place. In the Moscow Declaration of 30 October 1943, the three main Allied Powers (United Kingdom, United States, USSR) issued a joint statement that the German war criminals should be judged and punished in the countries in which their crimes were committed, but that, “the major criminals, whose offences have no particular geographical localization,” would be punished “by the joint decision of the Governments of the Allies.” . . .¹²⁷

¹²⁵ <<http://www.un.org/en/documents/charter/chapter7.shtml>>.

¹²⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 Aug. 1945. Article 1 states:

In pursuance of the Agreement signed on 8 August 1945, by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called “the Tribunal”) for the just and prompt trial and punishment of the major war criminals of the European Axis.

<<https://www.icrc.org/applic/ihl/ihl.nsf/9ac284404d38ed2bc1256311002afd89/65642c46c05fbc85c12563cd00519ba4>>.

¹²⁷ ICRC,

<<https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=87B0BB4A50A64DEAC12563CD002D6AAE>>; “The International Military Tribunal for the Far East (Tokyo 1948) was

Article 6 of the Charter of the International Military Tribunal set forth what became known as the Nuremberg Principles:

The Tribunal established . . . for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) “Crimes against peace:” namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) “War crimes:” namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) “Crimes against humanity:” namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.¹²⁸

established by a special proclamation of General MacArthur as the Supreme Commander in the Far East for the Allied Powers.”

¹²⁸ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 Aug. 1945 (hereafter, “Charter of the International Military Tribunal”), <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=AB2411F0665BE7C9C12563CD00519BF5>. See also, Charter of the International Military Tribunal, Art. 6, <http://www.un-documents.net/imtchart.htm>.

An individual may be held personally responsible for a crime of aggression only if he or she was in a position of authority, but an individual does bear responsibility for engaging in war crimes or crimes against humanity.¹²⁹

According to Article 8 of the Charter of the International Military Tribunal, an individual could not escape responsibility for violating the Nuremberg principles by claiming that he was following orders:

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.¹³⁰

In 1956, the Department of the Army of the United States incorporated the Nuremberg principles into the Army Field Manual, assigning personal responsibility and liability for punishment to “any person . . . who commits an act which constitutes a crime under international law.” Since 1956, the Army Field Manual has said:

498. Crimes Under International Law

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise:

- a. Crimes against peace.
- b. Crimes against humanity.
- c. War crimes.

Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned, only with those offenses constituting “war crimes.”

499. War Crimes

The term “war crime” is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.¹³¹

¹²⁹ “UNHCR Guidelines,” ¶¶ 23, 27, <<http://www.refworld.org/pdfid/529ee33b4.pdf>>, citing International Criminal Court (ICC), *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2, <<http://www.refworld.org/docid/4ff5dd7d2.html>>.

¹³⁰ Charter of the International Military Tribunal, Art. 8, <<https://www.icrc.org/applic/ihl/ihl.nsf/ART/350-530016?OpenDocument>>

¹³¹ Department of the Army, Field Manual No. 27-10, *The Law of Land Warfare*, 18 July 1956 [unchanged as of 15 July 1976], Chapter 8, Section II, ¶ 498, Crimes Under International Law, and ¶ 499, War Crimes, <<http://www.globalsecurity.org/military/library/policy/army/fm/27-10/index.html>>.

During the early 1960's, after intervention by the United States in the Dominican Republic and the beginning of the Vietnam War, David Mitchell asked the courts to decide:

whether a draftee, ordered to report for induction in the Armed Forces of the United States may lawfully refuse to obey the order upon the grounds that the Government is engaged in the commission of crimes against peace, war crimes, and crimes against humanity as defined by international law recognized by the Charter and Judgment of the Nuremberg Tribunal and affirmed by the United Nations General Assembly; and, therefore, that obedience to the Order would render him guilty of complicity in these crimes.

The U.S. courts refused to apply international law to judge the validity of the Vietnam War, and Mitchell went to prison.¹³²

5. Geneva Conventions and Protocols

The International Committee of the Red Cross (ICRC) played a major role in the formulation of the Geneva Conventions that set forth humanitarian rules applicable to armed conflicts. “[I]n 1863, the ICRC persuaded governments to adopt the first Geneva Convention. This treaty obliged armies to care for wounded soldiers, whatever side they were on” During World War I, the ICRC “intervened over the use of arms that caused extreme suffering—in 1918 it called on belligerents to renounce the use of mustard gas.” “The ICRC persuaded governments to adopt a new Geneva Convention in 1929 to provide greater protection for prisoners of war.” During World War II it “tried to work to assist and protect victims on all sides.” But lacking a specific legal basis, it “was unable to take decisive action” “on behalf of victims of the Holocaust and other persecuted groups.”

In 1949, at the ICRC's initiative, states agreed on the revision of the existing three Geneva Conventions (covering wounded and sick on the battlefield, victims of war at sea, prisoners of war) and the addition of a fourth: to protect civilians living under enemy control. The Conventions provide the ICRC's main mandate in situations of armed conflict.¹³³

¹³² David Mitchell, “What Is Criminal,” in *We Won't Go: Personal Accounts of War Objectors*, collected by Alice Lynd (Boston: Beacon Press, 1968), pp. 100-103. See below, note 203, *Mitchell v. United States*, 386 U.S. 972 (1967), Douglas, J., dissenting.

¹³³ ICRC, “History of the ICRC,” 29-10-2010 Overview, <<https://www.icrc.org/eng/who-we-are/history/overview-section-history-icrc.htm>>. See also, Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925: “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilized world; . . . this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations” [continued next page]

“In time of war,” the International Committee of the Red Cross says, “certain humanitarian rules must be observed, even with regard to the enemy.”

The Geneva Conventions are founded on the idea of respect for the individual and his dignity. Persons not directly taking part in hostilities and those put out of action through sickness, injury, captivity or any other cause must be respected and protected against the effects of war; those who suffer must be aided and cared for without discrimination.

The Additional Protocols extend this protection to any person affected by an armed conflict. They furthermore stipulate that the parties to the conflict and individual combatants must not attack the civilian population or civilian objects and must conduct their military operations in conformity with the recognized rules of international humanitarian law.¹³⁴

The 1977 protocols to the Geneva Conventions say that the civilian population and individual civilians should be protected against dangers arising from military operations under all circumstances, even in self defense. Indiscriminate attacks are prohibited. These include using methods or means of combat that strike military objectives and civilians or civilian property without distinction, and attacks that would be excessive when comparing the harm to civilians compared to the anticipated military advantage. In conducting military operations at sea or in the air, each party to the conflict is required to take all reasonable precautions to avoid losses of civilian lives and damage to civilian property.¹³⁵

<<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=58A096110540867AC12563CD005187B9>>.

¹³⁴ International Committee of the Red Cross, “Summary of the Geneva Conventions of 12 August 1949 and Their Additional Protocols,” Aug. 2005, second edition Nov. 2012, pp. 2-3, <<https://www.icrc.org/eng/assets/files/publications/icrc-002-0368.pdf>>. A footnote after the word “his” states: “Throughout this text, pronouns and adjectives in the masculine gender apply equally to men and women, unless otherwise specified.”

¹³⁵ For precise provisions and commentary, *see* “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977,” <<http://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5e5142b6ba102b45c12563cd00434741>> re self defense; *ibid.* and <<http://www.icrc.org/ihl/WebART/470-750065>> re protection of the civilian population; and <<http://www.icrc.org/applic/ihl/ihl.nsf/9ac284404d38ed2bc1256311002afd89/50fb5579fb098faac12563cd0051dd7c>> re precautions in attack.

The following provisions of the Protocols are summarized by the ICRC as “Treaties” under “Practice Relating to Rule 14. Proportionality in Attack,” (hereafter, “ICRC customary ihl”), <https://www.icrc.org/customary-ihl/eng/print/v2_rul_rule14>: [continued next page]

6. Statute of the International Criminal Court

Touching on the same themes, the Statute of the International Criminal Court, 1998, says the following constitutes a war crime in international armed conflicts:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹³⁶

7. Customary International Humanitarian Law: distinction and proportionality

In 2005, the International Committee of the Red Cross published a study on the rules of customary international humanitarian law, “applicable in both international and non-international armed conflicts.” These rules make two main points: civilians must be protected, and the collateral damage caused by military action must not be excessive. Stated another way, there are two concepts, “distinction” between civilian and military targets, and “proportionality,” weighing the damage to civilians against the gaining of military advantage. As one reads these rules, one may be reminded of carpet bombing of cities during World War II, sending unguided missiles into enemy territory with no control over where they will land, laying of land mines with no way of anticipating who will cause them to explode, or shooting to kill a boy with a rock in his hand. Specifically, some of these rules of customary international humanitarian law state:

- Rule 11. Indiscriminate attacks are prohibited.
- Rule 12. Indiscriminate attacks are those:
 - (a) which are not directed at a specific military objective;

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- Article 51(5)(b) of the 1977 Additional Protocol I prohibits an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
 - Under Article 85(3)(b) of the 1977 Additional Protocol I, “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, . . . is a grave breach.”
 - Article 3(3)(c) of the 1980 Protocol II to the Convention on Certain Conventional Weapons prohibits any placement of mines, booby-traps and other devices “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

¹³⁶ Rome Statute of the International Criminal Court, July 17, 1998, Art. 8(2)(b)(iv), <http://legal.un.org/icc/statute/99_corr/cstatute.htm>; quoted in ICRC customary ihl as UN Doc. A/CONF. 183/9, <https://www.icrc.org/customary-ihl/eng/print/v2_rul_rule14>.

(b) which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

- Rule 14. Proportionality in Attack. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.
- Rule 15. Precautions in Attack. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.
- Rule 17. Choice of Means and Methods of Warfare. Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.
- Rule 19. Control during the Execution of Attacks. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
- Rule 21. Target Selection. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be . . . the attack . . . which may be expected to cause the least danger to civilian lives and to civilian objects.
- Rule 23. Location of Military Objectives outside Densely Populated Areas. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas.¹³⁷

A large number of military manuals lay down the principle of proportionality in attack. Among those listed by the ICRC are Israel's Manual of the Laws of War,¹³⁸ and half a dozen U.S. military handbooks.

¹³⁷ ICRC customary ihl, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul>.

When determining what is “excessive,” military advantage is weighed against suffering by civilians. Thus, the ICRC quotes the U.S. Naval Handbook concerning first, the scope and means of attack, and then whether the expected damage to civilians is excessive considering the expected military advantage:

The principle of proportionality is directly linked to the principle of distinction. While distinction is concerned with focusing the scope and means of attack so as to cause the least amount of damage to protected persons and property, proportionality is concerned with weighing the military advantage one expects to gain against the unavoidable and incidental loss to civilians and civilian property that will result from the attack. The principle of proportionality requires the commander to conduct a balancing test to determine if the incidental injury, including death to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained. . . .¹³⁹

Violations of any of these principles of international law are not recognized by either the United States or Israel as grounds for an individual to refuse to participate in military service. They are regarded as political rather than religious grounds.

8. “Just War” Principles

a. International law

“*Jus ad bellum*” refers to international law on the use of force; “*jus in bello*” refers to international law during armed conflict. *Jus ad bellum* has to do with constraints on the use of force: for example, nations must not use force to invade the territory of another country, but the UN Charter permits use of force in self-defense until the UN Security Council has time to act. *Jus in bello* has to do with right conduct within war, or acceptable means and methods of warfare.¹⁴⁰

¹³⁸ Israel, “Laws of War in the Battlefield,” Manual, Military Advocate General Headquarters, Military School, 1998, p. 40, quoted in ICRC customary ihl under Rule 14, Military Manuals, Israel, <https://www.icrc.org/customary-ihl/eng/print/v2_rul_rule14> (last visited Aug. 1, 2015). See below, Part IV, C, 5, Manual on the Laws of War.

¹³⁹ United States, The Commander’s Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007, § 5.3.3, quoted in ICRC customary ihl, <https://www.icrc.org/customary-ihl/eng/print/v2_rul_rule14>.

¹⁴⁰ ICRC, “IHL and other legal regimes—*jus ad bellum* and *jus in bello*,” Overview, 29-10-2010, <<https://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus->

These just war principles may be compared with the Nuremberg principles. Crimes against peace, such as waging an aggressive war, would come under constraints on the use of force. War crimes have to do with conduct during war, such as devastation not justified by military necessity. Crimes against humanity include inhumane acts committed against any civilian population.

b. Catholic

Catholic “just war” principles (based not on international law but on moral principles of the Christian ethic) draw the same “distinction” between civilian and military targets (otherwise known as the principle of “discrimination” or “noncombatant immunity”), and they affirm the principle of “proportionality” (the use of no more force than is militarily necessary).

The United States National Conference of Catholic Bishops, in consultation with European bishops’ conferences, issued a Pastoral Letter on War and Peace in 1983,¹⁴¹ and a follow-up statement in 1993.¹⁴² In 1983, the focus was on avoiding nuclear war and concluded that nuclear deterrence was not adequate as a long-term basis for peace.¹⁴³

[A]n attack on military targets or militarily significant industrial targets could involve “indirect” (i.e., unintended) but massive civilian casualties. . . . This problem is unavoidable because of the way modern military facilities and production centers are so thoroughly interspersed with civilian living and working areas. . . . [E]ven with attacks limited to “military” targets, the number of deaths in a substantial exchange would be almost indistinguishable from what might occur if civilian centers had been deliberately and directly struck. . . .

The location of industrial or militarily significant economic targets within heavily populated areas or in those areas affected by radioactive fallout could well involve such

ad-bellum-jus-in-bello.htm>; and UNHCR Guidelines, ¶ 21 and n.50, <<http://www.refworld.org/pdfid/529ee33b4.pdf>>.

¹⁴¹ “The Challenge of Peace: God’s Promise and Our Response,” A Pastoral Letter on War and Peace by the National Conference of Catholic Bishops, May 3, 1983 (hereafter, “Catholic Bishops 1983”), <<http://www.usccb.org/upload/challenge-peace-gods-promise-our-response-1983.pdf>>.

¹⁴² “The Harvest of Justice Is Sown in Peace,” A Reflection of the National Conference of Catholic Bishops on the Tenth Anniversary of The Challenge of Peace, Nov. 17, 1993 (hereafter, “Catholic Bishops 1993”), <<http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/the-harvest-of-justice-is-sown-in-peace.cfm>>.

¹⁴³ Catholic Bishops, 1983, ¶ 186.

massive civilian casualties that, in our judgment, such a strike would be deemed morally disproportionate, even though not intentionally indiscriminate.¹⁴⁴

In 1993, the Catholic Bishops reiterated: “Strategies calling for use of overwhelming and decisive force can raise issues of proportionality and discrimination. . . . Fifty years after Coventry, Dresden, Hamburg, Hiroshima and Nagasaki, ways must be found to apply standards of proportionality and noncombatant immunity in a meaningful way to air warfare.”¹⁴⁵

In 1982, Pope John Paul II spoke about peace near the city of Coventry, a city devastated by war.¹⁴⁶ The following year, the Catholic Bishops wrote:

[I]t is not only nuclear war that must be prevented, but war itself. Therefore, with Pope John Paul II we declare:

Today, the scale and the horror of modern warfare—whether nuclear or not—makes it totally unacceptable as a means of settling differences between nations. War should belong to the tragic past, to history, it should find no place on humanity’s agenda for the future.

Reason and experience tell us that a continuing upward spiral, even in conventional arms, coupled with an unbridled increase in armed forces, instead of securing true peace will almost certainly be provocative of war.¹⁴⁷

With regard to whether or not the individual should participate in war, the Catholic Bishops stated in their 1983 pastoral letter:

Catholic teaching does not question the right in principle of a government to require military service of its citizens provided the government shows it is necessary. A citizen may not casually disregard his country’s conscientious decision to call its citizens to acts of “legitimate defense.” Moreover, the role of Christian citizens in the armed forces is a service to the common good and an exercise of the virtue of patriotism, so long as they fulfill this role within defined moral norms.

¹⁴⁴ Catholic Bishops, 1983, ¶¶ 180, 182.

¹⁴⁵ Catholic Bishops, 1993, B, 2.

¹⁴⁶ “Holy Mass of Pentecost Homily of John Paul II,” Solemnity of Pentecost, Coventry (30 May 1982), <<http://www.thepapalvisit.org.uk/Visit-Background/A-Retrospective-of-the-1982-Visit/Coventry-Airport/Holy-Mass-Of-Pentecost-homily-of-John-Paul-II-Solemnity-of-Pentecost-Coventry-30-May-1982>>.

¹⁴⁷ Catholic Bishops, 1983, ¶ 219, and endnote 94 referring to John Paul II. “Homily at Bagington Airport,” Coventry, 2, p. 55, a statement consistent with, but without reference to, the renunciation of war in the Kellogg-Briand Pact.

At the same time, no state may demand blind obedience. Our 1980 statement urged the government to present convincing reasons for draft registration, and opposed reinstatement of conscription itself except in the case of a national defense emergency. Moreover, it reiterated our support for conscientious objection in general and for selective conscientious objection to participation in a particular war, either because of the ends being pursued or the means being used. We called selective conscientious objection a moral conclusion which can be validly derived from the classical teaching of just-war principles. . . . We also approve requiring alternative service to the community—not related to military needs—by such persons.¹⁴⁸

B. Conscientious Objection under International Law

A “conscientious objector” is recognized under international law as a person who, on the basis of “principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives” believes that “the use of force is justified in some circumstances but not in others, and that therefore it is necessary to object in those other cases.”¹⁴⁹ Further, under international law the right to conscientious objection applies to both conscripts and volunteers, applies after as well as before joining the armed forces, and applies during wartime as well as time of peace.

1. Universal Declaration of Human Rights and International Covenant on Civil and Political Rights

A right to conscientious objection is based on the Universal Declaration of Human Rights¹⁵⁰ and the International Covenant on Civil and Political Rights.¹⁵¹ Article 18 of the Universal Declaration of Human Rights says:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in

¹⁴⁸ Catholic Bishops, 1983, ¶¶ 232-33.

¹⁴⁹ “UNHCR Guidelines,” ¶ 3, and sources cited therein, <<http://www.refworld.org/pdfid/529ee33b4.pdf>>.

¹⁵⁰ “Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration of Human Rights was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III) . . . as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected.” <<http://www.ohchr.org/en/udhr/pages/introduction.aspx>>.

¹⁵¹ The International Covenant on Civil and Political Rights was ratified by the United Nations General Assembly resolution 2200A (XXI), on 16 December 1966, and entered into force on 23 March 1976. <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>.

community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.¹⁵²

In almost identical language, the first paragraph of Article 18 of the International Covenant on Civil and Political Rights says:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.¹⁵³

The U.N. Human Rights Committee¹⁵⁴ explains:

The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief¹⁵⁵

¹⁵² Universal Declaration of Human Rights, Art. 18, <<http://www.un.org/en/documents/udhr/>> or <<http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>>.

¹⁵³ International Covenant on Civil and Political Rights, Art. 18, ¶ 1, <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>.

¹⁵⁴ “The **Human Rights Committee** is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties.” <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>>; *see also*, Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev.1), p. 2, <<http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>>.

The **Human Rights Committee and the Human Rights Council are two different entities**. The Charter of the United Nations (1945), Article 68 says: “The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.” <<http://www.un.org/en/documents/charter/chapter10.shtml>>. The **Commission on Human Rights** was established by Economic and Social Council resolution 5(1) of 16 Feb. 1946. It concluded its final session on 27 Mar. 2006. Its work is continued by the **Human Rights Council**, <<http://research.un.org/en/docs/humanrights/charter>>.

¹⁵⁵ United Nations Human Rights Office of the High Commissioner, “Conscientious Objection to Military Service,” United Nations Publication HR/PUB/12/1, New York and Geneva, 2012 (hereafter, “OHCHR 2012”), <http://www.ohchr.org/Documents/Publications/ConscientiousObjection_en.pdf>, p. 10, referring to general comment No. 22, paragraph 11 (1993). *See, ibid*, p. 7: “The right to conscientious objection to military service is not a right per se since international instruments of the United Nations do not make direct reference to such a right, but rather is normally characterized as a derivative right; a right that is derived from an interpretation of the right to freedom of thought, conscience and religion.” When the

The Human Rights Committee has interpreted the words “religion or belief” to protect “theistic, non-theistic and atheistic beliefs.” What is critical is that the objection be grounded in conscience, and “[a] claim of conscientious objection to military service must be based on an objection to the obligation to use lethal force.”¹⁵⁶ Furthermore, when considering whether an individual can make a claim of conscientious objection after he or she has joined the armed forces, the Human Rights Committee refers to the right to change one’s “belief” in both the Covenant on Civil and Political Rights and the Universal Declaration on Human Rights.¹⁵⁷ Thus, to be consistent, a claim of conscientious objection by someone who has volunteered to serve in the armed forces should be granted if based on a change of religion or belief.¹⁵⁸

Article 4 of the Covenant on Civil and Political Rights does not permit any derogation of (no exceptions to) a party’s obligations under Article 18 even in a time of public emergency that threatens the life of the nation. Therefore, the UN Human Rights Committee concludes, “it

right to refuse to perform military service “is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. . . .” UN Human Rights Committee (HRC), *CCPR General Comment No. 22, Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add. 4, <<http://www.refworld.org/docid/453883fb22.html>>.

See also, OHCHR 2012, p. 10 n.10: “The general comment appeared to be a departure from the Committee’s earlier determination in 1984 that there was no right to conscientious objection to military service under article 18 of the Covenant. *See L.T.K. v. Finland*, communication No. 185/1984.” <http://www.ohchr.org/documents/publications/conscientiousobjection_en.pdf>.

¹⁵⁶ UN General Assembly, Human Rights Council, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, 3 June 2013, A/HRC/23/22 (hereafter, “HRC 2013”), ¶¶ 12-13, and sources cited therein, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-22_en.pdf> or <<http://www.refworld.org/docid/51b5c73c4.html>>. *See also*, ¶ 21, referring to objections to the unlawful use of force in a particular armed conflict that are more inclusive than conscientious objection, such as objections based on international law:

Collectively such objections relate to being forced to participate in conflict activities that are considered by the applicant to be contrary to the basic rules of human conduct. Such objections may be expressed as an objection on the basis of one’s conscience, and as such can be dealt with as a case of “conscientious objection” . . . ; however, [i]ndividuals may, for example, object to participating in military activities because they consider this is required to conform to their military code of conduct, or they may refuse to engage in activities which constitute violations of international humanitarian, criminal or human rights law.

¹⁵⁷ HRC 2013, ¶ 25 and p. 8 n.22.

¹⁵⁸ HRC 2013, ¶ 26.

would appear that there could be no circumstances where the right to conscientious objection to military service could be set aside.”¹⁵⁹

It is precisely in time of armed conflict, when the community interests in question are most likely to be under greatest threat, that the right to conscientious objection is most in need of protection, most likely to be invoked and most likely to fail to be respected in practice.¹⁶⁰

2. *Conscientious objection to enforcing apartheid*

Less than three years after the International Covenant on Civil and Political Rights went into force, when racial segregation known as “*apartheid*” in South Africa had been government policy for decades,¹⁶¹ the General Assembly of the United Nations passed a resolution recognizing what amounted to selective conscientious objection. Here it is:

The General Assembly, . . .

1. *Recognizes* the right of all persons to refuse service in military or police forces which are used to enforce *apartheid*;

2. *Calls upon* Member States to grant asylum or safe transit to another State, in the spirit of the Declaration on Territorial Asylum, to persons compelled to leave their country of nationality solely because of a conscientious objection to assisting in the enforcement of *apartheid* through service in military or police forces;

3. *Urges* Member States to consider favourably the granting to such persons of all the rights and benefits accorded to refugees under existing legal instruments;

¹⁵⁹ HRC 2013, ¶ 11; *see also*, International Covenant on Civil and Political Rights, Art. 4(2), <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>.

¹⁶⁰ HRC 2013, ¶ 10, citing an opinion by three Committee members in *Jeong et al. v. Republic of Korea*, Communications Nos. 1642-1742/2007, views adopted on 24 Mar. 2011.

¹⁶¹ Comments in the 1985 Report to the U.N. Commission on Human Rights point out that apartheid is a racially prejudiced policy, but no government would agree that its use of armed forces is illegal:

Objection to military service always implies some degree of conflict of values between the authorities and the person who objects. . . . No Government is likely to agree that the way in which it uses its armed forces is illegal, under national or international law. Even in South Africa, the existing government (which is based on a racial minority) [as of 1985 when this was written] does not accept that its military actions run counter to international law. While therefore an objector may consider himself entitled, by reference to international law, to oppose military service in the South African armed forces, this right is not accepted under the national law of South Africa as at present enforced.

Asbjern Eide and Chama Mubanga-Chipoya, “Conscientious Objection to Military Service,” a report prepared by members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (United Nations: New York, 1985), E/CN.4/Sub.2/1983/30/Rev.1 (hereafter, “UN Sub-Commission 1985 Report”), ¶¶ 33-34, <<http://www.refworld.org/pdfid/5107cd132.pdf>>.

4. *Calls upon* appropriate United Nations bodies, including the United Nations High Commissioner for Refugees, the specialized agencies and non-governmental organizations, to provide all necessary assistance to such persons.¹⁶²

3. *International human rights norms and standards pertaining to conscientious objectors*

Resolutions of the Commission on Human Rights, and its successor, the Human Rights Council, are not legally binding.¹⁶³ It is up to each country to decide whether or to what extent to recognize conscientious objection. However, a series of human rights resolutions describe international norms and standards, adding to what nations are called upon to provide.

In 1989, the Commission on Human Rights recognized conscientious objection in a resolution that provided, in part, as follows:

Recognizing that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious or similar motives, [the Commission]

1. Recognizes the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought, conscience and religion as laid down in article 18 of the Universal Declaration of Human Rights as well as article 18 of the International Covenant on Civil and Political Rights;
2. Appeals to States to enact legislation and to take measures aimed at exemption from military service on the basis of a genuinely held conscientious objection to armed service;
3. Recommends to States with a system of compulsory military service, where such provision has not already been made, that they introduce for conscientious objectors various forms of alternative service which are compatible with the reasons for conscientious objection, bearing in mind the experience of some States in this respect, and that they refrain from subjecting such persons to imprisonment;
4. Emphasizes that such forms of alternative service should be in principle of a non-combatant or civilian character, in the public interest and not of a punitive nature;

¹⁶² General Assembly Resolution 33/165, “Status of persons refusing service in military or police forces used to enforce *apartheid*,” 20 Dec. 1978 (footnotes omitted), <<http://www.un.org/documents/ga/res/33/ares33r165.pdf>>.

¹⁶³ OHCHR 2012, p. 18, <http://www.ohchr.org/Documents/Publications/ConscientiousObjection_en.pdf>.

5. Recommends to Member States, if they have not already done so, that they establish within the framework of their national legal system independent and impartial decision-making bodies with the task of determining whether a conscientious objection is valid in a specific case;¹⁶⁴

In 1995, in addition to the premises set forth in 1989, the Commission on Human Rights:

- Affirms that persons performing military service should not be excluded from the right to have conscientious objections to military service;
- Urges States in their law and practice not to differentiate between conscientious objectors on the basis of the nature of their particular beliefs nor to discriminate against recognized conscientious objectors for failure to perform military service;
- Recognizes that some States accept claims of conscientious objection as valid without inquiry, and appeals to Member States that do not have such a system to establish, within the framework of their national legal system, independent and impartial decision-making bodies with the task of determining whether a conscientious objection is valid in a specific case;
- Affirms the importance of the availability of information about the right to conscientious objection to military service, and the means of acquiring conscientious objector status, to all relevant persons affected by military service;¹⁶⁵

In 1998, the Commission on Human Rights passed a resolution that elaborated further on “the right of everyone to have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion” Once again, refining and adding to earlier provisions, the Commission on Human Rights, among other things, said it

- Welcomes the fact that some States accept claims of conscientious objection as valid without inquiry;
- Calls upon States that do not have such a system to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held in a specific case, taking account of the requirement not to discriminate between conscientious objectors on the basis of the nature of their particular beliefs;

¹⁶⁴ UN Commission on Human Rights, “Conscientious objection to military service,” Resolution 1989/59 (08 Mar 1989), <<http://www.wri-irg.org/node/6409>>.

¹⁶⁵ UN Commission on Human Rights, “Conscientious objection to military service,” 8 Mar. 1995, E/CN.4/RES/1995/83, numbered ¶¶ 2, 4, 7 and 8, <<http://www.refworld.org/docid/3b00f0d220.html>>.

- Emphasizes that States should take the necessary measures to refrain from subjecting conscientious objectors to imprisonment and to repeated punishment for failure to perform military service, and recalls that no one shall be liable or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country;
- Encourages States, subject to the circumstances of the individual case meeting the other requirements of the definition of a refugee as set out in the 1951 Convention relating to the Status of Refugees, to consider granting asylum to those conscientious objectors compelled to leave their country of origin because they fear persecution owing to their refusal to perform military service when there is no provision, or no adequate provision, for conscientious objection to military service.¹⁶⁶

Thus, the Commission on Human Rights called on nations not only to recognize conscientious objectors but also to offer them alternative service; not to punish them more than once for continuing refusal to perform military service; and to grant asylum to refugees who had a legitimate fear of persecution.

In 2002 sixteen member states notified the Commission on Human Rights that they did “not recognize the universal applicability of conscientious objection to military service.”¹⁶⁷

But in 2013, the Human Rights Council reported under “best practices” a case that recognized selective conscientious objection:

Both the German Institute for Human Rights and the European Organisation of Military Associations referred to selective conscientious objection to military service and cited a case where the right to selective conscientious objection was recognized by the German Federal Administrative Court in 2005. The Court held that freedom of conscience protected an army software engineer, Major Florian Pfaff, who declared that the Iraq war was illegal and refused to work on a computer programme related to the conflict for reasons of conscience.¹⁶⁸

¹⁶⁶ UN Commission on Human Rights, *Conscientious objection to military service*, Commission on Human Rights resolution 1998/77, 22 Apr. 1998 (hereafter, “OHCHR Resolution 1998/77”), numbered ¶¶ 2, 3, 5 and 7, <<http://www.refworld.org/docid/3b00f0be10.html>>.

¹⁶⁷ OHCHR 2012, p. 17 and 17 n.24: “The letter (E/CN.4/2002/188) was submitted by the Permanent Representative of Singapore and co-signed by: Bangladesh, Botswana, China, Egypt, Eritrea, Iran (Islamic Republic of), Iraq, Lebanon, Myanmar, Rwanda, Singapore, the Sudan, Syrian Arab Republic, Thailand, United Republic of Tanzania and VietNam.” *See also*, HRC 2013, ¶ 15, and p. 6, n.13.

¹⁶⁸ HRC 2013, ¶ 47, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-22_en.pdf>. This appears to be an exceptional case, inasmuch as selective conscientious objection is not recognized in German law. The Basic Law for the Federal Republic of Germany, which serves as

In 2014, in order to provide guidelines on international protection of individuals who seek refugee status related to military service, the United Nations High Commissioner for Refugees addressed the question

whether the national law on military service adequately provides for conscientious objectors, by either: (i) exempting them from military service, or (ii) providing appropriate alternative service. . . . States can legitimately require that citizens perform military or alternative service. However, where this is done in a manner that is inconsistent with international standards, conscription may amount to persecution.¹⁶⁹

4. International standards for non-combatant service, alternative service, punishment, or asylum

When a conscientious objector's claim is recognized, he or she may be assigned to "noncombatant service" within the military, or be assigned to "alternative service" as a civilian.

A report prepared for the UN on conscientious objection to military service in 1985 states:

Germany's constitution, provides in Article 4(3), "No person shall be compelled against his conscience to render military service involving the use of arms. . . ."; Article 12a (2) provides that "Any person who, on grounds of conscience, refuses to render military service involving the use of arms may be required to perform alternative service. . . ."; and Article 12a (4) provides, "If, during a state of defence, the need for civilian services in the civilian health system or in stationary military hospitals cannot be met on a voluntary basis, women . . . may be called upon to render such services Under no circumstances may they be required to render service involving the use of arms." Deutscher Bundestag, *Basic Law for the Federal Republic of Germany*, Nov. 2012, <https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf>

"The Federal Republic of Germany is the first and up until now [1990], the only state that has laid down definitely the right to conscientious objection in its constitution." The Federal Constitutional Court held in 1978, that the "reasons of conscience can be based on religious conviction, ethical or humanitarian views, or ideological-pacifist reasons. Rational and intellectual considerations or political opinions alone are not sufficient, but they can become intensive enough so as to affect a decision for reasons of conscience." The Basic Law does not cover objection to military service that is "conditioned by a specific situation" based on who the enemy is, types of warfare or weapons. The Basic Law mentions objection to service in the field, not objection to military service as such. Jurgen Kuhlmann and Ekkehard Lippert, "Conscientious Objection in the Federal Republic of Germany," paper prepared for the conference, International Perspectives on Conscientious Objection, Utrecht/The Netherlands, Mar. 24-27, 1990, SOWI-ARBEITSPAPIER NR. 34, translated by Virginia Ann Schildhauer, p. 4 and endnote 4, <<http://www.mgfa-potsdam.de/html/einsatzunterstuetzung/downloads/ap034englisch.pdf?PHPSESSID=92bb8>>.

¹⁶⁹ UNHCR Guidelines, ¶ 17, <<http://www.refworld.org/pdfid/529ee33b4.pdf>>.

Objection to military service always implies some degree of conflict of values between the authorities and the person who objects. . . . [I]n a number of countries, a compromise has been worked out, whereby those who genuinely hold pacifist convictions are allowed to be exempted from combat, and are required to perform alternative service of various kinds. Such alternative service reflects the degree of compromise made: it may range from the transfer of the person concerned to non-combat roles within the armed forces (a compromise weighted in favour of the authorities), to service that corresponds to the preferences of the conscientious objector. . . .¹⁷⁰

a. Noncombatant service

“For the authorities, the easiest solution is to provide the objector with non-combat roles within the armed forces. This kind of service is administratively provided for even in countries that do not recognize the validity of conscientious objection.”¹⁷¹

If the individual objects to bearing arms but does not object to the use of force by others, non-combatant service in the military may be compatible with the individual’s reasons for conscientious objection.¹⁷² For example, if a person objects to the methods and means employed in an armed conflict, he or she might avoid the risk of participating in such acts if assigned to a non-combatant position such as a cook, or a logistical or technical support role.¹⁷³

If a member of the armed forces applies for conscientious objector status, he or she should be transferred to non-combat duties while the request is being examined.¹⁷⁴

“[W]hen the objection is based on the conviction that the use of armed force is immoral, or that the particular use of armed force in which the country concerned is engaged is immoral, then non-combat roles will not be acceptable.”¹⁷⁵

¹⁷⁰ UN Sub-Commission 1985 Report, ¶ 33, <<http://www.refworld.org/pdfid/5107cd132.pdf>>.

¹⁷¹ UN Sub-Commission 1985 Report, ¶ 108.

¹⁷² UN Sub-Commission 1985 Report, ¶107.

¹⁷³ UNHCR Guidelines 2014, ¶¶ 26, 29, <<http://www.refworld.org/pdfid/529ee33b4.pdf>>.

¹⁷⁴ HRC 2013, ¶ 27, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-22_en.pdf>, quoting Recommendation CM/Rec(2010)4 of the Committee of Ministers of the Council of Europe to member states on human rights of members of the armed forces, ¶ 43, available at <<https://wcd.coe.int/ViewDoc.jsp?id=1590149&Site=CM>>.

¹⁷⁵ UN Sub-Commission 1985 Report, ¶ 107.

b. Civilian alternative service

For conscientious objectors who object to any participation in the armed forces, in 1998 the Human Rights Commission recommended that nations provide “various forms of alternative service which are compatible with the reasons for conscientious objection, of a non-combatant or civilian character, in the public interest and not of a punitive nature.”¹⁷⁶

What is known as alternative service commonly includes services in medical institutions and hospitals, forestry and agriculture, and may include social services or disaster relief.

International development service is allowed for as an alternative service by some countries. It has been championed by an international non-governmental organization, Service Civil International, since 1920. The purpose of this organization is to promote international understanding and peace; it considers international development service as more conducive to peace than participation in armed forces. Several countries currently authorize international development service as an alternative to military service. . . .

In some countries, conscientious objectors may perform an alternative service directly related to the promotion of peace. . . . It gives the conscientious objector an opportunity to deal with issues directly related to the ethical aspirations underlying the objection to participation in the armed forces. . . .¹⁷⁷

Alternative service is normally, but not always, longer than regular military service. In order to impose an extra burden as a deterrent to potential conscientious objectors, the period of alternative service might be considerably longer.¹⁷⁸ Civilian service that is less onerous than military service might justify a longer duration. In one case, the Human Rights Committee recognized that a longer period could be justified based on the nature of the specific service or the need for special training in order to accomplish that service; but that doubling the length of service as the only way to test the sincerity of an individual’s convictions was not reasonable.¹⁷⁹

Conditions of alternative service were declared to be punitive in nature where the services were to be performed outside places of permanent residence, where salaries were below subsistence level for those who were assigned to work in social organizations, and there were restrictions on freedom of movement. It has been recommended that alternative service not exceed one and a half times the length of military service.¹⁸⁰

¹⁷⁶ OHCHR 2012, pp. 37-38.

¹⁷⁷ UN Sub-Commission 1985 Report, ¶¶ 110-111.

¹⁷⁸ UN Sub-Commission 1985 Report, ¶114.

¹⁷⁹ OHCHR 2012, pp. 39-40.

¹⁸⁰ OHCHR 2012, pp. 39, 41, and sources cited therein.

c. Punishment

A report on conscientious objection in 1985 states, in part:

An unrecognized conscientious objector who persists in objecting to military service may risk sanctions which sometimes can be very severe: imprisonment, even capital punishment, or at [least] a dishonourable discharge. In some cases, persistence in objecting to military service has been construed as mental disturbance, which may result in the objector's being placed in a psychiatric institution. . . .

In peacetime, the most likely consequence will be imprisonment. There appear to be two approaches to the imprisonment of unrecognized objectors. One approach is to use penalties in order to make them change their minds. Relatively short prison sentences are imposed, but after release the objector is again called up for military service. If he still refuses to serve, he receives a new sentence, which means that he may spend most of his adult life in prison because of his continued objection. This practice might be considered to be at some variance with article 14, paragraph 7, of the International Covenant on Civil and Political Rights, which states that no one shall be liable to be tried or punished for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.¹⁸¹

The report continues, "Objection in time of war or public emergency may lead to trial under martial law and can result in the death penalty."¹⁸²

Civil rights may be taken away, temporarily or forever. The objector may be banned from many kinds of public and private employment, especially if the employer demands a document showing that military service has been performed.¹⁸³

In a 1998 resolution and in other documents since then, the Commission on Human Rights repeated that nations should "refrain from subjecting conscientious objectors to imprisonment and to repeated punishment for failure to perform military service. . . . [N]o one shall be liable or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."¹⁸⁴

¹⁸¹ UN Sub-Commission 1985 Report, ¶¶ 115-16; *see also*, UNHCR Guidelines, ¶ 18 (the threat of prosecution and punishment puts pressure on conscientious objectors to change their conviction in violation of their right to freedom of thought, conscience or belief).

¹⁸² UN Sub-Commission 1985 Report, ¶ 120.

¹⁸³ UN Sub-Commission 1985 Report, ¶ 121.

¹⁸⁴ OHCHR Resolution 1998/77, ¶ 5, <<http://www.refworld.org/docid/3b00f0be10.html>> (last visited July 31, 2015); *see also*, OHCHR 2012, pp. 34-37; and HRC 2013, ¶¶ 32-33 [continued next page]

d. Asylum

Some conscientious objectors, and military deserters, have gone to Canada or other countries to avoid prosecution. The question arises whether they should be granted asylum. To qualify for asylum, they must face not merely prosecution and several years in prison, but persecution, involving much more serious consequences.

i. Guidelines

The Universal Declaration of Human Rights declares that “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”¹⁸⁵ A “refugee,” as defined in the Convention Relating to the Status of Refugees, is a person who is unable or unwilling to return to his own country because of a “well-founded fear of being persecuted for reasons of **race, religion, nationality, membership of a particular social group or political opinion**, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of [his own] country”¹⁸⁶ A person who has committed a crime against peace, a war crime or a crime against humanity does not have a right to asylum. It is left to the country granting asylum to evaluate the grounds for asylum.¹⁸⁷

In 2012, the Office of the United Nations High Commissioner for Human Rights summarized the situation:

Whether military service is compulsory or not, desertion is invariably considered a criminal offence. Although penalties vary from country to country, they are not normally considered persecution. Fear of prosecution and/or punishment for desertion or draft

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-22_en.pdf> and sources cited therein.

¹⁸⁵ Universal Declaration of Human Rights, Art. 14(1), <<http://www.un.org/en/documents/udhr/index.shtml#a14>>.

¹⁸⁶ 1951 Convention Relating to the Status of Refugees, Art. 1A(2), (28 July 1951) (emphasis added) (hereafter, “1951 Convention re Refugees”). The 1951 Convention was modified in the 1967 Protocol Relating to the Status of Refugees, and Resolution 2198 (XXI) adopted by the United Nations General Assembly, to remove the limitation on time and place. All of those documents, with an introductory note, are available at <<http://www.unhcr.org/3b66c2aa10.html>>. See, UN General Assembly Resolution 2312, Declaration on Territorial Asylum (1967), <<http://www.worldlii.org/int/other/UNGARsn/1967/56.pdf>>.

¹⁸⁷ 1951 Convention re Refugees, Art. 1F(a), <<http://www.unhcr.org/3b66c2aa10.html>>; and UN Sub-Commission 1985 Report, ¶ 137, “extradition proceedings may be defeated by the receiving State granting political asylum to the objector or draft evader.” <<http://www.refworld.org/pdfid/5107cd132.pdf>>.

evasion does not as such constitute a well-founded fear of persecution under the definition. A person is clearly not a refugee if his or her only reason for desertion or draft evasion is dislike of military service or fear of combat. However, a need for international protection may arise if a person's refusal to perform military service is based on genuine political, religious or moral convictions, or valid reasons of conscience. Such claims for refugee status need to **distinguish between "prosecution" and "persecution"** because prosecution and/or punishment under a law of general application are not generally considered to constitute persecution. As with all asylum claims, persecution related to military service obligations will give rise to eligibility for refugee status only if linked to one or more of the five grounds enumerated in the 1951 Convention.¹⁸⁸

As mentioned above, in 1998 the Commission on Human Rights encouraged countries to consider granting asylum as refugees to conscientious objectors who are compelled to leave their own country because they fear persecution and there is no provision, or no adequate provision, for conscientious objection to military service.¹⁸⁹ The first issue, then, is whether their own country's law on military service adequately provides for conscientious objectors either by exempting them from military service, or providing appropriate alternative service.¹⁹⁰

However, to be recognized as a refugee, the personal experiences of the applicant and others similarly situated must be examined to determine **whether there is a reasonable likelihood that the harm feared would actually materialize**: what would be the consequences if he or she returned to his or her own country; and would those consequences amount to persecution?¹⁹¹

According to Guidelines issued by the UN Office of the High Commissioner for Refugees, "persecution will be established if the individual is at risk of a threat to life or freedom, other serious human rights violations, or other serious harm," including excessive prison terms or corporal punishment, and denial of a fair trial. Indirect consequences may amount to persecution if they are sufficiently serious or cumulatively would make life intolerable, such as physical violence by military or non-state actors, severe discrimination and/or harassment by the community, and retribution for draft evasion or desertion, such as

¹⁸⁸ OHCHR 2012, pp. 74-75, <<http://www.refworld.org/docid/3b00f0be10.html>>. *See also*, Office of the UN High Commissioner for Refugees, "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees," Geneva, Reissued Dec. 2011, ¶ 167 (emphasis added) (hereafter, "OHCHR Handbook and Guidelines"), <<http://www.refworld.org/docid/4f33c8d92.html>>.

¹⁸⁹ OHCHR Resolution 1998/77, numbered ¶ 7, <<http://www.refworld.org/docid/3b00f0be10.html>>.

¹⁹⁰ UNHCR Guidelines, ¶ 17, <<http://www.refworld.org/pdfid/529ee33b4.pdf>>.

¹⁹¹ UNHCR Guidelines, ¶ 13.

suspension of rights to enroll in school or university or access to social services.¹⁹² However, if a deserter is offered an honorable discharge, the issue of persecution would not arise, unless other factors were present.¹⁹³ In summary,

A deserter or draft-evader may . . . be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has a well-founded fear of persecution on these grounds above and beyond the punishment for desertion.¹⁹⁴

ii. Jeremy Hinzman—Canada

At a Canadian Immigration and Refugee Board hearing in the case of Jeremy Hinzman in 2004, the Presiding Member determined that “evidence with respect to the legality of the U.S. incursion into Iraq would not be admitted into evidence because it was not relevant” to the claims of Jeremy Hinzman and his family.¹⁹⁵ The main issues were:

- “Is Jeremy Hinzman a Convention refugee by reason of a **wellfounded fear of persecution** by the government of the United States and its military for reason of political opinion, religion or membership in a particular social group, namely conscientious objectors to military service in the U.S. Army in Iraq”; and,
- “is Jeremy Hinzman a person **in need of protection** in that his removal to the United States of America would subject him personally to a risk of cruel and unusual treatment or punishment by the government of the United States and its military and we could include risk to life there as well”¹⁹⁶

¹⁹² UNHCR Guidelines, ¶¶ 14-15.

¹⁹³ UNHCR Guidelines, ¶ 19.

¹⁹⁴ OHCHR Handbook and Guidelines, ¶ 169, <<http://www.refworld.org/docid/4f33c8d92.html>>.

¹⁹⁵ Immigration and Refugee Board, Jeremy Dean Hinzman et al., claimants, File No: TA4-01429, Toronto, Canada, Dec. 6, 2004 (“Hinzman hearing”), p. 10; *see also*, pp. 12-13; *but see*, pp. 23-25, certain articles might be relevant to how the United States ended up in Iraq, but legal opinions dealing with the legality of the war were not admitted; and *see*, p. 33 exhibits that are not admitted are still “part of the record so if it went up to Federal Court and my ruling was challenged about the relevance of the legality of the war that court would have something to look at”

¹⁹⁶ Hinzman hearing, pp. 5-6 (emphasis added); *see also, ibid.*, p. 13, evidence includes why he left, whom he fears, and why he fears returning to the United States; and p. 31, the test for Convention refugee is a future looking test.

Jeremy Hinzman was denied refugee status in Canada.¹⁹⁷

iii. Andre Lawrence Shepherd—European Union

Andre Lawrence Shepherd unsuccessfully sought asylum in Germany. In his case, the Court of Justice of the European Union set down various criteria for determining whether non-combatant military personnel may be granted asylum in the European Union. After a hearing and “Opinion” by an Advocate General, the Court issued a preliminary “Judgment.”¹⁹⁸

Shepherd enlisted in the U.S. armed forces in December 2003. He was trained as a maintenance mechanic for Apache helicopters. He was transferred to Germany in September 2004 and deployed from Germany to Iraq where he carried out maintenance, particularly on helicopters, from September 2004 to February 2005 when his unit returned to its base in Germany. In 2007 his unit was redeployed to Iraq. By the time he received the order to deploy on April 1, 2007, he had come to view the war in Iraq as contrary to international law and the UN Charter. He deserted on April 11, 2007, thereby putting himself at risk of prosecution for desertion. In August 2008, he applied for asylum in Germany.¹⁹⁹

He considered that the military operations in Iraq involved the systematic, indiscriminate and disproportionate use of weapons without regard to the civil population. As a result particularly of the increasing deployment of Apache helicopters, more and more civilians were being harmed and international humanitarian law violated. He took the view that the

¹⁹⁷ Hinzman stated in a speech in Toronto, Canada on September 24, 2011 that his claims had been denied at every step in the court process, but that a court in 2010 decided that his case should be re-evaluated on humanitarian and compassionate grounds.

¹⁹⁸ *Opinion of Advocate General Sharpston: Andre Lawrence Shepherd v. Bundesrepublik Deutschland*, C-472/13, European Union: Court of Justice of the European Union, 11 Nov. 2014 (hereafter, “*Shepherd*, AG Opinion”), <<http://www.refworld.org/docid/546233b44.html>>; and Judgment of the Court (Second Chamber), Court of Justice of the European Union in Case C-472/13, 26 Feb. 2015 (hereafter, “*Shepherd*, Court Judgment”), <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=162544&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=625846>>, last accessed Mar. 23, 2015. In her Opinion, the Advocate General considered international law, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, the Qualification Directive that establishes minimum standards and common criteria for the recognition of refugees and asylum procedures, and national law. **Anyone seriously interested in asylum issues for military deserters in countries within the European Union should look at the preliminary Opinion and the Judgment of the Court of Justice of the European Union in the Shepherd case.**

¹⁹⁹ *Shepherd*, AG Opinion, ¶¶ 2-4. *See also*, *Shepherd*, Court Judgment (page 3 of 9): Shepherd’s asylum application was rejected on 31 March 2011. For an account by Andre Shepherd in his own words, *see*, Buff Whitman-Bradley, Sarah Lazare, and Cynthia Whitman-Bradley, *About Face: Military Resisters Turn Against War* (Oakland, CA: PM Press, 2011), pp. 33-41.

helicopters could not have been deployed in the war if he and other maintenance mechanics had not made them combat-ready. . . .²⁰⁰

He did not apply for conscientious objector status because he does not completely reject the use of war and force. He enlisted and he re-enlisted at the end of his initial period of service. He objects to the conduct of a particular war in a particular way that he thinks involves the commission of war crimes. And he did not think that an application to refuse to perform military service would have protected him from further deployment in Iraq.²⁰¹

There was no information in the file “to indicate whether any possible prosecution, punishment or social ostracism which Mr. Shepherd might face were he to be returned to the US would be sufficiently serious” to be granted refugee status. But that would need to be determined by competent national authorities, subject to review by the national court.²⁰²

The Court of Justice of the European Union agreed with the Advocate General that **all military personnel, including logistical and support staff**, such as a helicopter maintenance mechanic, should be able to apply for refugee status even though the refuser did not personally participate in combat.²⁰³ However, a person who refused to perform military service **cannot qualify for refugee status unless either he has first had recourse, unsuccessfully, to any available procedures for claiming the status of conscientious objector** or no such procedures are plausibly available to him.²⁰⁴ The Court was constrained to consider only the particular

²⁰⁰ *Shepherd*, AG Opinion, ¶ 3.

²⁰¹ *Shepherd*, AG Opinion, ¶¶ 4, 58.

²⁰² *Shepherd*, AG Opinion, ¶ 83; *Shepherd*, Court Judgment (page 8 of 9)

²⁰³ *Shepherd*, AG Opinion, ¶¶ 21, 30-32; *Shepherd*, Court Judgment (pages 6, 7 and 8 of 9).

²⁰⁴ *Shepherd*, AG Opinion, ¶ 84; *Shepherd*, Court Judgment (pages 7, 8 and 9 of 9). In her Opinion, *Shepherd*, AG Opinion, ¶ 84, the Advocate General stated that national authorities must consider these among other issues: whether there is a direct link between the acts of the person concerned and the reasonable likelihood that war crimes might be committed, because his actions comprise a necessary element of those crimes and without his contribution or all the contributions made by individuals in his situation, the war crimes or acts would not be possible; whether there are objective grounds for considering that the person concerned could be involved in committing war crimes; whether a dishonorable discharge from the army and a prison sentence is discriminatory because the applicant is a member of a particular social group, whether there are similarly situated social groups in the country that are comparable to that to which the applicant claims to belong, whether the applicant’s group is likely to be subject to different treatment, and if so whether any apparent difference in treatment could be justified; and, whether prosecution or punishment for desertion is disproportionate, that is, whether such acts go beyond what is necessary for the State to exercise its legitimate right to maintain an armed force.

conflict and, if there were a mandate from the United Nations Security Council or a consensus of the international community, the national authorities should take that into account.²⁰⁵

Additionally, the Court of Justice of the European Union ruled that the minimum standards for qualification and status as refugees who need protection must be interpreted as meaning:

- The situation is covered even if the applicant for refugee status would participate only indirectly in the commission of war crimes, if it is **reasonably likely that he would provide indispensable support** to the preparation or execution of those crimes;
- Even if war crimes have not already been committed, the situation is covered if it is **highly likely that such crimes will be committed**;
- The **national authorities** in the applicant's country of origin (U.S. in Shepherd's case) determine whether it is **credible that the alleged war crimes would be committed**, based on all the relevant facts and circumstances;
- In circumstances such as those in the Shepherd case, it is for the **national authorities** (U.S.) to decide **whether a prison sentence or discharge from the army is so disproportionate or discriminatory as to amount to acts of persecution**, considering the legitimate exercise of the nation's right to maintain an armed force.²⁰⁶

Although theoretically possible, it is predictable that few, if any, conscientious objectors will be able to achieve refugee status and be granted asylum in Canada or in any of the member states of the European Union.

²⁰⁵ *Shepherd*, Court Judgment (pages 6 and 8 of 9).

²⁰⁶ *Shepherd*, Court Judgment (pages 8 and 9 of 9) (emphasis added). The Court also stated (page 8 of 9) that social ostracism and disadvantages associated with it are only consequences of prosecution or punishment and cannot be regarded as acts of persecution.

III. UNITED STATES

The United States initially exempted some men from military service in time of war based on religious affiliation. That tradition persists in U.S. law. Supreme Court decisions and military regulations continue to recognize objection to military service only if it is based on “religious training and belief,” and only if the individual objects to “participation in war in any form.” Over the years, the definition of “religious training and belief” has become more inclusive, but the requirement that the individual object to “participation in war in any form” has not expanded.

No one has been drafted to serve in the United States military since 1973. As a result, the central issue for American conscientious objectors who are already in the military is whether their objections to participation in war “crystallized” after they volunteered and were inducted.

The situation of such volunteers is very different from that of objectors who grew up as pacifists because their objections emerge in response to their experience while in the military. Some of these individuals develop an objection to participation in any war. Some find themselves objecting to the war in which they have been ordered or expect to be ordered to participate, or wars of a certain character such as wars of aggression or nuclear war, and they do not qualify for recognition as conscientious objectors.²⁰⁷

A. Conscientious Objection in the United States Prior to 1948

The United States Supreme Court has given us a concise history of conscientious objection in the United States through the end of World War II:

Governmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country. . . . [By] the

²⁰⁷ This article does not address the consequences of failure to register with the Selective Service System. Section 3 of the Military Selective Service Act requires every male citizen or male person residing in the United States between the ages of 18 to 26 to register with the Selective Service System. If a man fails to register and he is prosecuted and convicted, he may face a \$250,000 maximum fine, a prison term of up to five years, or a combination of both. A person who influences a young man to violate the law may face the same penalties. Furthermore, a non-registrant does not qualify for certain kinds of student financial aid, job training, federal employment, and some state, local, or professional jobs. *See*, “Selective Service System, A Primer,” describing provisions of the Military Selective Service Act, 50 App. U.S. Code 451 et seq., <<http://www.sss.gov/PDFs/Educational%20Materials/Primer.pdf>>, pp. 2-3, 6.

Neither does this article address consequences of violating the Uniform Code of Military Justice (UCMJ). Articles 77 through 134 of the UCMJ, known as the “punitive articles,” set forth the specific offenses which, if violated, can result in punishment by court-martial. In any individual case, the possible penalty would depend on what charges were brought. *See*, Rod Powers, “Punitive Articles of the UCMJ,” <<http://usmilitary.about.com/od/punitivearticles/a/mcm.htm>>.

time of the Civil War, there existed a state pattern of exempting conscientious objectors on religious grounds. . . .

The need for conscription did not again arise until World War I. The Draft Act of 1917. . . required that all persons be inducted into the armed services, but allowed the conscientious objectors to perform noncombatant service in capacities designated by the President of the United States. . . .

In adopting the 1940 Selective Training and Service Act, Congress broadened the exemption afforded in the 1917 Act by making it unnecessary to belong to a pacifist religious sect if the claimant's own opposition to war was based on "religious training and belief."²⁰⁸

Supreme Court Justice William O. Douglas described the treatment of conscientious objectors during World War I:

The phrase "well-recognized religious sect" was given the most rigorous interpretation, and any who based conscientious objections on political, rather than religious, foundations got short shrift. Such objectors were either "shot to death by musketry," "imprisoned for long terms by court martial," or subjected to indignities and physical violence "by their more patriotic fellows."

Another account is substantially the same:

In military camp and prison alike, objectors were often subjected to indignities and to physical cruelty. Some were beaten; others were hung by their fingers to the doors of their cells in such a way that their feet barely touched the floor. In one case, an objector who refused to don the army uniform was kept in a damp cell, where he contracted pneumonia and died. His dead body was then dressed in the uniform that in life he had spurned, and, thus attired, was sent home to his family. A number of objectors among the absolutists went on hunger strikes and had to be fed forcibly.²⁰⁹

²⁰⁸ *United States v. Seeger* (hereafter, "Seeger"), 380 U.S. 163, 170-171 (1965).

²⁰⁹ *Ehlert v. United States* (hereafter, "Ehlert"), 402 U.S. 99, 110 (1971), Douglas, J., dissenting, citing A. Mason, Harlan Fiske Stone: Pillar of the Law 102 (1956), and citing M. Sibley & P. Jacob, Conscription of Conscience 15 (1952). See also, J. George Ewert, "Christ or Country?," *The Plough*, No. 4, May 1984, reprinted in Staughton Lynd & Alice Lynd, eds., *Nonviolence in America: A Documentary History*, rev. ed. (Maryknoll, N.Y.: Orbis Books, 1995), p. 120, describing the treatment of Hutterites who refused military service and were initially imprisoned at Alcatraz:

The first four and a half days they got nothing at all to eat, only half a glass of water every twenty-four hours. At night they had to sleep on the wet and cold concrete floor without blankets. (Their cell at Alcatraz was below sea level, and the water oozed through the walls.) The last one and a half days they had to stand with their hands tied together crosswise above their heads and fastened to iron rods so high that they could barely touch the floor with their feet. . . .

During World War II the treatment of conscientious objectors was less severe. The main disciplinary device was to give the man an order and then court-martial him for failure to obey the order. Justice Douglas continued:

punishment varied, but common sentences for objectors were five to ten years, although these were not infrequently reduced on review by Washington. Sentences on the whole were much lighter than those imposed by courts-martial during the First World War but more severe, on the average, than those meted out by *civil courts* during the Second World War. Sentences of general *courts-martial* were served in the several disciplinary barracks of the Army, but, in some instances, objectors were first sent to a “rehabilitation center,” where the Army gave prisoners a second chance to “reform”; if “reformation” did not take place, they served out their sentences in the disciplinary barracks. Army regulations provided for periodic and automatic clemency reviews, the first during the initial six months of the sentence and subsequent reviews once each year.²¹⁰

B. Statutory Provisions and Legal Interpretations after World War II

The Supreme Court summarizes the three requirements for recognition as a conscientious objector:

In order to qualify for classification as a conscientious objector, a registrant must satisfy three basic tests. He must show that he is conscientiously opposed to war in any form. . . . He must show that this opposition is based upon religious training and belief, as the term has been construed in our decisions. . . . And he must show that this objection is sincere. . . .²¹¹

The meaning of various terms in the test has been clarified by other court decisions.

Section 6(j) of the Selective Service Act of 1948 specified:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of **religious training and belief**, is conscientiously opposed to **participation in war in any form**. Religious training and belief in this connection means an individual’s belief in a

²¹⁰ *Ehlert*, 402 U.S. at 111, citing M. Sibley & P. Jacob, *Conscription of Conscience* 15 (1952).

²¹¹ *Clay v. United States*, 403 U.S. 698, 700 (1971), citing *Gillette v. United States*, 401 U.S. 437; *United States v. Seeger*, 380 U.S. 163; *Welsh v. United States*, 398 U.S. 333; and *Witmer v. United States*, 348 U.S. 375. Cassius Clay, known as the World Heavyweight Boxing Champion, Muhammad Ali, was convicted in 1967 and sentenced to five years in prison and a \$10,000 fine for refusing to be inducted into the armed forces. That was the maximum sentence under the Military Selective Service Act of 1948, 50 U.S.C. Appendix Sec. 462(a), <<http://trac.syr.edu/laws/50/50AUSC00462.html>>. The Supreme Court reversed the conviction.

relation to a Supreme Being involving duties superior to those arising from any human relation, but **does not include essentially political, sociological, or philosophical views or a merely personal moral code.**²¹²

1. Religious training and belief

The Supreme Court defined the words “Supreme Being” broadly in *United States v. Seeger*:

We have concluded that Congress, in using the expression “Supreme Being,” rather than the designation “God,” was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that, under this construction, the test of belief “in relation to a Supreme Being” is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. . . . The test might be stated in these words: a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.²¹³

Belief in a “Supreme Being” is no longer required. In 1967, Congress cut the requirement that “[r]eligious training and belief stem from the individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation”²¹⁴ The second sentence of the law now says: “the term ‘religious training and belief’ does not include essentially political, sociological, or philosophical views, or a merely personal moral code.”²¹⁵

In *Welsh v. United States*, the Supreme Court defined “religious training and belief” as it is now understood.

²¹² *Welsh v. United States* (hereafter, “*Welsh*”), 398 U.S. 333, 339-40 (1970), (emphasis added); 50 U.S.C.App. § 456(j) (1948) is quoted in its entirety in *United States v. Nugent*, 301 U.S. 1, n.1.

²¹³ *Seeger*, 380 U.S. at 165-166, 176.

²¹⁴ See “Selective Service—*Welsh v. United States*, 398 U.S. 333 (1970),” 61 J.Crim.L. Criminology & Police Sci. 491 (1970), p. 495 n.51: “In 1967, two years after *Seeger*, Congress amended the provision by deleting the reference to a ‘Supreme Being.’ Universal Military Training and Service Act, 50 U.S.C. App., § 456(j) (Supp. V, 1970), *amending* 50 U.S.C. App. § 456(j) (1964),” <<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5682&context=jclc>>.

²¹⁵ See, Military Selective Service Act of 1967, § 456(j), available at 50 U.S.C. App. 451 et seq., <<http://www.sss.gov/pdfs/mssa-2003.pdf>>, p. 26.

What is necessary under *Seeger* for a registrant's conscientious objection to all war to be “religious” within the meaning of § 6(j) is that this opposition to war stems from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. . . . If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content, but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual “a place parallel to that filled by . . . God” in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a “religious” conscientious objector exemption under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.²¹⁶

The Court concluded, Section 6(j) “exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”²¹⁷

2. *Participation in war in any form*

An applicant for conscientious objector status must declare an unwillingness to participate in war in any form. This has been interpreted to mean opposition to all war, not a particular war.

a. *Objection to a particular war*

In the 1960s, David Mitchell did not report for induction, claiming that the “waging of a war of aggression” is a “crime against peace,” imposing “individual responsibility” under the judgments of the Nuremberg Tribunal. The Supreme Court of the United States denied Mitchell’s request to hear his case. But Justice William O. Douglas dissented. Justice Douglas said that Mitchell raised a number of “extremely sensitive and delicate questions” that he thought should be answered.²¹⁸

²¹⁶ *Welsh*, 398 U.S. at 339-40 (1970).

²¹⁷ *Welsh*, 398 U.S. at 344. Remarkably, the Court stated, 398 U.S. at 342, We certainly do not think that § 6(j)’s exclusion of those persons with “essentially political, sociological, or philosophical views or a merely personal moral code” should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy.

Although *Welsh* broadened what could be recognized as religious, neither considerations of public policy, nor objections based upon international law, are recognized as “religious.”

²¹⁸ *Mitchell v. United States*, 386 U.S. 972 (1967), Douglas, J., dissenting, available at <<https://bulk.resource.org/courts.gov/c/US/386/386.US.972.1012.html>>.

Later that same year, in the case of three draftees (known as the “Fort Hood Three”) who were ordered to go to Vietnam, Supreme Court Justices Stewart and Douglas dissented when the Supreme Court refused to hear their case. Two of the questions presented were whether the executive branch constitutionally could order the soldiers to participate in military activity in Vietnam when no war had been declared by Congress, and of what relevance were treaty obligations (including renunciation of war in the Kellogg-Briand Pact). “We cannot make these problems go away simply by refusing to hear the case of three obscure Army privates,” Douglas wrote.²¹⁹

Four years later, the Supreme Court of the United States did consider conscientious objection to a particular war, rather than objection to war itself. The case concerned two men. One did not report for induction. The other applied for separation from the Army as a conscientious objector after he had completed basic training and received orders for duty in Vietnam. Both men regarded the war in Vietnam as “unjust;” and believed that their deeply held religious views required them not to participate in an unjust war. In *Gillette v. United States*, the Supreme Court said that the words “conscientiously opposed to participation in war in any form”

can bear but one meaning; that conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war. *See Welsh v. United States*. . . . [C]onscientious scruples must implicate “war in any form,” and an objection involving a **particular war, rather than all war, would plainly not be covered** by § 6(j).²²⁰

The Court held that “Congress intended to exempt persons who oppose participating in all war—and that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant’s conscience and personality that it is ‘religious’ in character.”²²¹

b. Use of force under some circumstances

A conscientious objector may use force under some circumstances, but under no circumstances may choose what war, or in what aspect of war, he or she will serve.

²¹⁹ *Mora v. McNamara*, 389 U.S. 934 (1967), Stewart, J., joined by Douglas, J., dissenting; and Douglas, J., joined by Stewart, J., dissenting. *See also*, Dennis Mora, James Johnson, and David Samas, “The Fort Hood Three,” in *We Won’t Go: Personal Accounts of War Objectors*, collected by Alice Lynd (Beacon Press: 1968), pp. 181-202.

²²⁰ *Gillette v. United States* (hereafter, “*Gillette*”), 401 U.S. 437, 443 (1971) (emphasis added).

²²¹ *Gillette*, 401 U.S. at 447. *See also*, *Gillette*, 401 U.S. at 460: “[W]e conclude that it is supportable for Congress to have decided that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not.”

The Supreme Court said in *Gillette*: “Willingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community, has not been regarded as inconsistent with a claim of conscientious objection to war as such.”²²²

The Army Regulation on Conscientious Objection says: “a conscientious objector is not necessarily a pacifist. **An applicant may be willing to use force to protect himself or herself or his or her family and still be a conscientious objector.** However, if he or she is willing to defend the United States, he or she cannot choose when and where.”²²³ The issue is whether a person is willing to be a combatant in war:

A person who desires to choose the war in which he or she will participate is not a conscientious objector under the regulation. His or her objection must be to all wars rather than a specific war.²²⁴

3. Sincerity

The ultimate question in conscientious objector cases is the sincerity of the applicant in objecting, on religious grounds, to participation in war in any form.²²⁵

As the Supreme Court said in *Welsh*: “A conscientious objector is one whose conscience . . . allows him or her no rest or inner peace if he or she is required to fulfill the present military obligation.”²²⁶

²²² *Gillette*, 401 U.S. at 447, citing cases by U.S. Courts of Appeal.

²²³ Army Regulation 600-43, Conscientious Objection, 21 Aug. 2006, effective 21 Sept. 2006, (hereafter, “AR 600-43”), Appendix D-4, d (emphasis added), <http://armypubs.army.mil/epubs/pdf/r600_43.pdf>.

²²⁴ Army Regulation 600-43, Glossary, Section II, Terms, “War in any form,” <http://armypubs.army.mil/epubs/pdf/r600_43.pdf>.

²²⁵ *Witmer v. United States*, 348 U.S. 375, 381 (1955). Witmer first claimed exemption as a farmer and as a conscientious objector, asserting that the ministerial classification did not apply to him; but after his claim for exemption as a farmer had been denied he claimed he was a full-time minister. “This is not merely a case of a registrant’s claiming three separate classifications; it goes to his sincerity and honesty in claiming conscientious objection to participation in war. It would not be mere suspicion or speculation for the Board to conclude, after denying Witmer’s now abandoned claims of farmer and minister, that he was insincere in his claim of conscientious objection.” 348 U.S. at 383.

²²⁶ *Welsh*, 398 U.S. at 344.

The Army Regulation uses the same language as the Supreme Court: “A conscientious objector is one whose conscience . . . allows him or her no rest or inner peace if he or she is required to fulfill the present military obligation.”²²⁷

C. Volunteers for Military Service May Become Conscientious Objectors

The central issue for American conscientious objectors who are already in the military is whether their objections to participation in war “crystallized” after they volunteered and were inducted. Some of these individuals develop an objection to participation in any war and they may qualify for recognition as conscientious objectors. Some find themselves objecting to the war in which they have been ordered or expect to be ordered to participate, or wars of a certain character such as wars of aggression or nuclear war, and they do not qualify for recognition as conscientious objectors.

1. Criteria

The criteria for granting or denying conscientious objector status are the same whether or not the person has entered into military service.²²⁸

Army regulation defines conscientious objection as “[a] firm, fixed and sincere objection to participation in war in any form or the bearing of arms, because of religious training and belief” and defines religious training and belief to include “deeply held moral or ethical belief[s]” even if the applicant himself characterizes them as non-religious. . . . Religious training and belief does not encompass “a belief that rests solely upon consideration of policy, pragmatism, expediency, or political views.” . . . Further, “[a] person who desires to choose the war in which he or she will participate is not a conscientious objector under the regulation. His or her objection must be to all wars rather than a specific war.”²²⁹

²²⁷ AR 600-43, Appendix D-4, b, <http://armypubs.army.mil/epubs/pdf/r600_43.pdf>.

²²⁸ *Gillette*, 401 U.S. at 442: “Department of Defense Directive No. 1300.6 . . . prescribes that post-induction claims to conscientious objector status shall be honored, if valid, by the various branches of the armed forces. Section 6(j) of the Act, as construed by the courts, is incorporated by the various service regulations issued pursuant to the Directive, and thus the **standards for measuring claims of in service objectors . . . are the same as the statutory tests applicable in a preinduction situation.**” (Emphasis added.) *See also*, Department of Defense, “Instruction,” DoDI 1300.06 May 31, 2007 (hereafter, “DoDI 1300.06”), <http://fas.org/irp/doddir/dod/i1300_06.pdf>.

²²⁹ *Watson v. Geren*, 569 F.3d 115, 130; en banc review denied, 587 F.3d 156 (2d Cir. 2009), citing Army Reg. 600-43, Glossary, Section II, Terms. *See also*, DoDI 1300.06 3. Definitions, <http://fas.org/irp/doddir/dod/i1300_06.pdf>, p. 2.

2. Late crystallization of belief

When a person enters military service and then applies for discharge or reassignment to noncombatant duty because of conscientious belief, the question is whether he or she has undergone a real change or development of belief since entry into military service.

Applicants who held their beliefs before entry into military service, but failed to make these beliefs known, cannot be discharged or reassigned to noncombatant duty. However, those who have undergone a real change or development of belief since entry into military service . . . may be discharged or reassigned to noncombatant duty, as proper. The investigating officer must attempt to determine if the person has undergone a sudden, easily identifiable experience or exposure to new beliefs, or if old beliefs have matured gradually and taken on new meanings in his or her life and, if so, when, where, and under what circumstances or influences.²³⁰

Jeremy Hinzman applied for non-combatant status.²³¹ If he were a combat medic with an infantry platoon, he would be in harm's way with bullets whizzing over his head, and he was

²³⁰ AR 600-43, Appendix D-4, e, <http://armypubs.army.mil/epubs/pdf/r600_43.pdf>. The application procedure is summarized by a district court judge in *Kanai v. Geren*, Opinion, U.S. District Court for the District of Maryland, Civil No. PJM 09-1597, Nov. 13, 2009, p. 4 n.2:

An application for CO status is a multi-stage process. First, the applicant submits a formal application and any supporting materials to his immediate commanding officer. Army Reg. 600-43, ¶ 2-1(a). The application is then submitted to an interviewing chaplain, who submits a detailed report to the commander, commenting on the nature and basis of the claim, opinion on the source of the beliefs, sincerity and depth of conviction, and appropriate comments on demeanor and lifestyle. Army Reg. 600-43, ¶ 2-3. The application is next forwarded to a military mental health physician, who evaluates whether the applicant is suffering from any mental disease or defect. Army Reg. 600-43, ¶ 2-3(b). If the applicant is able to cooperate intelligently in the administrative proceedings, an Investigating Officer ("IO") from outside the applicant's chain of command is appointed to review the evidence, hold a hearing, and write a report. Army Reg. 600-43, ¶ 2-4, 2-5. The IO's report and the entire case file is then forwarded through command channels for review and recommendation. Army Reg. 600-43, ¶ 2-6. An applicant has the opportunity to comment or rebut these additional recommendations. Eventually, the entire package is forwarded to the DACORB [Department of the Army Conscientious Objector Board], which makes the final determination on all applications for discharge on the basis of conscientious objection. Army Reg. 600-43, ¶ 2-8(a).

Criteria and procedures are spelled out in detail in Department of Defense Instruction 1300.06, May 31, 2007, <https://www.fas.org/irp/doddir/dod/i1300_06.pdf>.

²³¹ Justice Douglas, dissenting, in *Ehlert*, 402 U.S. at 113, warned (and Jeremy Hinzman experienced):
In a choice between civilian and military factfinders dealing in an area of conscience, clearly the former are to be preferred. . . . [P]roof of a conscientious objector's claim will usually be much more difficult after induction than before. Military exigencies may take him far from his neighborhood, the only place where he can find the friends and associates who know him. His

fully willing to do that. His “sole concern was with taking other lives.”²³² When asked whether he would draw a distinction between offensive and defensive operations, he said yes:

[I]f somebody broke the lines in our camp and started shooting . . . like anybody else . . . I would [be] obligated to the other soldiers that I’m with to take some sort of action, but that’s a lot different than planning out a raid or an ambush that’s rehearsed oftentimes weeks beforehand and then carrying it out. It’s an instantaneous reaction versus a very well orchestrated plan or attack.²³³

Hinzman was aware that the Army Regulation does not require a conscientious objector to be a pacifist and, he insisted, a conscientious objector retains the right to self-defense.²³⁴

Agustin Aguayo volunteered to serve in the United States Army in November 2002. He signed up for eight years in the Army with four years of active duty. In his enlistment agreement, Aguayo answered “no” to the following question:

Are you now or have you ever been a conscientious objector? (That is, do you have, or have you ever had, a firm, fixed, and sincere objection to participation in war in any form or to the bearing of arms because of religious belief or training?)²³⁵

Aguayo entered the service as a healthcare specialist in January 2003. In February 2004, shortly before he was deployed to Iraq, he applied for a discharge from the Army on the basis of conscientious objection. The captain who investigated Aguayo’s application recommended that the application be granted: “it seemed clear to me that PFC Aguayo is absolutely sincere in his stated beliefs,” that “Aguayo’s opposition to war grew during basic training and solidified during live fire exercises,” and that “he is internally incapable of participating in any form of war without being in a constant state of personal moral dilemma.” But Aguayo’s application was repeatedly denied at higher levels in the chain of command.²³⁶

chances of having a fair hearing are therefore lessened when the hearing on his claim is relegated to in service procedures.

²³² Hinzman hearing, p. 101.

²³³ Hinzman hearing, pp. 103-04.

²³⁴ Hinzman hearing, p. 110; see Army Regulation 600-43, Appendix D-4, d.

²³⁵ *Aguayo v. Harvey* (hereafter, “*Aguayo*”), 476 F.3d 971, 973 (D.C. Cir. 2007). An applicant who would have qualified for CO status before entering the military is generally not eligible for CO status once in the service. *Aguayo*, 476 at 973 citing 32 C.F.R. § 75.4(a).

²³⁶ *Aguayo*, 476 at 973-74.

On appeal, Aguayo insisted, “the ‘crystallization’ of conscientious objector beliefs, like the process of religious conversion, is not always the result of prolonged study and can instead be dramatic and quick, as when it is precipitated by a life crisis,” in his case, his experience in weapons training.²³⁷

The Department of the Army’s Conscientious Objector Review Board (DACORB) denied Aguayo’s application in July 2004. The DACORB’s decision was final.²³⁸ A court can overturn the Army’s decision only if there is no objective evidence to support the DACORB’s determination.²³⁹ Among the reasons for the Board’s denial were:

- Applicant lacks the religious foundation; the underpinning that supports Conscientious Objector beliefs.
- Applicant has not provided any significant source of his beliefs; conscience or moral views that would warrant Conscientious Objector status.
- Appears that applicant held beliefs prior to entry to the Army. Although these could have crystallized after entry, it still appears that these beliefs were considerable prior to entry with no significant identification of these beliefs at entry to the Army.
- Questionable timing of the application just prior to unit deployment.²⁴⁰

Other cases state that the timing of an application for conscientious objection is never enough to furnish a basis in fact to support a disapproval.” “It is universally the law . . . that **late crystallization of conscientious objector convictions is not a sufficient basis in fact to reject**

²³⁷ *Aguayo*, 476 F.3d at 981.

²³⁸ *Aguayo*, 476 F.3d at 974: “DACORB makes the final decision on all CO applications requesting discharge.”

²³⁹ *Aguayo*, 476 F.3d at 978, the District Court explained:

The scope of our review . . . is extremely narrow. We neither substitute our judgment for that of the military nor look for substantial evidence to support its decision. *Witmer v. United States*, 348 U.S. 375, 380-81 . . . (1955). Under this standard the Army’s decision “can be overturned only if it has ‘no basis in fact.’” *Id.* at 381 . . . ; see also *Dickinson v. United States*, 346 U.S. 389, 396, . . . (1953).

“[T]he district court does not independently weigh any evidence. Rather, it merely determines if there was any objective evidence to support the DACORB’s determination.” *Watson v. Geren*, 569 F.3d 115, 129-130 (2d Cir. 2009).

²⁴⁰ *Aguayo*, 476 F.3d at 975.

the claim.” “A sincere conscientious objector is entitled to release from his service obligations whether his view crystallizes late or early.”²⁴¹

3. *Assignment to noncombatant service*

A member of the military who applies for conscientious objector status should be immediately assigned to noncombatant tasks until his request is ruled on. He or she may be offered and may accept noncombatant service for the duration of his or her enlistment.

The Department of Defense recognizes the same two classifications of conscientious objector as the Military Selective Service Act, designated as 1-O and 1-A-O:

Class 1-O Conscientious Objector. A member who, by reason of conscientious objection, sincerely objects to participation in military service of any kind in war in any form.

Class 1-A-O Conscientious Objector. A member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a non-combatant status.²⁴²

Army Regulation 600-43 sets forth the policy, criteria, and procedures applicable to conscientious objectors in military service. Conscientious objectors who enlist as 1-A-0 noncombatants for the medical career management field are assigned to modified basic training (MBT), which excludes training in the study, use, or handling of arms or weapons; but they may be assigned hazardous duties.²⁴³ A person who has applied for conscientious objector status after enlisting may be deployed with his or her unit.²⁴⁴

Within three days after he applied for conscientious objector status, Jeremy Hinzman was reassigned to noncombatant duties, first as a gate guard checking people’s identification and license plates. After a couple of months he was assigned to work in the kitchen and dining facility of his battalion; and during his entire deployment in Afghanistan, he worked fourteen or fifteen hours a day doing menial kitchen tasks.²⁴⁵

²⁴¹ *Hanna v. Secretary of the Army*, 513 F.3d 4, 12-13 (1st Cir. 2008), citing AR 600-43, ¶ 1-5.b., and *Hager v. Secretary of Air Force*, 938 F.2d 1449, 1455 (1st Cir. 1991); *Hager v. Secretary of Air Force*, 938 F.2d 1449, 1455 (1st Cir. 1991), citing *Lobis v. Secretary of the United States Air Force*, 519 F.2d 304, 307 (1st Cir. 1975) (emphasis added); and *Hanna*, citing *Lobis*, 519 F.2d at 307, citing *Ehlert v. United States*, 402 U.S. 99, 103-04 (1971).

²⁴² DoDI 1300.06, 3.1.1 and 3.1.2, <https://www.fas.org/irp/doddir/dod/i1300_06.pdf>, p. 2.

²⁴³ AR 600-43, 1-6, <http://armypubs.army.mil/epubs/pdf/r600_43.pdf>.

²⁴⁴ AR 600-43, 2-10, c(1).

²⁴⁵ Hinzman hearing, pp. 93, 105-07.

Rory Fanning's experience as a noncombatant was not so benign. Twelve hours after he formally declared his intention to file the papers necessary to be recognized as a conscientious objector, he was deployed to Afghanistan for a second time. "[T]hey sent me to 'walk with the donkeys' in a supply role in a combat zone. I would also be the gofer for my first sergeant, who was now referring to me as 'bitch' and 'vile piece of shit' for betraying the Ranger Creed."²⁴⁶ During the twenty-one-hour plane ride and two-hour helicopter trip, he remembers no one speaking to him. He was scared. In high mountain terrain, he was sent out to chop wood.²⁴⁷

Occasionally I was sent off with the donkey train to gather more supplies at the bottom of the mountain. At nights I slept outside, often in the snow and the mud, by myself with a single blanket. I soon caught a high fever. There was no room for me in the rooms we were told to sleep in. . . . In the beginning I was overwhelmed. . . . I couldn't imagine getting home safely at that point. You need support when you are halfway around the world in a combat zone—this is what famously bonds soldiers together. Being rejected in such an environment has a strong effect²⁴⁸

If he made it home, Rory Fanning thought, he could never say a word about it. He was afraid that the connection with his family would be damaged from the shame. He would have to hide part of himself because he didn't think his family would ever understand.²⁴⁹

During the Korean War, Staughton Lynd applied for and was granted 1-A-O classification as a medic who would not carry a weapon. During basic training the question was asked, "If there were a seriously wounded soldier and a lightly wounded soldier on the battlefield, who would you help first?" Staughton thought he knew enough about the Hippocratic Oath to answer that question. To his astonishment, the correct answer was "the lightly wounded soldier, because he can get back into combat sooner." That was when Staughton realized that he had made a major mistake to enter military service at all.

²⁴⁶ Rory Fanning, *Worth Fighting For: An Army Ranger's Journey Out of the Military and Across America* (Chicago: Haymarket Books, 2014) (hereafter, "Fanning"), p. 99.

²⁴⁷ Fanning, pp. 100-101.

²⁴⁸ Fanning, pp. 101-102.

²⁴⁹ Fanning, p. 103.

IV. ISRAEL

Israel became recognized as a state after World War II and the horrors experienced by Jews during the holocaust. This chapter focuses on Israeli “refuseniks,” men and women who refuse to serve in Lebanon or the occupied Palestinian territories of the West Bank and Gaza Strip, or who take a stand against certain kinds of military action.

Israel has been engaged in military action since its founding in 1948. For more than sixty-five years, members of the Israel Defense Forces have been confronted with orders to serve in a series of military actions and occupations in Lebanon, the West Bank, and Gaza Strip. Increasingly and prominently, young people facing military service, reservists, active duty members of the military and veterans, have refused to serve or have denounced what they have come to believe are immoral or unlawful actions.

Israel is similar to the United States in that it exempts or postpones military service based on religious practice. Like the United States, Israel does not recognize selective conscientious objection. Unlike the United States, military service is compulsory for most Israeli men and women.

A. Exemption for Reasons of Religious Conviction

Under Israeli law, only women are exempted from military service for reasons of conscience. Article 39(c) of the Defence Service Law says, “A female person of military age who has proved . . . that reasons of conscience o[r] reasons connected with her family’s religious way of life prevent her from serving in defence service shall be exempt from the duty of that service.” Article 40, “Exemption for reasons of religious conviction,” requires practice as well as belief:

A female person designated for defence service who declares in writing . . . before a judge . . . [of a civil or rabbinical court,] (1) that reasons of religious conviction prevent her from serving in defence service and (2) that she observes the dietary laws at home and away from home and (3) that she does not ride on the Sabbath shall be exempt from defence service after delivering the affidavit, in the manner and at the time prescribed by regulations, to a calling-up office empowered in that behalf.²⁵⁰

Historically, full-time yeshiva students (men who study traditional religious texts and for whom “Torah is their calling”) could be deferred or, in practice, exempt from military service.²⁵¹

²⁵⁰ Israel Ministry of Foreign Affairs, Defence Service Law – Consolidated Version 5746-1986, 30 Jan. 1986, Art. 39(c) and Art. 40, <<http://www.mfa.gov.il/mfa/mfa-archive/1980-1989/pages/defence%20service%20law%20-consolidated%20version--%205746-1.aspx>>.

²⁵¹ GlobalSecurity.org, “Ultra-Orthodox/Haredi—Military Service” (hereafter, “Haredi—Military Service”), <<http://www.globalsecurity.org/military/world/israel/jew-haredi-idf.htm>>; and Batsheva

The rationale was that ultra-Orthodox young men serve the nation through prayer and study, thus preserving Jewish learning and heritage, and that conscription threatens their community.²⁵² There has also been some question as to how effective such students would be in military service. They would encounter difficulties in adjusting to the military, and the military would have difficulties adjusting to them.

Thus, for example, the ultra-Orthodox do not recognize the Chief Rabbinate of Israel's certification that food is kosher, while they themselves disagree over recognition of a number of special kosher certifications by various rabbis. Similarly, other daily practices of theirs are likely to give rise to many difficulties in the IDF's ability to integrate them.²⁵³

After years of controversy, the Defence Service Law was amended in March 2014 so that yeshiva students will gradually be integrated into either the Israel Defense Forces (IDF) or the National Civilian Service. During an "adjustment period" from March 20, 2014 to June 30, 2017, the Minister of Defense may approve requests to delay the draft for individual yeshiva students aged 18 to 24. The Minister will consider military needs, yearly draft quota objectives, and the requester's individual circumstances. During the "permanent period" beginning on July 1, 2017, a yeshiva student may be drafted for military service, placed in a program run by the National Civilian Service, or fully exempted from service upon reaching the age of 24. If the yearly draft quota has been met, the Minister of Defense may approve yeshiva students' draft delay requests until they reach the age of 26; but if the yearly quota goal has not been met, all yeshiva students over the age of 21 are to be drafted to either military or national civil service with the exception of 1800 "committed students" per year.²⁵⁴

B. Israel's Policy on Selective Conscientious Objection

When military service is compulsory, as it was in the United States for many years and still is in Israel, some individuals or groups refuse induction into the military and others become

Sobelman, "Cabinet approves changes to Israel's draft law," *Los Angeles Times*, July 07, 2013, <<http://articles.latimes.com/2013/jul/07/world/la-fg-wn-israel-draft-20130707>>. Secondary sources are cited where primary sources are not readily available on the internet in English.

²⁵² AP/Jerusalem Post/Knesset PR, "Jerusalem – Israel Passes Law Meant to Draft Ultra-Orthodox," Mar. 12, 2014, <<http://www.vosizneias.com/157999/2014/03/12/jerusalem-israel-passes-law-meant-to-draft-ultra-orthodox/>>.

²⁵³ Haredi—Military Service, <<http://www.globalsecurity.org/military/world/israel/jew-haredi-idf.htm>>.

²⁵⁴ Global Legal Monitor [Global Legal Monitor is an online publication from the Law Library of Congress], "Israel: Amendment Law Imposes Military Draft and National Service Obligations on Yeshiva Students," (Mar 31, 2014), and sources cited therein, <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403917_text> (last visited Aug. 2, 2015).

objectors in the course of serving in the military. When numbers of objectors are small and cases are not publicized, individuals may be accommodated or not prosecuted. But when the numbers swell and there are notorious public refusals, policies become more clearly defined and enforced.

Gad Elgazi was one of a group of twenty-seven high school seniors who published a letter in 1979 saying they would refuse to serve in the occupied Palestinian territories. Elgazi's request for exemption was denied and he served three consecutive one-month prison terms. He took his case to the Supreme Court of Israel, claiming discrimination inasmuch as the Ministry of Defense had previously granted exemptions. Counsel for the Israel Defense Forces (IDF) explained:

Army authorities had given objectors a guarantee that they would be stationed according to their wishes, within the borders of Israel, as long as refusal was an isolated phenomenon. Now policy has changed. What had once been sporadic instances of refusal with which the IDF was prepared to live, has changed in character and become an organized protest whose aim is to turn the IDF . . . into the battleground for a kind of confrontation which the army cannot be associated with.

The Supreme Court of Israeli concluded: "No military organization can tolerate the existence of a general principle according to which individual soldiers can dictate their place of service, be it for economic or social reasons, or for reasons of conscience."²⁵⁵

In 1993, the Human Rights and International Relations Department of Israel's Ministry of Justice declared Israel's Policy on Selective Conscientious Objection pertaining to "soldiers who refuse to serve in specific locations (selective conscientious objectors)":

- "the needs of the IDF must take priority over the personal preferences of its soldiers";
- "each individual must abide by policies of the democratically elected government with which he might disagree";
- "soldiers of the IDF must serve where they are posted";
- "a soldier must serve 'when and where' so commanded."

The policy states:

²⁵⁵ Alek D. Epstein, "The freedom of conscience and sociological perspectives on dilemmas of collective secular disobedience: the case of Israel," *Journal of Human Rights*, Vol. 1, No. 3 (Sept. 2002), 305-320, 311, citing *Proceedings of the Supreme Court*, 24 Sept. 1980, <[http://www.openu.ac.il/Personal_sites/download/Alek/12%20Conscientious%20disobedience%20-%20JHR,%201,%203%20\(2002\).pdf](http://www.openu.ac.il/Personal_sites/download/Alek/12%20Conscientious%20disobedience%20-%20JHR,%201,%203%20(2002).pdf)>.

A soldier cannot be allowed to dictate which government policies he will respect nor where and under what circumstances he will serve. Israel does not recognize a right to “selective” objection, i.e., unwillingness to serve in specific places or capacities. The recognition of such a “right” runs contrary to basic conceptions of military order and discipline. Under any democracy’s military law, refusal to comply with a military order constitutes grounds for criminal prosecution or disciplinary action. No army could function without the ultimate authority to order soldiers to serve in any location according to military necessity.

By way of rationale, the Israeli policy concludes with a quotation from the U.S. Supreme Court’s rejection of selective conscientious objection in *Gillette v. United States* and a statement that disciplinary measures against selective objectors in Israel “are considerably more lenient than those taken by the United States and other Western democracies.”²⁵⁶

C. Refuseniks

People who refuse to serve in the Israel Defense Forces (IDF), whether pacifists or selective objectors, are commonly called “refuseniks.” Particularly during times of conflict in which the Israel Defense Forces attacked targets in Lebanon and the occupied Palestinian territories (West Bank and Gaza Strip), men and women who would willingly defend Israel but believed that what Israel was doing was morally wrong or not in Israel’s best interests, refused military service. A partial list of Israel’s wars and military operations includes:

- War of Independence (1948)
- Six Day War (1967)
- First Lebanon War (1982-1985)
- First Intifada (1988-1992)
- Second Intifada (2000-2005) and Operation Defensive Shield (2002)
- Second Lebanon War (2006)
- Operation Cast Lead (2008-2009)
- Operation Pillar of Defense (2012)
- Operation Protective Edge (2014)²⁵⁷

²⁵⁶ State of Israel, Ministry of Justice, Human Rights and International Relations Department, “Israel’s Policy on Selective Conscientious Objection” (May 25, 1993), <<http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Israel-s%20Policy%20on%20Selective%20Conscientious%20Objecti.aspx>>.

²⁵⁷ Jewish Virtual Library, “Israel Defense Forces: Wars and Operations,” Table of Contents, <<http://www.jewishvirtuallibrary.org/jsource/History/wartoc.html>>.

What follows are statements by various groups and individual refuseniks.

1. *Shministim*

Shministim is Hebrew for “twelfth graders” and refers to Israeli high school students who intend to refuse military service. Since 1970, groups of high school seniors who called themselves Shministim, have signed letters expressing their intention to refuse military service.²⁵⁸

2. *Yesh Gvul*

Yesh Gvul (“There is a limit!” in Hebrew) is an organization founded in 1982 when Israel invaded Lebanon. Three thousand reservists signed a petition stating that they refused to serve. In 1982, 168 servicemen were jailed, some repeatedly; and in 1987, during the first Palestinian intifada, close to 200 were jailed. Yesh Gvul offers counseling to “soldiers wrestling with the painful choice between serving policies they find abhorrent, or defying military discipline.” The organization provides financial support for families of jailed refuseniks, and brings such protests to public notice.²⁵⁹

3. *Adam Keller*

“I refused to do duty in Lebanon so they made me a dishwasher in a tank regiment. In 1988, at the beginning of the intifada,^[260] I went out one night and wrote on the tanks: ‘Soldiers refuse to be occupiers and aggressors. Don’t go to the occupied territories.’” Keller did three months in prison for having scrawled such graffiti on 117 tanks and other military vehicles.²⁶¹

“A psychiatrist asked me what was my motivation. I told him it was the people in history who fought for right that motivated me. Then he said: ‘Can we say you hear the voice of

²⁵⁸ Primary sources are not readily available in English, but secondary sources corroborate one another. See, Michael R. Burch, “The Shministim: Israeli Refuseniks and Dissenters,” (hereafter, “Burch, Shministim”), <<http://www.thehypertexts.com/The%20Shministim.htm>>, and “Refusal to serve in the IDF,” *Wikipedia*, <http://en.wikipedia.org/wiki/Refusal_to_serve_in_the_IDF>.

²⁵⁹ Yesh Gvul, “Who we are, what we do, how to support us,” <<http://www.yeshgvul.org.il/en/about-2/>>; and Burch, Shministim.

²⁶⁰ The word “intifada” means “to shake off” in Arabic but is commonly translated into English as “uprising.”

²⁶¹ *The Guardian*, “I realized the stupidity of it,” Mar. 11, 2003 (hereafter, “Guardian, stupidity”), <<http://www.refusingtokill.net/Israel/Irealisedthestupidityofit.htm>>; and, Burch, Shministim, which adds that on electricity pylons and doors of officers’ toilet stalls, Keller wrote, “Down with the occupation!”

history?’ That’s how I got my discharge—he wrote on my report that I was hearing voices of history.”²⁶²

4. Yuval Ophir-Auron

Yuval Ophir-Auron explained why he had a conscientious problem with enlisting in the army (presumably in 1989):

For 41 years now, Israel has been imposing an occupation of lands that are not its own. . . . What I see is a country . . . in thrall to an insatiable hunger for another street, another tree to cram into its shattered borders. . . . I regard it as my moral duty to refuse serving in the army. My conscience does not allow me to join an organization that demolishes, by fiat of the state, the homes of innocent people, kills children who are not part of the armed fighting, and which prevents sick people from getting due treatment. . . .²⁶³

5. *Manual on the Laws of War*

Israel’s 1998 Manual on the Laws of War states: “Even when it is not possible to isolate the civilians from an assault and there is no other recourse but to attack, this does not constitute a green light to inflict unbridled harm on civilians. The commander is required to refrain from an attack that is expected to inflict harm on the civilian population that is disproportionate to the expected military gain.”²⁶⁴

Nevertheless, in 2006, Israel flattened Dahiya, a section of Beirut, and in 2008, the commander of the IDF northern front was reported by Reuters to have said:

What happened in the Dahiya quarter of Beirut in 2006 will happen in every village from which Israel is fired on We will apply disproportionate force on it (village) and cause great damage and destruction there. From our standpoint, these are not civilian villages, they are military bases. . . . This is not a recommendation. This is a plan. And it has been approved.²⁶⁵

²⁶² Guardian, stupidity.

²⁶³ Burch, Shministim.

²⁶⁴ Israel, “Laws of War in the Battlefield,” Manual, Military Advocate General Headquarters, Military School, 1998, p. 40, quoted in ICRC customary ihl under Rule 14, Military Manuals, Israel, <https://www.icrc.org/customary-ihl/eng/print/v2_rul_rule14>.

²⁶⁵ Reuters, “Israel warns Hizbullah war would invite destruction,” Maj.-Gen. Eisenkot tells *Yedioth Ahronoth*, 3 Oct. 2008, <<http://www.ynetnews.com/Ext/Comp/ArticleLayout/CdaArticlePrintPreview/1,2506,L-3604893,00.html>>.

6. Jonathan Ben-Artzi

During the second Palestinian intifada, Jonathan Ben-Artzi, nephew of Benjamin Netanyahu (former and present prime minister of Israel), declared himself a pacifist and refused military service.

Jonathan Ben-Artzi went to France when he was 14 years old. He visited some of the battle fields of World War I. Seeing “rows and rows of graves,” he “realized the stupidity of it. So many lives sacrificed and they didn’t really know what they were fighting for. . . .”

As a high schooler, he wrote about pacifism. He refused to go on a trip through the occupied Palestinian territories: “I told the teacher I wouldn’t go because it’s not OK to have kids on a trip going through villages where [Palestinians] are trapped in their homes under curfew.”

At the army induction center, he told the Colonel he had no intention of signing up. He was questioned by military officers on a “conscience committee.” “Their decision was that I’m not a pacifist. It’s an automatic decision. No one has ever been accepted as a pacifist. . . .” The military prosecutor said Ben-Artzi “was not a pacifist because ‘the competent military committee has already reviewed his case’ and decided he was not. The prosecutor added that to let Ben-Artzi go would ‘undermine discipline in the army’.”

Later, a brigadier general told Ben-Artzi that if he “agreed to enlist he would be granted ‘an easy service, without a gun, uniform or military training’ . A job would be found for him in a hospital. Ben-Artzi replied that he would do three years’ service, but not in an organization dedicated to killing.”

The army then “declared that Ben-Artzi was already conscripted and ordered the first court martial of a conscientious objector in three decades.”²⁶⁶

7. Combatants’ Letter

In 2002, fifty combat officers and soldiers signed what came to be known as the Combatants Letter:

- We, reserve combat officers and soldiers of the Israel Defense Forces, who were raised upon the principles of Zionism, self-sacrifice and giving to the people of Israel and to the

²⁶⁶ Guardian, stupidity; and, Joshua Holland, “Meet Bibi Netanyahu’s Refusenik Nephew Who Says That Israel Is an Apartheid State,” lightly edited transcript of interview (Aug. 6, 2012) (brackets in original), <<http://www.alternet.org/world/meet-bibi-netanyahus-refusenik-nephew-who-says-israel-apartheid-state>>; and <http://en.wikipedia.org/wiki/List_of_Prime_Ministers_of_Israel>.

State of Israel, who have always served in the front lines, and who were the first to carry out any mission in order to protect the State of Israel and strengthen it.

- We, combat officers and soldiers who have served the State of Israel for long weeks every year, in spite of the dear cost to our personal lives, have been on reserve duty in the Occupied Territories, and were issued commands and directives that had nothing to do with the security of our country, and that had the sole purpose of perpetuating our control over the Palestinian people.
- We, whose eyes have seen the bloody toll this Occupation exacts from both sides,
- We, who sensed how the commands issued to us in the Occupied Territories destroy all the values that we were raised upon,
- We, who understand now that the price of Occupation is the loss of IDF's human character and the corruption of the entire Israeli society,
- We, who know that the Territories are not a part of Israel, and that all settlements are bound to be evacuated,
- We hereby declare that we shall not continue to fight this War of the Settlements.
- We shall not continue to fight beyond the 1967 borders in order to dominate, expel, starve and humiliate an entire people.
- We hereby declare that we shall continue serving the Israel Defense Force in any mission that serves Israel's defense.

The missions of occupation and oppression do not serve this purpose – and we shall take no part in them.

An organization by the name of Courage to Refuse continues to collect new signatories for this letter. “Its members, beyond refusing to serve in the occupied territories, take part in many demonstrations, cultural events and other activities of public education aimed to end the occupation and bring peace to Israel.”²⁶⁷

8. Pilots' Letter

In September 2003, twenty-seven Israeli Air Force reserve pilots who described themselves as “active fighters, leaders, and instructors of the next generation of pilots,” sent a

²⁶⁷ Courage to Refuse, “About Us,” <<http://seruv.org.il/english/movement.asp>>; and Combatants Letter, *Courage to Refuse*, <http://www.seruv.org.il/english/combatants_letter.asp>.

letter to the commander of the Air Force declaring that they would defend Israel, but they were opposed to carrying out orders in the occupied territories that they believed were illegal and immoral.

We, who were raised to love the state of Israel and contribute to the Zionist enterprise, refuse to take part in Air Force attacks on civilian population centers. We, for whom the Israel Defense Forces and the Air Force are an inalienable part of ourselves, refuse to continue to harm innocent civilians.²⁶⁸

9. Commandos' letter

In December 2003, thirteen soldiers from the Israeli Defense Forces' most prestigious combat unit sent a letter to the Prime Minister, Ariel Sharon, affirming that they would continue to defend Israel, but:

We, citizens of Israel who fulfill our duty as reserve soldiers, fighters and officers, veterans of Sayeret Matkal, have chosen to walk at the head of our camp, as we have been taught. Out of concern for the future of Israel as a Jewish, Zionist, Democratic state, and out of fear for its moral character we declare that:

- We shall no longer lend a hand in the occupation of the territories
- We shall no longer take part in the deprivation of basic human rights from millions of Palestinians
- We shall no longer serve as a shield in the crusade of the settlements
- We shall no longer corrupt our moral character in missions of oppression
- We shall no longer deny our responsibility as soldiers of the Israeli DEFENSE force.

We fear for the fate of the children of this country, who are constantly subjected to an evil that is unnecessary, an evil in which we have participated. We have long ago crossed the line of those who fight for their own protection; we stand facing the border of those who fight to conquer another people.

We shall not cross this border! . . . ²⁶⁹

²⁶⁸ Courage to Refuse, "The Pilots have Courage to Refuse" (Sept. 25, 2003), <<http://www.seruv.org.il/English/article.asp?msgid=55&type=news>>.

²⁶⁹ Courage to Refuse, "The Commandos have Courage to Refuse" (2003), <http://www.seruv.org.il/English/news_item.asp?msgid=85>.

10. *Maya Wind*

Maya Wind joined the Shministim in December 2008 and refused to serve in the Israeli Defense Forces:

We can no longer term our military a “Defense Force.” A defense force does not conquer lands of another people. A defense force does not assist in the building of settlements on those lands. A defense force does not permit settlers to throw stones at Palestinian civilians, nor does it deny them access to their lands and source of livelihood. None of these are acts of a defense force. The occupation has no defensive advantages. On the contrary, the pointless occupation of millions of people only leads to radicalization of opinions, hatred and the escalation of violence. Violence is a cycle that feeds into itself. This cycle will not stop until someone stands up and refuses uncompromisingly to take part in it. This is what I am doing today. . . .

Maya Wind spent several weeks in detention and forty days in military prison before she was exempted from military service in March 2009.²⁷⁰

11. *Danielle Yaor*

Danielle Yaor is one of 150 signers of a statement by Israelis whose reasons for refusing to serve in the army are based on violations of international law and masculine domination of the Israeli army.

We, the undersigned, intend to refuse to serve in the army and the main reason for this refusal is our opposition to the military occupation of Palestinian territories. . . . In these territories, human rights are violated, and acts defined under international law as war-crimes are perpetuated on a daily basis. These include assassinations (extrajudicial killings), the construction of settlements on occupied lands, administrative detentions, torture, collective punishment and the unequal allocation of resources such as electricity and water. . . .

We refuse to aid the military system in promoting and perpetuating male dominance. In our opinion, the army encourages a violent and militaristic masculine ideal whereby ‘might is right’. This ideal is detrimental to everyone, especially those who do not fit it. Furthermore, we oppose the oppressive, discriminatory, and heavily gendered power structures within the army itself. . . .

²⁷⁰ Burch, Shministim, <<http://www.thehypertexts.com/The%20Shministim.htm>>. *See also*, Bella Caledonia, “Exclusive: Interview with Maya Wind, an Israeli peace activist” (Nov. 29, 2012), <<http://bellacaledonia.org.uk/2012/11/29/exclusive-interview-with-maya-wind-an-israeli-peace-activist/>>.

At age 19, she says, “I have to refuse to take part in the war crimes that my country does. . . . Since I was young we’ve been trained to be these masculine soldiers who solve problems by violence. I want to use peace to make the world better.”²⁷¹

12. Unit 8200 letter

Unit 8200 is Israel’s Intelligence Corps. On September 11, 2014, forty-three “veterans of Unit 8200, reserve soldiers both past and present,” sent a letter to the Prime Minister, the Military Intelligence Director, and the Commander of Unit 8200, in which they declared: “we refuse to take part in actions against Palestinians and refuse to continue serving as tools in deepening the military control over the Occupied Territories.”

The Palestinian population under military rule is completely exposed to espionage and surveillance by Israeli intelligence. While there are severe limitations on the surveillance of Israeli citizens, the Palestinians are not afforded this protection. There’s no distinction between Palestinians who are, and are not, involved in violence. Information that is collected and stored harms innocent people. It is used for political persecution and to create divisions within Palestinian society by recruiting collaborators and driving parts of Palestinian society against itself. In many cases, intelligence prevents defendants from receiving a fair trial in military courts, as the evidence against them is not revealed. . . .

Millions of Palestinians have been living under Israeli military rule for over 47 years. This regime denies the basic rights and expropriates extensive tracts of land for Jewish settlements subject to separate and different legal system, jurisdiction and law enforcement. This reality is not an inevitable result of the state’s efforts to protect itself but rather the result of choice. Settlement expansion has nothing to do with national security. The same goes for restrictions on construction and development, economic exploitation of the West Bank, collective punishment of inhabitants of the Gaza Strip, and the actual route of the separation barrier.

In light of all this, we have concluded that as individuals who served in Unit 8200, we must take responsibility for our part in this situation and it is our moral duty to act. We cannot continue to serve this system in good conscience, denying the rights of millions of people. Therefore, those among us who are reservists, refuse to take part in the state’s actions against Palestinians. We call for all soldiers serving in the Intelligence Corps, present and future, along with all the citizens of Israel, to speak out against these

²⁷¹ David Swanson, “Israeli Chooses ‘Honorable Life’ Over Joining Military” (Oct. 27, 2014), <<http://davidswanson.org/node/4566>>.

injustices and to take action to bring them to an end. We believe that Israel's future depends on it.²⁷²

According to media accounts in January 2015, members of Unit 8200 who signed the letter to Prime Minister Benjamin Netanyahu and top army chiefs in September were expelled and can no longer serve in the unit.²⁷³

D. Moral Injury and Conscientious Objection

1. Unit 8200 Testimonies

Although they may not have used terms such as “moral injury” or “conscientious objection,” several of the signers of the Unit 8200 letter offered personal explanations for their refusal to serve any longer in Israel's Intelligence Corps or to condone Israel's military control over the Occupied Territories:

After my discharge from the Intelligence Corps, I had a moment of shock while watching the film “the lives of others,” about the secret police in East Germany. On the one hand, I felt solidarity with the victims, with the oppressed people who were denied such basic rights as I take for granted to be mine. On the other hand, I realized that the job I had done during my military service was that of the oppressor. My first reaction as a discharged soldier was that we do the same things, only much more efficiently.²⁷⁴

The contradiction between morality and following orders became an issue for one of the signers of the Unit 8200 letter who had been a course instructor for soldiers assigned to the Palestinian arena:

. . . I gave a class called “Morality and Intelligence.” . . . The Lieutenant A. affair was a major part of this class. . . . The report said the objective of that operation was to demolish a building empty of people, and that Lieutenant A.'s job was to make sure the

²⁷² Leak Source, “Letter & Testimony from Israel's Elite Intelligence Unit 8200 Members Refusing to Spy on Palestinians” (Sept. 13, 2014), <<http://leaksource.info/2014/09/13/letter-testimony-from-israels-elite-intelligence-unit-8200-members-refusing-to-spy-on-palestinians/>>.

²⁷³ See, “Israeli intel unit drops soldiers who refused to spy on Palestinians,” *Reuters* (Jan. 26, 2015), <<http://www.reuters.com/assets/print?aid=USKBN0KZ27F20150126>>; and Jodi Rudoren, “Israel: Dissident Reservists Dismissed,” *New York Times* (Jan. 26, 2015), <http://www.nytimes.com/2015/01/27/world/middleeast/israel-dissident-reservists-dismissed.html?_r=0>.

²⁷⁴ From “Testimonies” linked to Leak Source, “Letter & Testimony from Israel's Elite Intelligence Unit 8200 Members Refusing to Spy on Palestinians,” Sept. 13, 2014 (hereafter, “Unit 8200 Testimonies”), <<http://www.scribd.com/doc/239665844/Letter-Testimony-from-Israel-s-Elite-Intelligence-Unit-8200-Members-Refusing-to-Spy-on-Palestinians>>.

building was indeed empty—when in fact the contrary was true. The objective was to bomb a building containing innocent people, and the Lieutenant was supposed to inform the unit when they were inside. We discussed this affair in class. Everyone said what they would have done in A.’s stead. . . . [T]he only conclusion reached was that in this unit there is no such thing as an illegal order. It is not we who decide what is moral and what isn’t. Nowadays I realize that this is what the bombing pilot says too: “It’s not for me to say what is moral and what isn’t.” Everyone passes the responsibility onto others. After deliberating a bit, as that was the method of the class, the final message was: “Do what you’re told.”²⁷⁵

An Israeli veteran, who refused further service in the reserves, described an experience similar to that of American drone pilot Brandon Bryant:

[T]here was someone suspicious next to a weapons warehouse in Gaza and we thought he was our target. It had taken us a long time to find him. Judging by his location, the time and similar date, we concluded it was him. After we assassinated him it turned out that he was a kid. . . . I remember an image on the screen of him in an orchard, and the explosion on the screen, the smoke clearing and his mother running to him, at which point we could see he was a child. The body was small. We realized we had screwed up. It got quiet and uncomfortable. Then we needed to carry on as there were other things to do

This veteran explained, “In real time you can see maps and images from the helicopter, but you’re sitting in an office so it’s very easy to feel detached and distance yourself. Nor was it my job to ask questions. I was told what was needed and that’s what I did.”

I assumed a role in which people are called “targets.” . . . I could urge my unit to take all kinds of measures. The attitude was “Why not?” “We can, so let’s do it.” . . . I chose to disconnect from it – to clock in my hours, and check out. . . .²⁷⁶

An Israeli who served as a translator during “Operation Cast Lead” in Gaza wrote:

Upon the start of the operation something seemed wrong to me. Instead of attacking rocket and weapons caches in the Gaza Strip, as a preparatory defense measure for the campaign against Hamas, the Israeli Air Force attacked a parade of police officers. The assault killed 87 policemen. . . . Those were precious hours in which we should have been doing our jobs preventing the launching of rockets against Israeli civilians, and this did not serve that purpose. . . .²⁷⁷

²⁷⁵ Unit 8200 Testimonies.

²⁷⁶ Unit 8200 Testimonies.

²⁷⁷ Unit 8200 Testimonies.

An Israeli reservist described the reactions of others in the room with him when they learned the results of bombing raids:

Throughout the operation I accompanied different teams engaged in collecting and translating intelligence on targets in the Gaza Strip—on both weapons and humans. I remember the overwhelming silence in the rooms from which we worked, seconds after the Air Force bombed those targets. A tense silence, hopeful of causing harm. When an attack was identified or executed, cheering and applause filled the room. . . . X's were marked on the facial composite sketches that adorned the walls of the rooms. No one asked about "collateral damage." I felt bad—it was very difficult to realize that no one was interested in who else had been hit. Throughout the campaign, hundreds of civilians were killed—men, women, and children—collateral damage. . . .

When senior leaders of Hamas' military wing were targeted, the Air Force reported who had been harmed.

[T]ension filled the room in anticipation of finding out whether the people injured were the targeted objectives of the attack. When it became clear that they were other unrelated persons, cries of disappointment were heard, not because people had been killed arbitrarily, but because they weren't the people we were looking for. . . .²⁷⁸

An Israeli assigned to collect "intelligence" on people who were accused of attacking Israelis, trying to attack Israelis, or desiring to harm Israelis, said he collected information on completely innocent people:

Any Palestinian is exposed to non-stop monitoring by the Israeli Big Brother, without legal protection. Junior soldiers can decide anyone is a target for the collection of information. There is no procedure in place to determine whether the violation of the individual's right is necessarily justifiable. . . . Any Palestinian may be targeted and may suffer from sanctions such as the denial of permits, harassment, extortion, or physical injury.

Another member of the 8200 Unit explained, you "fish out" an innocent person who might be recruited or squeezed into becoming a collaborator:

If you're homosexual and know someone who knows a wanted person . . . Israel will make your life miserable. If you need emergency medical treatment in Israel, the West Bank or abroad—we searched for you. The state of Israel will allow you to die before we let you leave for treatment without giving information on your wanted cousin. . . .

²⁷⁸ Unit 8200 Testimonies.

At the conclusion of my service in the army I was a commander and instructor for several months, teaching youth who had graduated from High School and were being prepared to serve as translators for the Intelligence Corps. I repeatedly tried to raise these questions with them: is it legitimate to deem as a target any person who interests the Israeli security system, for whatever reason? The answer I received, time and again, was yes. Today I believe the answer is no.²⁷⁹

2. *Breaking the Silence*

Breaking the Silence is an organization of veteran combatants who served in the Occupied Palestinian Territories. They collect and publish testimonies from young soldiers who face a civilian population on a daily basis in the West Bank, Gaza, and East Jerusalem.

Soldiers who serve in the Territories witness and participate in military actions which change them immensely. Cases of abuse towards Palestinians, looting, and destruction of property have been the norm for years, but are still explained as extreme and unique cases. Our testimonies portray a different, and much grimmer picture in which deterioration of moral standards finds expression in the character of orders and the rules of engagement, and are justified in the name of Israel's security. While this reality is known to Israeli soldiers and commanders, Israeli society continues to turn a blind eye, and to deny . . . what is done in its name. Discharged soldiers returning to civilian life discover the gap between the reality they encountered in the Territories, and the silence about this reality they encounter at home. In order to become civilians again, soldiers are forced to ignore what they have seen and done. We strive to make heard the voices of these soldiers, pushing Israeli society to face the reality whose creation it has enabled.²⁸⁰

Breaking the Silence collected testimonies from military personnel who were engaged in the war between Israel and Palestinian militants in Gaza during the summer of 2014 from which they concluded that many of the deaths were preventable and resulted from Israeli military policies. Here is a selection from one of those interviews under the title, "*From what we knew, that area was supposedly devoid of civilians.*"

I remember in Shuja'iyya there was one time I needed to interpret an attack that took place on a building or something like that. I opened up the footage, and it was all scorched, burned to the ground. Entire streets where one building is half-destroyed, the next one totally destroyed, the next one half-destroyed. Entire streets that were totally shelled, and I needed to verify a certain target that had clearly been obliterated. I opened up the footage and saw that it was taken right after the strike had been carried out, and

²⁷⁹ Unit 8200 Testimonies.

²⁸⁰ Breaking the Silence, "Israeli soldiers talk about the Occupied Territories," <<http://www.breakingthesilence.org.il/about/organization>> (last visited July 31, 2015).

there were lots of people there, and lots of ambulances, and a whole lot of smoke and lots of commotion. And from what we knew, that area was supposedly devoid of civilians.

[Question:] You said earlier that you did know the neighbourhood was supposed to be empty of civilians?

Yes. That's what they told us. They told us—maybe really so we wouldn't think the IDF [Israel Defense Forces] does immoral things—they told us the civilians had been informed via leaflets scattered in the area, and that it was supposed to be devoid of civilians, and civilians who remained there were civilians who apparently chose to be there.

[Question:] Who told you that?

The commanders, in off-the-record type conversations, or during all kinds of briefings. Just so we'd know, for our general knowledge, that this is what's going on. That there's no civilians supposed to be there, and any who are—are there because they chose to be. In conversations between us it was summed up as, “There's nothing we can do, war is war.” You don't really talk about it—any discourse or opinions that are slightly ‘deviant’ are pretty much silenced.²⁸¹

3. Shachar Berrin

Shachar Berrin, an Israeli soldier, stood up wearing his IDF uniform, and spoke during the question and answer session at a debate on May 14, 2015, between a human rights activist and a pro-settler activist on the premise that the occupation is destroying Israel. Less than twelve hours after speaking, Berrin was ordered back to his base and charged with “taking part in a political meeting and in an interview [with] the media without permission from the army.” Here are excerpts from what Berrin said:

I propose that what makes a country good isn't whether it is happy or not, it's about the ethics and morality of the country.

When soldiers, when we, are conditioned and persuaded on a daily basis to subjugate and humiliate people and consider other human beings as less than human, I think that seeps in, and I think the soldiers, when they go home . . . they bring that back with them.

²⁸¹ Alistair Dawber, “‘From what we knew, that area was supposedly devoid of civilians’: The testimonies of Israeli soldiers provided to Breaking the Silence,” *The Independent*, 4 May 2015, <<http://www.independent.co.uk/news/world/middle-east/from-what-we-knew-that-area-was-supposedly-devoid-of-civilians-the-testimonies-of-israeli-soldiers-provided-to-breaking-the-silence-10223374.html?>> (last visited Aug. 1, 2015).

. . . Just the other week, when some border police soldiers were rough with some Christian tourists, another soldier of mine, a colleague, said she couldn't believe what they were doing: "Come on, they are people, not Palestinians." And that, I think resonates through much of the soldiers in the occupied territories.

I personally serve in the Jordan Valley, and we can see it every day how soldiers talk about what they're doing, how they act, how they look at these people not as other human beings, not as someone who is equal, but as someone who is less than them.

And to think that, oh no, we can just leave that racism there, we can leave that xenophobia, they will only be racist, they will only humiliate Palestinians, of course not. .

. . .
A few weeks ago there was a border police soldier who was caught on camera beating up an Ethiopian Israeli in uniform. To say that we can just leave this all behind, is nonsense I think. I think that once you are conditioned to think something, you bring it back with you and that it deeply affects Israeli society and causes it . . . to be more racist.

Shachar Berrin was tried, convicted and sentenced to one week in prison before the program was aired on television. An Israeli journalist, Gideon Levy, commented,

This whole incident shows that when rapid, determined action is called for, the Israel Defense Forces knows how to act. When soldiers kill Palestinian children, the investigation is stretched out over years, gathering dust before usually going nowhere. . . . But if a soldier dares to attest publicly that his fellow soldiers are humiliating Palestinians, the IDF mobilizes rapidly to trample, punish and silence. That's what happened to Shachar Berrin.²⁸²

Berrin and other Israeli refuseniks do not use the term "moral injury," nor do they describe symptoms of suffering from moral injury. But they do describe participating in, seeing, or failing to prevent what they regard as immoral acts, and they convey a sense of betrayal of what Israel should stand for. They may not use the term "conscientious objection" but what they regard as immoral actions have led them to say No to such military service.

²⁸² Ben Norton, "Israel will imprison soldier, 19, for publicly criticizing the occupation," *Mondoweiss*, May 24, 2015, <<http://mondoweiss.net/2015/05/imprison-criticizing-occupation>> (last visited Aug. 1, 2015). *See also*, Gideon Levy and Alex Levac, "Soldier pays the price for criticizing the Israel army," *Haaretz*, May 21, 2015, <<http://www.haaretz.com/weekend/twilight-zone/.premium-1.657553>> (last visited Aug. 1, 2015).

CONCLUSION

There is no solution to physical and moral injury as long as people are willing to fight wars. International agreements to limit the horrors of war have been developed over many decades, but nations put their own interests ahead of the rights of others.

A paradigm for what we confront is the matter of torture. The United States of America was one of the nations that signed and later ratified the Convention Against Torture.²⁸³

The United States declared several reservations.²⁸⁴ These reservations do not, however, relieve the United States from its responsibility for what was done to captives after September 11, 2001 (“9/11”). Article 2.2 of the Convention Against Torture states: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”²⁸⁵

In 2004, the Office of the United Nations High Commissioner for Human Rights published the Istanbul Protocol Manual on the Effective Investigation and Documentation of

²⁸³ The United States signed the Convention Against Torture on April 18, 1988 and the Senate ratified it on October 21, 1994, <https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en>. Article 1 of the Convention Against Torture provides an internationally recognized definition of torture:

[T]he term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. . . .

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, entered into force 26 June 1987, (hereafter, “Convention Against Torture”), <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>>.

²⁸⁴ With reference to Article 1 of the Convention Against Torture, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

<https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en>.

²⁸⁵ Convention Against Torture, Art. 2.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁸⁶ The Findings and Conclusions of the Senate Select Committee on Intelligence²⁸⁷ show that the CIA violated many of the methods of torture listed in paragraph 145 of the Istanbul Protocol.²⁸⁸

- The CIA applied its enhanced interrogation techniques with significant repetition for days or weeks at a time. Interrogation techniques such as slaps and “wallings” (slamming detainees against a wall), frequently concurrent with sleep deprivation and nudity. . . . At times, detainees were walked around naked or were shackled with their hands above their heads for extended periods of time. Other times, detainees were subjected to what was described as a “rough takedown,” in which approximately five CIA officers would scream at a detainee, drag him outside of his cell, cut his clothes off, and secure him with Mylar tape. The detainee would then be hooded and dragged up and down a long corridor while being slapped and punched. The Istanbul Protocol prohibits blunt trauma such as a slap, punch or kick, restriction of sleep, forced nakedness and humiliation.
- Sleep deprivation involved keeping detainees awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads. At least five detainees experienced disturbing hallucinations during prolonged sleep deprivation and, in at least two of those cases, the CIA nonetheless continued the sleep deprivation. CIA medical personnel treated at least one detainee for swelling in order to allow the continued use of standing sleep deprivation. The Istanbul Protocol prohibits restriction of sleep, and positional torture using suspension, prolonged constraint of movement, and forced positioning.
- At least five CIA detainees were subjected to “rectal rehydration” or rectal feeding without documented medical necessity. While rectal rehydration is not explicitly forbidden in the Istanbul Protocol, it does prohibit sexual violence to genitals, molestation, and “instrumentation.”
- The waterboarding technique was physically harmful, inducing convulsions and vomiting. One man, for example, became “completely unresponsive, with bubbles rising

²⁸⁶ UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”)*, 2004, HR/P/PT/8/Rev.1 (hereafter, “Istanbul Protocol”), ¶ 145, <<http://www.refworld.org/docid/4638aca62.html>> or <www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.

²⁸⁷ Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program*, approved Dec. 13, 2012, updated for release Apr. 4, 2014, Declassification Revisions Dec. 3, 2014, Findings and Conclusions, pp. 2-3 of 19, <<http://www.intelligence.senate.gov/study2014/sscistudy1.pdf>>.

²⁸⁸ *Istanbul Protocol*, ¶ 145.

through his open, full mouth.” The Istanbul Protocol prohibits asphyxiation, such as drowning, smothering, or choking.

- The CIA placed detainees in ice water “baths.” Lack of heat at the facility likely contributed to the death of a detainee. The Istanbul Protocol prohibits exposure to extremes of temperature.
- The CIA led several detainees to believe they would never be allowed to leave CIA custody alive, suggesting to one detainee that he would only leave in a coffin-shaped box. The Istanbul Protocol prohibits threats of death.
- CIA officers also threatened at least three detainees with harm to their families—to include threats to harm the children of a detainee, threats to sexually abuse the mother of a detainee, and a threat to “cut [a detainee’s] mother’s throat.” The Istanbul Protocol prohibits threats of harm to family.
- Except when being interrogated or debriefed by CIA personnel, CIA detainees at the COBALT detention facility were kept in complete darkness and constantly shackled in isolated cells with loud noise or music and only a bucket to use for human waste. The Istanbul Protocol prohibits solitary confinement, deprivation of light, deprivation of normal sensory stimulation, restriction of food, water, toilet facilities, bathing, medical care, and loss of contact with the outside world.²⁸⁹

How can we say the enhanced interrogation techniques intentionally inflicted by persons acting in an official capacity were not torture? As described above, it is not only CIA personnel but members of the Armed Forces who participate in these actions.²⁹⁰ Furthermore, as the Convention Against Torture states, “No exceptional circumstances whatsoever,” such as 9/11, “may be invoked as a justification of torture.”

²⁸⁹ For a firsthand account by a detainee who was subjected to many of the methods of torture described in the Senate Armed Services report, *see*, Mohamedou Ould Slahi, *Guantánamo Diary*, Larry Siems, ed., (New York: Little, Brown and Company, 2015). Numerous statements by Slahi are corroborated by official sources cited in footnotes by the editor.

²⁹⁰ *See*, U.S. Department of Justice, Office of the Inspector General, Oversight and Review Division, *A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq*, May 2008, Chapter Five, FBI Concerns about Military Interrogation at Guantanamo Bay, and Chapter Eight, FBI Observations Regarding Detainee Treatment in Guantanamo Bay, <<http://www.justice.gov/oig/special/s0805/final.pdf>>.

This article has endeavored to be realistic in representing what might support the man or woman in military service who is struggling to find a way forward from what may seem an unbearable situation.

Law, particularly international law, can be helpful. But for the foreseeable future, individuals and small groups of service men and women who are confronted with orders perceived to be unlawful and immoral may have to step forth in the knowledge that they may be punished if they say No but with faith in the possibility of a better future.

As the little girl watching her first military parade says in Carl Sandburg's *The People, Yes*: "Sometime they'll give a war and nobody will come."²⁹¹

²⁹¹ Carl Sandburg, "*The People, Yes*," <<http://www.poemhunter.com/carl-sandburg/quotations/>>.

RESOURCES

GI Rights Hotline provides counseling and information on military discharges, AWOL and UA, and GI rights, 1-877-447-4487, <<http://girightshotline.org/>>. You may be directed to a Network counseling center in your region, such as: Quaker House, 223 Hillside Avenue, Fayetteville, North Carolina 28307 (near Fort Bragg), 910-323-3912, <<http://www.quakerhouse.org/>>, email, qpr@quaker.org.

Center on Conscience & War, offers counseling if you seek discharge or reassignment as a conscientious objector; if you face deployment soon, call 1-800-379-2679; 1830 Connecticut Ave. NW, Washington, DC 20009; 202-483-2220; <<http://www.centeronconscience.org/>>, email ccw@centeronconscience.org.

Yesh Gvul, in Jerusalem, Israel, counsels soldiers, supports refuseniks and, when jailed, provides financial support to their families, 972 2 6250271, <<http://www.yeshgvul.org.il/en/about-2/>>.

Brite Divinity School, Soul Repair Center, provides lists programs, books, essays, and other resources pertaining to moral injury, <<http://www.brite.edu/academics/programs/soul-repair/resources/#top>>.

Copies of the chapter on “Moral Injury” may be obtained as a printed pamphlet at no charge except for shipping from

Quaker House
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