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Mogilisatsiya – The Rights and Refugee Status Eligibility of Russian Absolute and Selective Conscientious Objectors during the War in Ukraine

Master's Thesis
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Abstract for Master's Thesis

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Abstract:

This thesis sets out to define and contextualize the right to conscientious objection to military service within the field of international human rights law and refugee law. Practicing conscientious objection to military service during wartime is difficult, whether selectively objecting to the current conflict or to any military service in an absolute sense. As Russia entered a state of partial mobilization due to their invasion of Ukraine such an issue became highly relevant. It concerns a non-democratic state, with certain protections for conscientious objectors, conducting a war of aggression that has come to feature many cases of accused war crimes and that has strongly repressed any domestic opposition to its conduct.

Examining the human rights instruments binding (pre-war) Russia, the ICCPR and ECHR, the status of conscientious objection as a derivative human right under the right to freedom of thought, conscience, and religion will be contrasted to its practical implementation in Russian society through the civilian alternative to military service. This institutionalization of conscientious objection is examined through the domestic law establishing alternative service, the ECtHR judgement examining the law's implementation as well as reports of current practice of its implementation in Russia – pointing to some grave inadequacies. Among these are the problematic process of applying for alternative service before the military authorities as well as the arbitrary inaccessibility of making such an application. Adding to this is recent domestic Russian reforms which restrict the rights of persons who do not comply with draft calls and reported cases of persons being threatened as well as forced into armed service when attempting to appeal such draft calls. The case is therefore made that Russian practice towards conscientious objectors could amount to persecution.

Focusing on international protection in the EU, relevant international legal sources is examined to point out what conditions a Russian conscientious objector would have to meet to qualify for refugee status in Europe, or if not then some form of subsidiary protection. With a basis in doctrine and UNHCR guidelines on international protection regarding interpreting the relevant legal sources the case is made that Russian conscientious objector's asylum applications should be given due regard on account of the persecution their conscientious stances would bring about. This is however contrasted with state practice of EU member states, both in past application processes, as well as through contemporary statements by government officials and heads of state being reluctant or outright dismissive of such applications. Thus, potentially neglecting to provide adequate protection to persons conscientiously objecting to a war that the same member states also strongly condemn.

Keywords: Conscientious Objection, Freedom of Religion, Conscience, Refugee Law, Human Rights, International Law, Russia, Military Service, War, Mobilisation

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Abbreviations

CoE – Council of Europe

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

HRC – (UN) Human Rights Committee

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

OSCE – Organisation for Security and Co-Operation in Europe

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

1. Introduction

1.1. Background

"*If everyone made war only according to his own convictions, there would be no war.*"
Lev Tolstoy, *War and Peace* (1865-1869)[1]

In the morning of February 24th, 2022, as mechanized infantry entered Ukraine from North, South and East, Russia did not plan for a long war. Anticipating a repeat of their annexation of Crimea, they attempted to seize vital military and political targets and presenting the world with a *fait accompli* before any real opposition, be it Ukrainian, domestic or international could muster.[2] This would prove not to be the case. In the coming days, a better prepared Ukraine had defied their aggressors' expectations and mustered a strong defence. Forcing the attackers to fall back and dig in as the war would turn into a drawn-out conflict.[3] Something that would be painfully obvious to the Russian leadership is that drawn out conflicts eat up a lot of resources, especially manpower – and the professional ranks of the Russian military were far from endless.[4] This would leave the Russian leadership with one option.

The draft, taking the form of a "partial mobilisation" announced on September 21st, 2022, was a shock to many Russians. In a poll by the independent Russian research organization Levada Center on the Russian public attitude towards the mobilisation, 47 percent of the respondents responded that they felt "anxiety, fear and/or horror" (*Тревога, страх, ужас*), while 23 percent responded that they felt pride (*Гордость*).[5] Subsequently, the partial mobilisation quickly became known amongst critics under the Russian wordplay "Mogilisatsiya" *(Могилизация)* – combining the Russian word for grave *(Могила)* with mobilisation *(Мобилизация).*[6] And the war has indeed been a bloody affair. A year into the war in February 2023 a collaboration between the Russian-language section of the

[1] "*Ежели бы все воевали только по своим убеждениям, войны бы не было"* – Lev Tolstoy (1865–1869) *War and Peace* p. 31.
[2] See: Seth G. Jones "Russia's Ill-Fated Invasion of Ukraine: Lessons in Modern Warfare" (Center for Strategic and International Studies, 1 June 2022) <https://www.csis.org/analysis/russias-ill-fated-invasion-ukraine-lessons-modern-warfare> (accessed 27.10.2023).
[3] Ibid.
[4] See: Mark F. Cancian, "What does Russia's Partial Mobilistaion Mean?" (*Center for Strategic and International Studies,* 26.9.2022) <https://www.csis.org/analysis/what-does-russias-partial-mobilization-mean> (accessed 3.10.2023).
[5] "Конфликт с украиной: сентябрь 2022 года" (Levada Center, 29 September 2022), <https://www.levada.ru/2022/09/29/konflikt-s-ukrainoj-sentyabr-2022-goda/> (accessed 27.10.2023).
[6] See: "*могилизация",* (Wiktionary) <https://ru.wiktionary.org/wiki/%D0%BC%D0%BE%D0%B3%D0%B8%D0%BB%D0%B8%D0%B7%D0%B0%D1%86%D0%B8%D1%8F> (Accessed 21.1.2023).

BBC and Russian news outlet Mediazona were able to confirm the death of 14 093 Russian combatants since the start of the war, among which 1082 were drafted in conjunction with the mobilization.[7] In September 2023, the total number of confirmed dead were 32 656 Russian soldiers of which 3 723 were mobilized draftees.[8] The real number is most likely much larger as not all deaths would be possible to confirm. In the meantime, according to Eurostat there were 15 390 first time asylum-applicants in the European Union (EU) originating from Russia during 2022, the first year of the war.[9] A significant amount, but nevertheless a small portion of the almost 1 million total applications in the EU+ reported by the EU Agency for Asylum.[10] Complete statistics are not yet available for 2023 but the trend seems to continue as Eurostat reports applications from persons with Russian citizenship numbering 2480 applications in March, while 1720 in April and 1435 in May.[11] This is however not a study on those who fight, but rather those who refuse to do so. Neither is this a study on those who refuse because they fear being put in a combat situation, or who do not trust their military's materiel and command to keep them alive, or those who simply feel that they have something better to do. The keyword for this study is *conscience*.

Conscientious objection to military service, based on religious, philosophical, ethical or political reasons is a right that rarely is easy to exercise. This can be exercised in an absolute sense, adopting a pacifist world view that does not permit any armed service. One may also exercise it in a selective form, where one can conscientiously consent to take part in certain military service but draw the line in certain situations. A popular line among Russians for example being that they would condone fighting in World War Two against the invading Third Reich but not in the current conflict – be it Chechnya, Georgia, or now most recently Ukraine.[12] For these persons, a draft call would at the latest be a wake-up call to start actively exercising their right to conscientious objection. But would they be able to exercise it? Is conscientious objection to military service an internationally

[7] BBC, "1000 человек за четыре месяца: что известно о смертях российских мобилизованных" (*BBC News Русская служба,* 13.2.2023) <https://www.bbc.com/russian/features-64628270> (accessed 16.2.2023), See also: Mediazona, 'Потери России в войне с Украиной. Сводка «Медиазоны»' (*Медиазона*, 13.2.2023) <https://zona.media/casualties> (accessed 16.2.2023).

[8] Mediazona, "Потери России в войне с Украиной. Сводка «Медиазоны»" (*Медиазона,* 13.2.2023), <https://zona.media/casualties> (accessed 3.10.2023).

[9] Eurostat "Annual Report on Migration and Asylum 2022 – Statistical Annex" (June 2023) <https://ec.europa.eu/eurostat/en/web/products-statistical-reports/w/ks-09-23-223> p.13.

[10] "Almost 1 million asylum applications in the EU+ in 2022" (European Union Agency for Aylum, 22 February 2023) <https://euaa.europa.eu/news-events/almost-1-million-asylum-applications-eu-2022> (accessed 27.10.2023).

[11] Eurostat, "Almost 86 000 Asylum Seekers in March 2023" (26.6.2023) <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230626-1> (accessed 27.9.2023), Eurostat, (25.7.2023)"Over 72 000 Asylum Seekers in April 2023" <https://ec.europa.eu/eurostat/en/web/products-eurostat-news/w/ddn-20230725-2> (accessed 27.9.2023) and, Eurostat, (25.8.2023) "Over 80 000 Asylum Seekers in May 2023" <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230825-1> (accessed 27.9.2023).

[12] See for example the plea of Mr. Krotov in: *Krotov v. Secretary of State for the Home Department,* United Kingdom: Court of Appeal (11.2.2004) (C1/2002/1537/IATRF). §2 (Further analysis in chapter 5.4).

recognized human right? Can one exercise conscientious objection to military service in Russia? And if all else fails, would one be able to receive international protection as a last resort to, for conscientious reasons, avoid such state mandated armed service? Or would the draft call mean that one is condemned to take part in a war of aggression against both will and *conscience*?

1.2. Research Question and Delimitations

The aim of this study is to contextualize the emerging human rights norm of conscientious objection to military service through an examination of international human rights and refugee law. More specifically, an analysis of whether Russian men fleeing the partial mobilisation due to conscientious objection to military service in general, or the war in Ukraine in particular, would be eligible for international protection within the EU, and if so, under what conditions. To tackle this question, one can divide it into several subtopics, or interrelated subcategories of questions each fitting in as a puzzle piece of the whole. Firstly, is there an international human right to conscientious objection to military service, and if so, from which legal sources could such a right be derived? Secondly, we should consider whether (and how) such a right is implemented in the state party of interest for this study, namely Russia. Thirdly, and interrelatedly, if such a right to conscientious objection is imperfectly implemented in Russia, could such a lapse amount to persecution as understood within the 1951 Refugee Convention and other similar legal instruments?

In the first part, the topic of conscientious objection as a human right will be examined. To start with, certain definitions must be made, such as when does a civilian legally become a soldier? Especially seen in the context of service in the Russian armed forces. Who is a conscientious objector and how does that differ from being a deserter or a defector? What is the difference between an absolute conscientious objector and a partial conscientious objector? The matter of conscientious objection to military service is heavily related to beliefs, whether religious, moral or ideological. As this is a legal study, it is neither the aim, nor the ambition to analyse or systematise the beliefs held by various conscientious objectors. As Russia, however, is highly credibly accused of breaches of international law both *jus ad bellum* and *jus in bello*, the just war-doctrines of "moral equality of combatants" and "invincible ignorance" applied both through a traditional, and a pacifistic lens will assist in examining how a person may develop and exercise a sense of selective conscientious objection. In essence, them seeing war not in itself as morally unjust, but the war in Ukraine as a particularly immoral war that they would refuse to take part in.

Part two will take these definitions and apply them to the ongoing situation in the partially mobilized Russia. As the war in Ukraine at the time of writing is an ongoing conflict with its end far out of

sight, there exists a need to draw a line where further developments after a certain date will not be examined. The line will therefore be drawn on the 25th of June 2023, the date of the so called (failed) Wagner coup. Future historians, working with the privilege of hindsight, would be more qualified to identify turning points and divide up the war in different phases and thusly this is not an attempt to draw grand conclusions on the course of the war (even if a consequence of the coup may be that conscripts will be more likely to be ordered to fight in Ukraine), but rather an abstention from prematurely analysing potential future developments.[13] As the focus is on conscientious objection to armed service, the first year and a half of the war may also be considered adequate for a person to develop and maintain such a conscience if genuine as, if eligible, that person would already have had a high chance of been drafted, or if not, had sufficient time to voice their conscientious objection. Either through applying for alternative civilian service – an uncertain remedy established by Russian domestic law which will be examined further below, or through other measures, such as seeking international protection – another uncertain alternative established through international law, which also will be further analysed below. Topics that will be discussed within these parameters are how Russia's military is structured and more importantly how military drafting has been implemented. Specifically, the Russian procedure for applying for status as a conscientious objector (i.e., civil alternative service) will be examined to determine what its strength and weaknesses are and how has it been implemented in war time? An argument will be made that the procedure, while on paper quite adequate, in practice has been implemented to such a lacking degree that it can be argued that conscientious objectors in Russia have suffered persecution at the hands of the state and military.

In part three, this potential persecution will be analysed to see if it is compatible with the definitions and requirements of the relevant legal source of international refugee law. The response from the EU and individual member states to Russians seeking refuge on conscientious objection grounds will also be analysed. The analysis will be contrasted to the historical background of cases involving conscientious objectors from Russia and the Soviet Union seeking refuge in EU member states, providing background to these states reluctance to accepting Russian conscientious objectors. The sum of this argument being that the EU and its individual member states could, and possibly should, do much more to accommodate conscientious objection to military service. Especially those exercising their objection against a conflict that is also strongly condemned by the state parties at hand.

[13] See: Elisabeth Braw, Wagner's Revolt May Weaken Russia's Draft (Foreign Policy, 26 June 2023) <https://foreignpolicy.com/2023/06/26/wagner-revolt-russia-conscription-ukraine-war/#cookie_message_anchor> (accessed 23.10.2023).

1.3. Material and Method

Building upon and contextualising the research on refugee status for conscientious objectors to military service (such as Bailliet, 2006 and Çinar, 2021) the aim of this study is to examine the rights of Russian conscientious objectors under the fields of international human rights and refugee law. This will be accomplished through a legal-dogmatic analysis of the international human rights norms which bind Russia and the common international refugee law norms of the EU member states.

In examining whether conscientious objection to military service is recognized as a human right in the treaties binding Russia – the International Covenant on Civil and Political Rights (ICCPR) as well as the analysis and judgements of its governing treaty body the Human Rights Committee (HRC) alongside the European Convention on Human Rights (ECHR) as well as the judgements of the European Court of Human Rights (ECtHR) – will be analysed.

Of these a few further words on the ECHR is warranted as the relevancy of the convention to the topic at hand is complicated. At the launch of Russia's invasion of Ukraine, the Russian Federation was a party to the European Convention. However, after being suspended from the Council of Europe (CoE) due to its conduct, the Russian Federation withdrew from the Organisation.[14] This means that in accordance with Article 58(3), Russia also denunciates the Convention due to its withdrawal from the CoE. A denunciation of the ECHR, however, takes six months to come into effect according to Article 58(1).[15] This means that for a large portion of the first year of the war in Ukraine, both sides of the armed conflict were bound by the ECHR. To add to this a lot of the countries that Russians eligible for the draft have fled to both in continental Europe and in the Caucasus, are bound by the ECHR. Due to these reasons a certain focus on ECtHR jurisprudence is relevant for this study.

Examining the dichotomy of personal conscience and duty in war would be incomplete without tying it into the larger context of just war-doctrines. This is because the representatives of the state and conscientious objectors may have very different approaches to this topic. Juxtaposing the traditional, dominant just war-doctrines with a pacifistic approach will help in attempting to better understand and portray the role and responsibility of the soldier to determine the morality and conscionability of participating in war, both through the eyes of the state as well as a conscientious objector. The writings on just war-theory by leading pacifist scholar Edmund Pries critiquing the traditional

[14] Council of Europe Committee of Ministers "Resolution CM/RES(2022)2 on the Cessation of the Membership of the Russian Federation to the Council of Europe" (12 March 2022) CM/RES(2022)2.

[15] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as, amended) (ECHR) (adopted 4 November 1950, entered into force 3 September 1953), art 58(1).

positions of Michael Walzer and Francisco de Vitoria therefore helps bring light in general terms on how a conscientious objector would approach this topic in contrast to the approach of states. Contextualising this in a legal sense, these doctrines are contrasted to the very real breaches of both *jus ad bellum* and *jus in bello* that the Russian side is credibly accused of in its war against Ukraine. Clarifying when a soldier may be entitled to selectively conscientiously object to a particular war due to its nature and the way in which it is fought.

When analysing the domestic side of the coin, the Russian procedure for applying for and fulfilling alternative civil service instead of the military variety will be examined through the Russian federal law that defines and regulates this process. The critical analysis of the Russian alternative service will be spearheaded by the arguments made by the ECtHR, both the judgement claiming the sufficiency of the institution – *Dyagilev v. Russia*, (2020), but also the Joint Dissenting Opinion of Judges Pinto De Albuquerque, Keller and Schembri Orland to this case highlighting some insufficiencies in the process. As Russia is an authoritarian state engaged in war, detailed and reliable documents relating to drafting matters and appeals are not widely available. This makes the reporting by free and oppositional news outlets the next best option to uncover such stories. A few stories of conscientious objectors having this right infringed during the days of the draft upon have been highlighted by the media. In lieu of the difficulty of accessing relevant documents from Russian domestic courts, the analysis of potential persecution of Russian conscientious objectors will be based on profiles done by the St. Petersburg-based news outlet Fontanka, London-based BBC Russian, as well as the Riga-based independent news outlet Meduza. An analysis of Eurostat statistics on the number of males with Russian citizenship who have sought asylum in an EU country during the last ten years will also clarify how many, if any at all, Russian conscientious objectors have attempted to apply for asylum in an EU member state due to persecution resulting from their conscientious objection.

If such potential persecution could make one eligible for refugee status is analysed with the help of the main hard law source of international protection – The 1951 Convention Relating to the Status of Refugees and its 1967 protocol (1951 Convention). In accordance with article 35 of the 1951 Convention as well as article 2 in its 1967 Protocol, signatory states undertake to cooperate with the treaty body the United Nations High Commissioner for Refugees (UNHCR) in fulfilling the obligations contained within the Convention. In such, the guidelines and statements of the UNHCR carry much authority in interpreting the Convention and custom in the field of refugee law. The interpretive handbook by the UNHCR – The UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR handbook) will be a valuable tool in examining the scope of the 1951

convention in relation to conscientious objection. Since the publication of the UNHCR handbook significant changes have been seen in the practice of states as well as jurisprudence within the field of refugee status of deserters and conscientious objectors. This necessitated the publishing of the UNHCR Guidelines on International Protection No. 10 – another soft law source assisting in understanding international jurisprudence on handling refugee status claims by persons that for one reason or other refuse to perform military service. A second hard law source of interest is the EUs attempt at harmonizing the standards and practice for handling applications for international protection - Directive 2011/95/EU of the European Parliament and Council of December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (EU Qualification Directive) - which also introduced subsidiary protection another remedy of interest for this study.

2. Military Service and Conscientious Objection

2.1. Military Oaths and Oath-breaking

There are many reasons that a draftee or a serving soldier in the armed forces of the Russian Federation would refuse to fight in Ukraine and therefore seek international protection. These can range from being a conscientious objector to war in general, to objection to the war in Ukraine in particular. Such a refusal could also be based on the conduct of the Russian armed forces in the war in Ukraine – either in general or directed towards their unit in particular. Refusal of armed service can however also be based on a general fear of combat, or a concern that the fighting forces do not get enough support that fighting would amount to more than a suicide mission. Some may be ready to fight for the Russian armed forces in other situations, but don't consider Ukraine as a legitimate enemy because of their close cultural bonds, and oftentimes even close personal bonds of the fighters to persons on the other side of the conflict. Some, who at the time of being drafted might have had an unwavering faith in their country and military may also have a change of heart when faced with the realities of the war and combat in it. Regardless of when, why, and how a refusal to take part in compulsory armed service takes form, there usually exists severe repercussions for an individual taking such a stance. When such repercussions are handed out, the reasoning for refusing to fight is often secondary to the method one applies to not fight. When no legal avenues for avoiding military service is available a person may resort to means such as draft-dodging, desertion or defection. Such labels are often uncritically applied to a person refusing military service, which is a trap that is easy to fall into when discussing conscientious objection. It is therefore vital to define what conscientious objection to military service is, and what it is not.

This chapter will therefore examine the dichotomy between the duty of military service to one's state and the internal ethical or religious convictions that may compel a person to refuse such service. To achieve this one must define when military service, especially in Russia starts and ends – but also how one could go about to end it prematurely. As the representation of premature and unilateral ending of military service, desertion's relationship with conscientious objection will be examined. This aims to highlight how desertion as a mean and conscientious objection as a reason are two separate phenomena – but two separate phenomena that may overlap in certain situations. After approaching the topic of conscientious objection in a somewhat backward way of defining what it is not, the latter parts of this chapter will define what it is, both generally and in the context of international law. The status of conscientious objection as a human right and the sources for where

such a right is derived with a special focus on the instruments binding Russia will lay the groundwork for further examination into this topic.

To define military service, one must define a point in time where a person is no longer a civilian, but rather a soldier, carrying with them all the rights and obligations that such a status would include. The swearing of an oath of military service can be seen as an, albeit imperfect, dividing line between when refusal to perform military service would fall within the ambit of desertion and conscientious objection, at least in the form of an absolute refusal to be a part of the armed forces of one's state. Imperfect in the way that personal convictions can change over time, meaning that the conviction one holds when swearing such an oath might not be the conviction one holds at a point later in life when a soldier is called on by their state to perform acts of military force on their behalf. But applicable in the way that one, having sworn such an oath, a person has expressed consent to be put into the service cycle of completing their military training to then be placed either in active duty or the reserve, and therefore expected to answer a call to arms if the state demands so. Using the military oath as a cut-off point between military and civilian life is not without its problems, as it often carries with it more of a symbolic and traditional connotation than outright legal ones, especially when it comes to international law. Nevertheless, it can be considered to represent the moment when an individual takes an oath of service, recognising their will to take up arms for their state and be a part of a military force. Within the military, obedience is cherished in order to guarantee a functioning and orderly organization.[16] As is tradition in most societies the oath of military service is sworn, where the recruit promises to uphold the values of their society and to respect and follow the orders of their superiors. But blind obedience is not called for by many countries.[17] Thus allowing soldiers the agency to apply their conscience in cases of manifestly unlawful orders. This study focuses on a specific armed force, in a specific conflict. Namely, the armed forces of the Russian Federation in the war in Ukraine and how potential persecution of conscientious objectors to service in this armed force might result in a right to international protection for such individuals. This necessitates looking at the specific domestic Russian conditions on this topic. So, what is it that Russian conscripts swear to do and uphold? In Russia, the oath of military service goes as follows:

> "I, (full name), solemnly swear allegiance to my Fatherland - the Russian Federation. I swear to sacredly observe the Constitution of the Russian Federation, strictly comply with the requirements of military regulations, orders

[16] Edmund Pries, 'A Soldier's Right Not to Fight: Breaching the Insuperability of Military Oaths' (2012) 44/45 Peace Research p. 31-32.
[17] See: Pries (2012) p. 67-69.

of commanders and superiors. I swear to adequately fulfill military duty courageously defend the freedom, independence, constitutional order of Russia, the people and the Fatherland".[18]

The Russian oath thus does not contain any references to any potential (un)lawfulness of orders, instead demanding strict complying of orders by commanders and superiors. It was signed into Russian domestic law through article 39 in the law «*О воинской обязанности и военной службе*» № 53-ФЗ» (11 Febuary 1993).[19] Previous versions of the law referred to non-use of force against one's own government and readiness to do military service both on the territory of the Russian Federation, as well as abroad.[20]

When such an oath has been sworn, a Russian conscript would be expected to complete basic training followed by service and then being placed in the reserve if one does not feel inclined to sign on as a professional soldier. In the reserve a person would go on to live their life, with the obligation of answering the call if, and when, a war and a subsequent mobilisation was to come.

2.2 Desertion, Defection and Draft Dodging – Methods of Avoiding Military Service.

As the partial mobilisation of September 21st, 2022, was underway, many military age draftees and reservists would be faced with the reality of being sent to war. Having sworn an oath to fight for one's country and obey one's superiors there may be few legal avenues to avoid such a fate, meaning that the temptation of non-legal methods would be greater.

An early avenue of avoiding military service before it starts would be draft dodging. To clarify, the term "dodging", may be considered to entail both legal and non-legal methods of avoiding military service.[21] In this study the legal methods of avoiding military service, such as exploiting loopholes in domestic law, will not be considered to fall within the definition of draft dodging. As it would be disingenuous to bundle exercising one's right to, for example, receive a medical exemption or

[18] In Russian: **"***Я, (фамилия, имя, отчество), торжественно присягаю на верность своему Отечеству — Российской Федерации. Клянусь свято соблюдать Конституцию Российской Федерации, строго выполнять требования воинских уставов, приказы командиров и начальников. Клянусь достойно исполнять воинский долг, мужественно защищать свободу, независимость и конституционный строй России, народ и Отечество*"., Translation into english by; Kerchtt.ru 'Military Oath of the Russian Federation. When Do They Take the Oath in the Army after Being Drafted? How Is the Oath Taking by the Soldiers of the Russian Army' < https://kerchtt.ru/en/voennaya-prisyaga-rossiiskoi-federacii-kogda-prinimayut/> (accessed 27 February 2023).

[19] Russian Federal Law No. 53-F3 (Федеральный закон от 28.03.1998 N 53-ФЗ "О воинской обязанности и военной службе) (adopted 6 March 1998, entered into force 12 March 1998), art 39.

[20] Kerchtt.ru 'Military Oath of the Russian Federation. When Do They Take the Oath in the Army after Being Drafted? How Is the Oath Taking by the Soldiers of the Russian Army' < https://kerchtt.ru/en/voennaya-prisyaga-rossiiskoi-federacii-kogda-prinimayut/> (accessed 27 February 2023).

[21] Jason Friedman, "Draft Dodging", in Margaret E. Beare (ed.) Encyclopaedia of Transnational Crime and Justice (Sage, 2012) p. 110.

applying for alternative service into the negatively loaded phrase "draft dodging". A more fitting phrase may therefore be "draft *resister*" for those who employ non-legal methods such as hiding from the reach of the military authorities.[22] In this study the more commonly used term "draft dodging" will however be applied as is common when referring to people resisting to participate in a draft.[23] Such a definition does bring draft dodging closer to desertion, while still separating them by the point in time when the refusal to participate in armed service is done – draft dodging before the beginning of armed service and desertion while in the middle of it.

This study subsequently adopts the definition of desertion as the refusal to perform military actions, often specifically such actions that would include combat, by an individual already enrolled in an armed force that has been ordered to perform such actions by a military command with the powers to issue such orders. A definition of desertion as it relates to the field of public international law can also be found in the *Max Planck Encyclopaedia of Public International Law*, as "the unauthorised individual or collective abandoning of one's duty or post without permission or resisting the call up for military duties".[24]

There is an important distinction drawn by Rosas between a deserter and a defector. The latter would be someone who actively abandons their comrades in arms to aid the hostile forces, while a deserter is simply someone who wants to avoid the military service, but does not hold any intent to aid the hostile forces they would be expected to fight.[25] The political motives and ideology of the deserter therefore may play a role in the status assigned to them in domestic law, as well as in international law. Defection, at least when apparently rightfully attributed, will therefore not be focused on further in this study. A, perhaps naïve, assumption is made that the state receiving such a defector would find it in their interests to adequately look after the defector. In such a case the defector would find more effective protection in the receiving states internal legislation, than in the international refugee law system.

Desertion has historically carried a great stigma with it and has most often been severely punished through either the death penalty or through long prisons sentences. A loss of citizenship has also occasionally been accompanied with being convicted for desertion.[26] Such punishments have been recognized within the field of international law as something necessary for a state to be able to maintain discipline and an effective military force, enabling a state to when necessary, exercise their

[22] Ibid.
[23] Ibid.
[24] Ebrahim Afsah, "Deserters", in Rudiger Wolfrum (ed.), The Max Planck Encyclopaedia of Public International Law, Through: Heike Niebergall-Lackner, "Status and Treatment of Deserters in International Armed Conflicts" (2016) International Humanitarian Law Series Vol. 47 p. 20.
[25] Allan Rosas, The Legal Status of Prisoners of War, p. 388, through Niebergall-Lackner (2016) p. 21.
[26] Niebergall-Lackner (2016) p. 24.

right to individual or collective self-defence in accordance with article 51 of the UN Charter as well as customary international law.[27]

In Russian domestic law, the penal code sets out the punishment for draft dodging and desertion as follows:

> "Draft, or military service, evasion and desertion are criminally prosecuted. Evasion of military service is punishable by a fine, three to six months in prison, or up to two years in prison (Article 328). Desertion is punishable by imprisonment for up to seven years, and up to ten years in the event of armed conflict or in the case of collective desertion (Article 336). Escape from a unit is punishable by imprisonment for up to six years or imprisonment in disciplinary battalions with a prison sentence of up to two years (Article 337)"[28]

One can note here that the penal code sets out different punishments depending on when the refusal to be a part of the armed forces takes place. Already evading a draft may result in a prison sentence, but the length of that sentence is significantly increased when it is deemed to constitute a desertion. This length is yet increased even more in cases of war time or if the desertion is deemed to have a collective nature.

As stated, the reason for refusing military service can be grounded in many different reasons that, while all legitimate from the personal point of view of the deserter, might not always be so from a legal one. Such a decision could be based on a fear of combat or losing faith in the military command or the prospects of victory. Personal considerations such as worrying for the family at home or battle fatigue can also be a ground for such a decision.[29] None of these reasons are however equitable with conscientious objection, as such a reason to refusal to fight builds on a rather specific human experience – conscience.

2.3 Conscientious Objection to Military Service

This conscience – based on either political, religious, or ethical convictions – carries with it both ethical and legal implications in a refusal to perform military service. Ethical in the way that such a refusal would not be grounded in personal gain, but rather adherence to a particular world view that rejects war either in an absolute sense or selectively. And legal, as it pertains to the right of freedom of thought, conscience, and religion which will be discussed below. Conscientious objection to

[27] Ibid. p. 62.
[28] Rudi Friedrich, 'Conscientious Objection and Desertion in Belarus, Russian Federation, and Ukraine' (*Connection e.V.*, 24 March 2022) <https://en.connection-ev.org/article-3522> (accessed 21 January 2023).
[29] Niebergall-Lackner (2016) p. 1.

military service is thus understood within the scope of this study as the refusal to perform compulsory military service based on moral, ethical or religious convictions. Such a conviction could be based on a general pacifistic philosophical or religious belief rejecting all war and armed service. It could also be based on the objection to a specific conflict that fulfilling armed service would require involving oneself in. It is within the right to maintain and act according to personal beliefs, mainly religious but also other deep held conscientious beliefs, that the right to conscientious objection has been derived. The right to conscientious objection therefore has its origins within religious rights and the human right of freedom of belief.[30] A defining factor in conscientious objection to military service is the genuineness of the convictions. The objection to military service would therefore need to be based on specifically that philosophical or religious world view that rejects war, not on the fear of combat or care for one's physical safety. In the UNHCR Guidelines on International Protection no. 10, a conscientious objector is defined as following:

> "Conscientious objection to military service refers to an objection to such service which "derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives." 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."[31]

This wording is significant because the High Commissioner recognises that the objection to armed service is not required to originate from a lifelong ethical or religiously based condemnation of armed force. Instead, one can object to certain uses of force or have changed one's mind after committing oneself to service within an armed force.

To exercise conscientious objection is in essence to assert the primacy of personal morals and international law above the self-interest of the state.[32] When a state with a conscription army does not provide for any legal avenues for conscientious objection to armed service, conscientious objectors have applied several legal, as well as non-legal, alternatives. These include accepting non-

[30] Mădălina Preda, Sorin Pînzariu, "The Freedom of Thought and Conscience – The Status of Conscientious Objector to Military Service" (2022) Annals: Series on Military Service vol 14(2) p.112-113.
[31] UNHCR, "Guidelines on International Protection No. 10, Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees" (3.12.2013) UN Doc HCR/GIP/13/10 §3.
[32] Emily N. Marcus "Conscientious objection as an Emerging Human Right" (1998) 38 Va. Journal of International law 507, p. 510-513.

combat roles in the military, such as maintenance or logistical assignments, for those willing to accept such a compromise. It may also include feigning medical conditions that would disqualify them from service, accepting the legal consequences such as prison sentences or compulsory labour, or migrating to a different country where they would escape service.[33]

If drafted to fight in a war, a conscientious objector may be forced to resort to the methods of avoiding military service described in chapter 2.2 – i.e., draft-dodging or desertion. This highlights the differences between desertion or draft dodging as a method of, and conscientious objection as a reason for avoiding military service. A conscientious objector may be labelled as a deserter, but not all deserters are conscientious objectors, and neither would all conscientious objectors be deserters. Incidentally, to accommodate conscientious objectors, states may implement a system of alternative service, constituting either civilian service outside of the armed forces or service in the armed forces in a strictly non-combatant role.[34] Exercising such accommodations would not label a conscientious objector as a draft dodger in any legal sense, but in case of such accommodations being non-existent, draft-dodging might seem a viable alternative to avoid military service.

In the internal law of the state in focus, the Russian Federation, the right to refuse military service on conscientious grounds is guaranteed through article 59(3) of the Constitution.[35] This was further concretised trough the law on Civil Alternative Service No. 113-FZ passed in 2004, where Article 2 recognizes the right to substitute military service for this alternative service if military duties go against an individual's convictions or religious beliefs.[36] This law will be further analysed in chapter 4.2. The right of potential Russian draftees to apply for civil alternative service did however not appear in a vacuum. It has rather been adopted to bring Russian domestic law in line with the international human rights instruments that bind and form Russian human rights legislation.

2.4 Conscientious Objection as a Human Right

Conscientious objection is often not explicitly mentioned as a human right but can be derived from other rights, more specifically those on freedom of thought, conscience, and religion. Conscientious objection may therefore be called a derivative right. Certain exceptions exist, however. Article 10(2)

[33] Preda, Pînzariu (2022) p. 113-114.
[34] For definition see: UNHCR Guidelines no. 10, §3.
[35] Constitution of the Russian Federation, (Adopted 12 December 1993, entered into force 25 December 1993, last amended 4 July 2020), art. 59(3).
[36] Russian Federal Law No. 113-FZ (Федеральный закон от 25.07.2002 N 113-ФЗ «Об альтернативной гражданской службе) (adopted 28 of June 2002, entered into force 10 July 2002), art. 2. See also: 'Country Report and Updates': Russia (War Resisters' International, 15.5.2005) <https://wri-irg.org/en/programmes/world_survey/country_report/en/Russian%20Federation> (accessed 27 February 2023).

in the Charter of Fundamental Rights of the European Union recognizes that people have the right to conscientious objection.[37] The right is included within the provisions on freedom of thought, conscience, and religion and does not specify any further what is encompassed by the term "conscientious objection". It therefore does not explicitly specify objection to military service, but also such as in the case of, for example performing certain medical services.

A specific reference to conscientious objection to performing obligatory military service in a hard law instrument can be found in the 2005 Ibero-American Convention on Young People's Rights article 12(1).[38] The right is however restricted to youths, which in the context of the Convention is defined to persons aged between fifteen and twenty-four years old.[39]

Neither of these regional instruments bind Russia, the state in focus of this study. Although inexplicit, the right does not however remain unrecognized within the jurisprudence under other international human rights instruments. The ICCPR, ratified by Russia in 1969, recognises the freedom of thought, conscience, and religion in article 18.[40] Stating that:

> "1. 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.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."[41]

While not explicitly mentioning the right to conscientious objection, the convention does in its second paragraph prohibit coercion which would impair a person's freedom to adopt a religion or belief of his or her choice.[42] The treaty body established under the ICCPR, the HRC is composed of

[37] Charter of Fundamental Rights of the European Union (adopted 18 December 2000, entered into force 1 December 2009) 2000/C 364/01.
[38] Ibero-American Convention on Young People's Rights (adopted 10-11 October 2005, entered into force 1 March 2008), Article 12(1).
[39] Ibid. art. 1.
[40] See: UNOHCHR, "Ratification of 18 International Human Rights Treaties" available at: <https://indicators.ohchr.org/> (accessed 13.4.2023).
[41] International Covenant on Civil and Political Rights (ICCPR) (adopted 16.12. 1966, entered into force 23.3.1976) UNTS vol. 999 art. 18.
[42] ICCPR art. 18(2).

independent experts and tasked with monitoring the implementation of the treaty.[43] Being the authority on the rights enshrined within the ICCPR, their interpretation recognizing the far-reaching nature of the right is almost tantamount to the textual content of the treaty as they in their General Comments No. 22 (1993) stated the following;

> "Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. 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 belief. When this right 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. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service."[44]

In their General Comment, the HRC therefore recognised conscientious objection to military service as a right derived from article 18 of the convention and in states where this right has been recognised through law or practice, prohibited discrimination among conscientious objector based on from where this belief is derived as well as between them and other members of society. This is a stark contrast to its original stance on the subject as it previously in the case *L.T.K v. Finland* (1984) had stated that:

> "The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as implying that right".[45]

The re-interpretation of the protection of freedom of thought, conscience, and religion under the ICCPR that included a requirement that state-parties provide for the possibility to refuse military service on a conscientious basis was further enshrined by the HRC in the case of *Min-Kyu Jeong et al. v. The Republic of Korea* (2011). The case concerned the right to conscientious objection on

[43] See: UN OHCHR, "Treaty Bodies – Human Rights committee", <https://www.ohchr.org/en/treaty-bodies/ccpr> (accessed 26.9.2023).
[44] UNHRC, "CCPR General Comment no. 22: Article 18 (Freedom of Thought, Conscience, and Religion)" (30.7.1993) CCPR/C/21/Rev.1/Add.4, §11.
[45] *L.T.K. v. Finland*, Comm no. 185/1984, (Admissibility decision) (UNHRC, 18 October 1984) §5.2.

religious grounds as the applicant, a Jehovah's Witness, refused to take part in compulsory service in the South Korean armed forces. The domestic court system of South Korea deemed that article 18 of the ICCPR only guaranteed the right to request alternative service for conscientious reasons but does not provide the right to refuse to take part in armed service and demand alternative service when the call to armed service comes.[46] The HRC was not of the same opinion, stating that the rights enshrined in article 18 are non-derogable, even in times of a public emergency. As the right to conscientious objection can be derived from article 18, a state may not impair it through coercion.[47] The HRC further argued on the topic of alternative service that:

> "A State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights."[48]

Aside from this, there have been five other cases concerning conscientious objectors to military service before the HRC further solidifying the committee's stance that this right is protected under article 18 of the ICCPR.[49] Other UN human rights bodies that have recognized conscientious objection to military service in various resolutions are the UN Commission on Human Rights in nine resolutions and subsequently its successor the UN Human Rights Council in four resolutions, the latest from 2022.[50] In resolution 50/43 (2022), the Human Rights Council recognizes a development where conscientious objection to military service is considered in the UN mechanisms as a part of the *forum internum* dimension of ones beliefs and therefore absolute and non-derogable.[51]

The regional approach on conscientious objection to military service of the European Court of Human Rights (ECtHR) has been described as *forum externum*, meaning that it constitutes an external manifestation of one's beliefs and therefore subject to certain limitations.[52] In accordance with article 9(2) of the ECHR, these limitations have to be prescribed by law, necessary in a

[46] *Min-Kyu Jeong et al. v. The Republic of Korea*, CCPR/C/101/D/1642-1741/2007, (views) (UNHRC, 27 April 2011), § 2.2.
[47] Ibid. § 7.3.
[48] Ibid. § 7.3.
[49] See. *Durdyyev v. Turkmenistan* (CCPR/C/124/D/2268/2013); *Dawletow v. Turkmenistan* (CCPR/C/125/D/2316/2013); *Nazarov et al. v. Turkmenistan* (CCPR/C/126/D/2302/2013*); Jong-bum Bae et al. v. Republic of Korea* (CCPR/C/128/D/2846/2016); and *Petromelidis v. Greece* (CCPR/C/132/D/3065/2017).
[50] See: UN Commission on Human Rights resolutions: E/CN.4/RES/1987/46, E/CN.4/RES/1989/59, E/CN.4/RES/1991/65, E/CN.4/RES/1993/84, E/CN.4/RES/1995/83, E/CN.4/RES/1998/77, E/CN.4/RES/2000/34, E/CN.4/RES/2002/45 and E/CN.4/RES/2004/35 and UN Human Rights Council resolutions: A/HRC/RES/20/2 (2012), A/HRC/RES/24/27 (2013), A/HRC/RES/36/18 (2017), A/HRC/RES/50/43 (2022).
[51] UNHRC "Conscientious Objection to Military Service – Analytical report of the Office of the United Nations High Commissioner for Human Right" (11.5.2022), Res A/HRC/RES/50/43 §5. See also: UN Human Rights Council resolutions A/HRC/42/39, §60 (b) and A/HRC/WGAD/2019/84, §42.
[52] See: UNHRC, res A/HRC/RES/50/43 §13.

democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[53]

The ECtHR has recognized conscientious objection as a right falling within ECHR article 9 on Freedom of thought, conscience, and religion. This was first recognized in the case *Bayatyan v. Armenia* (2011).[54] The case concerned, Mr. Bayatyan, another member of the religious group Jehovah's Witnesses refusing to perform compulsory military service in the Armenian armed forces and subsequently was sentenced to prison.[55] The refusal to partake in any form of military service is a central antecedent in the faith of Jehovah's Witnesses, making this a question of freedom of thought, conscience, and religion which is protected under article 9 of the ECHR. In previous cases concerning conscientious objection, the ECtHR has referred to Article 4(3)(b) that states that the prohibition of slavery and forced labour does not include:

> "…any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service."[56]

This was interpreted in previous jurisdiction in the Court as leaving the recognition of conscientious objection within the margin of appreciation of member states domestic law.[57] In *Bayatyan v. Armenia*, however, the Court, interpreting the Convention as a living instrument concluded that this no longer should be the case and that the complaint should be examined only under Article 9 not in conjunction with article 4(3)(b).[58] In other words conscientious objection to military service is a question of the right to freedom of thought, conscience, and religion, not whether it is a legitimate exception to the prohibition on forced or compulsory labour. The reasons for this were that more and more of the signatory states to the ECHR had implemented recognition of conscientious objection in their domestic laws to the point that only four other CoE member states had not implemented such a legislation at the time of the alleged infringement of the applicants right to freedom of conscience.[59] The Court also referred to the HRCs conclusions on conscientious objection being guaranteed under article 18 of the ICCPR.[60] Therefore, this study adopts the view that within the jurisprudence under the human rights treaties binding Russia, conscientious objection

[53] ECHR art. 9(2).
[54] *Bayatyan v. Armenia,* App no 23459/03 (Judgement, Grand Chamber) (ECtHR, 7 July 2011).
[55] Ibid. §26-40.
[56] ECHR art. 4(3)(b).
[57] Bernadette Rainey, Elizabeth Wicks, Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017), p. 79
[58] *Bayatyan v. Armenia,* App no 23459/03 (Judgement, Grand Chamber) (ECtHR, 7 July 2011) §102, §109.
[59] Ibid. §46–49.
[60] Ibid. §58.

to military service is an inseparable aspect of the right to freedom of thought, conscience, and religion. Thus, further analysis of the manner in which this right is implemented is required.

It has been recommended that to guarantee the right to conscientious objection to military service states should; 1) Give all persons affected by military service access to information on conscientious objection, their rights and how to apply for such status. 2) This application procedure should be free and easily available. 3). Such a right should not only be guaranteed to persons that are absolute conscientious objectors, but also to those selective objectors that are willing to serve in some circumstances, which they see as just, while not in other situations that they see as unjust. 4) The availability to exercise this right to conscientious objection should be implemented in a non-discriminatory fashion where a distinction between beliefs, be they religious or non-religious or the nature of them is not made.[61] How Russia thus has managed to implement the right to conscientious objection domestically will be examined both *de jure* and *de facto* in chapter 4. Although before that a deeper examination of the extent of the right of conscientious objection to military service is warranted to answer the following questions. Can a person be selective in which cases and which wars they consider military service to conform to their conscientious beliefs, or is the right restricted to those who engage in absolute conscientious objection rejecting all military service as inherently wrong? Lastly, what role should the soldier even have in questioning the orders and directives coming from their military and political leadership?

[61] Preda, Pînzariu (2022) p. 114.

3. Selective Conscientious Objection - Refusal to Take Part in an Illegal War.

3.1 Pacifism, Responsibility and Conscience

Is there such a thing as a just war? The question has entertained philosophers and theologs throughout the centuries. This is hardly the place to give a thorough analysis of the history of ideas on the subject, but an examination of two of the main just war-theories as they pertain to the subject and the pacifist critique of them help widen the understanding of conscientious objection. What is the responsibility of a regular soldier to make moral judgements on their actions and participation in war? Or is the responsibility squarely put on the military command and political leadership? And how would someone who views war as morally wrong inherently in itself and regardless of context argue the case? Adherents to these two views can be divided into "absolute" and "selective" conscientious objectors. While the previous chapter discussed the former, this chapter will examine selective conscientious objection and why many states find it harder to recognize such rights. The nature of the war in Ukraine and Russia's breaches of international law, both *jus ad bellum* and *jus in bello*, will be examined to see how a person may argue that certain warfare is morally tolerable while maintaining a firm conscientious objection to other forms.

The traditional, Walzerian, view on the prospect of a "just war", named after the just war-theorist Michael Walzer has been criticized from a pacifistic view by Edmund Pries.[62] One could approach the former view as approximating a point of departure for state actors while the latter would be closer to that of conscientious objectors. This approach has its benefits in illustrating that while both actors could be in agreement that the regular soldier has some agency to make conscientious determinations on the acts they are associated with, they could be very far apart in what they, in practice, consider to be within such a prerogative.

According to the doctrine of the Moral Equality of Combatants, in the Walzerian definition, combatants on both sides each seek to kill one another, and have therefore forfeited their right to not themselves be killed. They are both acting as morally equal servants of their respective states, both equally the transgressors and victims.[63] The war in itself being seen as resulting from not a "relation between persons but between political entities and their human instruments".[64] Pries criticizes this from a pacifist angle by claiming that while combatants on both sides may be morally equal, they are so in the sense that they do not have the right to kill the other nor have they conceded their right

[62] See: Edmund Pries, "Moral Equality of Combatants and Invincible Ignorance: Two Just War Doctrines in Which Pacifists have a High Stake" (2017), The Canadian Journal of Peace and Conflict Studies (2017) vol. 49(1). See also: Michael Walzer, "Just and Unjust Wars: A Moral Argument with Historical Illustrations" (Basic Books 1977).
[63] Pries (2017) p. 46.
[64] Walzer, (1977) p. 36.

not to be killed. He does however concede that the moral equality doctrine, viewed either through the lens of equal culpability or blamelessness of the combatants, that it does promote empathy towards combatants of either side.[65] On the other hand, the traditional stance of most pacifist communities Pries writes, is that refusal to take part in warfare is expected of its members and that they should accept the consequences of this conscientious stance, even if it would lead to martyrdom. If the state in question, however, provides for some alternative to armed service and the conscientious objector nevertheless opts for that armed service, they have in the eyes of the community conceded their role as victims and instead adopted one of a perpetrator.[66] This highlights the conflicting requirements and expectations placed on conscientious objectors. Aside from the internal dimension, where one may hold differentiating moral qualms on armed service and participation in hostilities, there also may exist contradicting pressures from one's community. On one hand the state and society and their demands of a would-be soldier and on the other hand the demands of a community, for example a strictly pacifistic religious grouping like the Jehovah's Witnesses or a political grouping denouncing the war in particular, (or war in general). In the collision course of these conflicting demands is an individual caught between martyrdom in the service of their state, or their belief.

It is for this reason that alternative service for conscientious objectors is of such importance and why one may argue that, in the absence of such effective remedies, there may exist a need for other states to afford international protection to individuals caught in such a situation. Traditionally, however, there has not been much understanding afforded to regular soldiers to make judgement calls on whether the agree morally with certain conflicts.

The doctrine of Invincible Ignorance has its origins in the writings of Francisco de Vitoria as early as 1529. Its central tenet being "*princes should rule, soldiers should fight*" – meaning that it is not the soldier's job to determine whether a war is just or not.[67] Pries highlights that it is not as simple as that as Vitoria condemned "wilful ignorance", highlighting that personal conscience and irrefutable evidence against the justness of the war could negate the notion of a soldier being above (or below) determining whether their side of a conflict is in the right.[68] Building on this, Pries highlights that if a soldier cannot formulate why their acts of war are just, then they should probably not engage in those acts – and if ignorance is the expected position of the average soldier or civilian, this would amount to an admission that warfare is incompatible with a democratic society.[69]

[65] Pries (2017) p. 47.
[66] Ibid. p. 48.
[67] Ibid. p. 56.
[68] Ibid. p. 56
[69] Ibid. p. 57.

Aside from the grand doctrines of just wars and responsibility, there are the of basic human experiences such as regret and growing and developing as a person in turn changing one's mind on matters. During their lifetime someone may develop a sense of conscientious objection to war or armed service that they did not have from the outset. Subsequently, the Organisation for Security and Co-Operation in Europe (OSCE) recommends its member states to extend the possibility of conscientious objection to include professional soldiers, instead of only recruits, both prior to and during military service and recognizes that this has been done by its members states Belarus, the Czech Republic, Germany, Romania, Slovakia, Slovenia, Spain, Switzerland and the United Kingdom.[70] They however also acknowledge that it may potentially be problematic due to the fact that a willingness to fight in other conflicts may cast doubts on the sincerity of the conscientious beliefs as well as how such beliefs easily could be construed as being of a political character, not a dictate of conscience.[71] Pries lists a number of reasons why a person may choose to take the role as a soldier and fight in a war, none of which involve any particular bloodlust or hatred towards the other side of the conflict.[72] For example, one may have been compelled to fight by their state for example through a draft, such as many Russians have found themselves through the ever-expanding partial mobilisation. In such cases one may have just "gone with the flow", as Pries calls it, as one may answer the call to arms without much consideration or guidance to choose other paths until it is too late. One may also have been misled or convinced or even after careful consideration concluded that the war one is to take part in is "just" only to, after further deliberation or experience with the reality of combat come to a different conclusion. Then there is the question of compulsion, either from social bonds such as demands from friends and family or societal demands such as a promise of a paying job or education. Pries here argues that such arguments do pass some of the blame from the individual on to society but does not rid the individual of their agency nor their responsibility.[73] Instead of promoting martyrdom of the conscientious objectors, one should promote the responsibility of the community, in the first hand the state but also, if required, the international community, to provide avenues for one to refuse armed service and to regret their participation in armed service.

[70] OSCE, "Human Rights of Armed Forces Personnel - Compendium of Standards, Good Practices and Recommendations, (2021) (OSCE Office for Democratic Institutions and Human Rights (ODIHR) and Geneva Centre for Security Sector Governance (DCAF)) p. 142. – For a list of member states recognising selective conscientious objection, see also: OSCE, "Conscientious Objection to Military Service", <https://www.osce.org/files/f/documents/1/2/480251.pdf> (Accessed 22.9.2023).
[71] Ibid. p.140.
[72] Pries (2017) p. 49-50.
[73] Ibid. p. 50.

3.2 *Jus ad Bellum* – the Illegality of Russia's War

Russia's war on Ukraine has been met with wide condemnation as an illegal act of aggression in contravention to article 2(4) of the Charter of the United Nations. On the 1st March, 2023 the UN General Assembly, in an emergency special session, voted in favour of resolution A/es-11/L.1 condemning the war in Ukraine, stating that it constitutes an act of aggression by Russia and demanding that Russia would cease hostilities immediately.[74] In the Security Council a resolution that would demand Russia to withdraw its troops and stop the war was vetoed by Russia itself.[75] Eleven of the Councils members voted in favour, while China, India and the United Arab Emirates Abstained. Even with a lack of decisive Security Council action, the conduct of states within the UN mechanisms proves that there is a strong international consensus that the Russian war in Ukraine is illegal and constitutes an act of aggression.

Aggression, as defined under the amended Rome statute establishing the International Criminal Court (ICC), is an illegal act consisting of the use of armed force by one state against another state's sovereignty, territorial integrity, or political independence, or in a manner otherwise inconsistent with the UN charter.[76] The persons responsible for this crime are those "in a position to effectively exercise control over or to direct the political or military action of a state".[77] In practice this means that only high-ranking state officials may be held legally responsible for crimes against the peace.

Traditionally, the legal view on the criminality of aggression lies in that it is the political collective, the state, that is wronged through having its sovereignty impeded on.[78] Dannenbaum, however, argues that this is an incomplete view of the matter as what separates aggression from other infringements on a state's sovereignty is the human suffering it brings about – as such the main victims would not be the state entity, but rather the individuals killed fighting in lawful self-defence as well as the civilians harmed in collateral damage.[79] Continuing by stating that;

[74] UNGA, "Aggression against Ukraine" (1 March 2022) UN Doc A/ES-11/L.1.
[75] UN News, "Russia Blocks Security Council Action on Ukraine" (25 February 2022) <https://news.un.org/en/story/2022/02/1112802> (accessed 23 February 2023).
[76] Rome Statute of the International Criminal Court, (adopted 17 July 1998, entered into force 1 July 2002) UNTS vol. 2187, No. 38544, art. 8bis(2).
[77] Ibid. art. 8bis(1).
[78] See: Walzer 1977 p. 58.
[79] Tom Dannenbaum, "Why Have We Criminalized Aggressive War?" (2017) The Yale Law Journal vol 125 no 5, p. 1247.

> ”What is unique about illegal war among violations of states’ rights—what makes it criminal, when no other sovereignty violation is—is the fact that it entails the slaughter of human life, the infliction of human suffering, and the erosion of human security.”[80]

If a war is illegal, then the killing of enemy combatants and any resulting collateral damage could not be justified.[81] Here lies a normative interpretation of the wrongs of the soldiers fighting in a war of aggression. On one end of the spectrum as only cogs in a larger machine, no more accountable for the wrongs than an individual taxpayer in the aggressing state, to directly accountable for their participation in the illegal act of aggression.[82]

Echoing the doctrine of Invincible Ignorance, it has been argued that in imposing a duty (perhaps even when it is only the case of a right) to object for members of an armed force in carrying out orders that would entail a crime against peace, it could bring with it unforeseen consequences and threaten global security.[83] As it would be unserious to presume that regular soldiers would be capable to determine the politics and laws of war in such a manner that a large portion of an army would exercise such a duty or right if ordered to commit a crime against the peace. If they however could reasonably fear to be sentenced for partaking as a lower-ranking soldier in an unjust war, this could have catastrophic consequences for the safeguarding of human rights in conflicts. Soldiers may be more inclined to fight more ferociously for victory, not wanting to subject themselves to the victor’s mercy if there is a risk of being persecuted of being part in an armed force that commits a crime against the peace.[84] This may also incentivise soldiers to commit war crimes if they were to think that this could bring about victory as they already are making themselves guilty of committing international crimes.[85]

In the Walzerian “moral equality of combatants”-view a soldier has obligations when it comes to their conduct in the war, in other words, their conduct that falls under *jus in bello*. When it comes to *jus ad bellum* the question of culpability and responsibility is lifted from the individual soldier.[86] Pries, on the other hand, highlights the individual moral responsibility of the soldiers as citizens to assess the justness of the war in question. Instead, the debate should rather circle around whether the accountability for the potential *jus ad bellum*-violation should be shared equally, or if the

[80] Dannenbaum (2017) p. 1270.
[81] Cecilia M. Bailliet, “Assessing Jus Ad Bellum and Jus in Bello within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum” (2005) 20 Georgetown Immigration Law Journal 337 p. 338-340.
[82] Dannenbaum (2017) p. 1248.
[83] Tom Dannenbaum, ”The Criminalization of Aggression and Soldier’s Rights”, (2018) European Journal of International Law 29(3) p. 869.
[84] Ibid. p. 869.
[85] Ibid. p. 869.
[86] Pries (2017) p. 49.

decision-making leadership or the members of the public that agitate for such a war should be held to a greater degree of accountability.[87]

A common theme across all views and doctrines analysed is therefore that the regular soldier does not carry a responsibility to assess the legality of the war that they partake in. But what if they do so anyway, exercising selective conscientious objection to refuse to participate in the specific war that they consider unjust? The notion that one cannot expect of a soldier to be able to determine the justness of a war is of course not a presumption that certain soldiers would not be able to do so. And guaranteeing a regular soldier legal immunity for participating in an illegal war does however not remove their moral culpability in the wrong committed.

The nature of the war in Ukraine with Russia as the clear aggressor and breacher of *jus ad bellum* does not strengthen a "moral equality of combatants"-doctrinal stance on the conflict. While soldiers on both sides of the conflict can both be seen as perpetrators and victims, caught up in tide of two states colliding with the individual soldier having little power to influence the machinery of state, the fact that one state is exercising its right to self-defence while the other acts as the aggressor does change the victim-perpetrator dynamic. One could argue that if one concedes such a point, one should also concede that no conflict can truly be said to have true moral equality of soldiers on both sides, but that is not necessarily true. In the age of the UN-charter and its article 2(4) (on the non-use of force in international relations) contra article 51 (on states' rights to individual and collective self-defence) there exists a legal fact of which side is more in the wrong also outside the arena of moral semantics. Would that then necessarily place further requirements on the individual soldier on the Russian side to refuse armed service? Perhaps, but it could also mean that there is a further responsibility on society and the international community to accommodate a person to be able to refuse armed service on conscientious grounds, perhaps also to enable them to escape eventual persecution that would follow such a refusal. As Dannenbaum writes, such international protection would not hinge on the potential criminal liability a soldier may face when acting out orders that would constitute a crime against peace, but rather on whether there is a risk of being associated with the wrong committed.[88] Detaching soldiers from the moral wrong of fighting in an aggressive war should therefore not also detach them from an internationally recognised right to refuse to participate in such a conflict.

[87] Ibid. p. 49.
[88] Dannenbaum (2018) p. 867.

3.2 *Jus in Bello* – The Illegality of Russia's Warfare

Russia's war of aggression against Ukraine is not only breaching international law in the field of *jus ad bellum*. The conduct of the Russian armed forces in the war has also been condemned as credible evidence of several breaches of *jus in bello* has been documented. In resolution 49/1 of the UN Human Rights Council, the Independent International Commission of Inquiry on Ukraine was established. The Commission was tasked with examining all alleged violations and abuses of international human rights, and humanitarian law.[89] They have since reported that:

> "The Commission has documented violations, such as the illegal use of explosive weapons, indiscriminate attacks, violations of personal integrity, including executions, torture and ill-treatment, and sexual and gender-based violence. It also found that the rights of children have been violated."[90]

To add to this the head of state, Russian President Vladimir Putin as well as the Commissioner for Childrens Rights in the Office of the President of the Russian Federation Maria Lvova-Belova were issued arrest warrants from the ICC on the 17 March 2023. The warrant concerned their alleged responsibility in the unlawful deportation and transfer of population, namely children, from Ukraine to Russia.[91] This being a crime under article 8(2)(a) and 8(2)(b) of the Rome statute. These are just some of the documented breaches of international humanitarian law that Russia has been accused of during the course of the war. To this one can add personal experiences of a soldier or a recruit and stories told by people around them that could further entrench a person in a wish to express selective conscientious objection and refuse to take part in the war.

In contrast to the accountability of taking part in an act of aggression a soldier holds personal responsibility for *in bello* breaches. Through the Nuremberg principles, a soldier may not fall back on the fact that they acted accordingly to orders they were given if that action would constitute a war crime or another breach of general international law.[92] Therefore one could add that as not breaching a *jus cogens* norm is not always a matter of conscience as much as it is a baseline assumption for any actor, whether a legal or a physical person. The establishing of whether a war

[89] UNHRC Res 49/1 "Situation of Human Rights in Ukraine Stemming from the Russian Aggression", (7.3.2022) UN Doc A/HRC/RES/49/1.
[90] UN OHCHR, (Press Release) "UN Commission Concludes that War Crimes have been Committed in Ukraine, Expresses Concern about Suffering of Civilians" (23.9.2022) <https://www.ohchr.org/en/press-releases/2022/10/un-commission-concludes-war-crimes-have-been-committed-ukraine-expresses> (accessed 16.9.2023).
[91] ICC, (Press Release), "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova" (17 March 2023) <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (accessed 16.9.2023).
[92] Pries (2012) p. 35-36.

crime has been committed is often an arduous and strict process that not seldom is influenced by factors such as lack of evidence and political considerations. An act does not have to constitute a war crime to be objected to either as the threshold for what is allowed or not through personal morals often will be lower than that of war crimes.

The question of validity of refusing to take part in certain military acts, while still remaining a part of the armed forces through the lens of conscientious objection, is a question that has become relevant in many states. For example, in Israel, the refusenik movement consists of soldiers in the Israeli Defence Force refusing to carry out certain orders that they object to on a moral basis. The Israeli government does not recognize these soldier's selective conscientious objection and often try and sentence them for insubordination.[93] The inclusion of swearing to "strictly comply" with orders of commanders and superiors in the Russian military oath as discussed in chapter 2, could point to the Russian military taking a similar approach to demanding strict obedience of its soldiers. There is also a lack of international custom on how such conscientious objection to certain orders a soldier considers illegal or immoral should be handled. This is exemplified in the fact that in the International Committee of the Red Cross Review of Customary International Humanitarian Law the issue of soldiers deserting for reasons of conscience is absent and the fact that common state practice is to dishonourably discharge and/or imprison deserters acting out of their conscience.[94] Although the matter of freedom of thought, conscience, and religion is touched upon in the ICRC review, rule 104 only calls for the respect of convictions and religious practice of civilians and persons *hors de combat*, not mentioning conscientious objection neither of an absolute or selective nature.[95]

As pointed out by Baillet, there is a conflict between interests in international law between state interests and the right of conscientious objectors to specific military actions.[96] As states are keen to portray its conduct as lawful and righteous, they have a strong incentive not to give credence to persons objecting to that conduct. If a person then objects to an armed actions and does not wish to be complicit in that, then they may find themselves in a situation where the state is not so accepting of such a position.[97] This may be further complicated in cases where there are credible allegations that a state potentially has breached international law, either *jus in bello* or *jus ad bellum*, and, naturally, opposes such allegation. States may also be reluctant to grant international protection to

[93] Niebergall-Lackner (2016) p. 3.
[94] Bailliet (2006) p. 344.
[95] Jean-Marie Henckaerts, Louise Doswald-Beck, "Customary International Humanitarian Law – Volume I: Rules" (ICRC, 2005) p. 319-323.
[96] Bailliet (2006), p. 363.
[97] Ibid. p. 370.

conscientious objectors or deserters from other states to not set a precedent for their own armed forces. Driven to the point, one can here see a clash of ideals. On one hand is the collectivist ideal taking the form of a unitary, loyal and to a certain point, unquestioning military allowing the state to defend itself and project power towards other states. On the other hand, is an individualistic ideal, highlighting the personal choices, rights and conscience of individuals.

The just war doctrines of moral equality and invincible ignorance, viewed from either a traditional or a pacifistic lens, both highlight the responsibility of soldiers to maintain compliance with *jus in bello*. Through the lens of moral equality, as combatants on both sides are humanised as equally victims and perpetrators, there should exist no differentiation on who is entitled to the protection of international humanitarian law.[98]

In terms of invincible ignorance, as it is traditionally understood, the political leaders and members of high command are responsible for determinations of *jus ad bellum*. *In bello* determination however are often up to individual units or even combatants.[99] Soldiers are therefore not in control of WHY they fight, but can instead control HOW they fight, more importantly refraining from acts that would constitute war crimes.

As a soldier is not held responsible for acts that are not manifestly illegal, they are not assumed to take responsibility for such orders as they carry them out, regardless of moral objections. This would protect them from responsibility when following an order that is illegal when they are not aware of its illegality, but also, counterproductively, robs them of agency in being able to dissent to such orders as the expectation is to carry out the orders, regardless of objection.[100]

Lastly, one should also consider cases where a soldier may be placed in a situation where they are forced to choose between fulfilling an order that would constitute a war crime or facing threats to their own health or life. In international jurisprudence, duress has not been found to be a legitimate excuse for committing war crimes. In cases where a soldier may be forced to violate human rights or fundamental freedoms, the UN General Assembly Declaration on Human Rights Defenders (53/144) states that:

> No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.[101]

[98] See: Pries (2017) p. 48-49.
[99] Ibid. p. 56.
[100] Bailliet (2006) p. 369.
[101] UNGA Res 53/144 "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" (8 March 1999), UN Doc A/RES/53/144, art 10.

On the other hand, in the ICTY case of *Prosecutor v. Erdemovic* (1997), the reason of duress due to threats to the defendant's life were not deemed to be a complete defence to having committed a war crime.[102] The case concerns a soldier in the Serbian forces that was coerced into participation in the mass executions which took place in Srebrenica. The defendant stated that he had been told when trying to refuse to take part in the massacre that he either would participate or die alongside the victims, stating that he chose the former because of his family.

Mr. Erdemovic did not argue that he would have refused on conscientious grounds, but one could easily see a similar situation where someone who would (selectively) conscientiously object to an order would be coerced into fulfilling it. Bailliet highlights that this indicates how the expectations on the individual in cases where they are coerced into taking part in war crimes are that they should make sure to never be put in such a situation where this could become a reality. In essence meaning that such an individual should be expected to either dodge the draft or in a later stage desert.[103] Failing to do so would necessitate a person facing the consequences, either as a convicted war criminal or subjecting themselves to the mercy of the coercer.

One could therefore ask – if the international community condemns the war and the criminal conduct it is waged in, then can it really expect of individuals to lay aside potential conscientious scruples and partake in the war on the side of the aggressor? Yes, the right to conscientiously object to military service is recognized in international human rights law, but such a right becomes vaguer when it comes to selective conscientious objection. While the validity of practicing such a selective conscientious objection in relation to the war in Ukraine in an international law-sense may be strengthened by Russia's *jus ad bellum* and *jus in bello* conduct, it is not as valid domestically. In the next chapter, the domestic situation in Russia is discussed. How does Russia accommodate conscientious objectors to military service? Have such accommodations been scrutinized by any international legal bodies? And how has the situation for Russian conscientious objectors developed during the partial mobilisation?

[102] *Prosecutor v. Erdemovic*, (Judgement, Appeals Chamber) (ICTY, 7 October 1997) Case no. IT-96-22-A.
[103] Bailliet (2016) p. 380.

4. Exercising Conscientious Objection in Russia

4.1 The Draft

Now that we have delved into the theoretical implementation of conscientious objection and the international legal precariousness of Russia's war, we will delve into the real and practical implications of the war in Russian society. Who is it that is being drafted? How is the mobilisation carried out? Are there adequate measures for persons to express their conscientious objection and through that be granted exception to being drafted? Is there a way to change one's mind on the righteousness of serving in the Russian armed forces if one for example has sworn the military oath and is in active service or reserve?

States have the entitlement to call up their citizens to perform military service without it being a violation of the rights of that individual citizen. The UNHCR, however, lays out that the service must be justified through fulfilling a few requirements. It must be prescribed by law and challengeable in a court. It also must not be arbitrarily or discriminatorily implemented, and the functions and discipline of the recruits must be based on military needs and plans.[104]

Article 59 of the constitution of the Russian Federation states that "The defence of the Fatherland shall be the duty and obligation of citizens of the Russian Federation".[105] It however also states that "A citizen of the Russian Federation shall have the right to replace military service with alternative military service in the case that his convictions or religious beliefs preclude military service, and also in other cases provided by the federal law".[106]

The Russian armed forces are described as a hybrid format made up in part by a traditional cadre-and-reserve conscript system as well as a contract-professional system.[107] While striving to professionalise their military, the armed forces are still heavily prodded up by a system of conscripts, which the U.S.-based think tank Institute of the Study of War (ISW) describes as necessary for most combat units to reach combat readiness.[108] The pool of conscripts is maintained through a system of conscription where individuals fit for military service are identified among the male, military aged portion of the population are called to present themselves to the military authorities. Out of these a

[104] UNHCR Guidelines no. 10. §5,6.
[105] Constitution of the Russian Federation, art 59(1).
[106] Ibid. Art 59(3).
[107] Kateryna Stepanenko, Frederick W. Kagan, Brian Babcock-Lumish, "Explainer on Russian Conscription and Mobilization" Institute for the Study of War (ISW) (5 March 2022) <https://www.understandingwar.org/sites/default/files/Explainer%20on%20Russian%20Conscription%2C%20Reserve%2C%20and%20Mobilization%204%20March%202022.pdf> (accessed 30 March 2023).
[108] Ibid.

portion are conscripted into compulsory military service until they are placed in the reserve.[109] On September 21st, 2022, those in the reserve, as well as those about to be drafted, faced a, for many, unpleasant reality as the presidential decree announcing the first (of what is speculated will be multiple) wave of the draft meant many of them risked being sent to fight in Ukraine. The presidential decree did not specify neither, the length of the mobilization nor any specific number of reservists that would be drafted.[110] In March 2023, the Russian state further tightened its conscription laws, moving the conscription notices onto the government web portal Gosuslugi.[111] The new amended law No. 127-F3 states that a conscription notice is considered delivered when it shows up in the web portal, and received after a week has passed. If one fails to visit a draft office, then that person will be banned from travelling abroad as well as lose their driving licence, buy and sell real estate, take out loans and will not be able to register a small business.[112] Such measures seem to be striving to further complicate the process of seeking alternative service due to conscientious reasons and to leave the country in order to avoid the draft. Of those two possibilities, alternative service is the one which would be most preferrable as it does not involve upending one's life and seeking an uncertain future abroad. As such, it is necessary to further examine how alternative service for conscientious objectors, functions in Russia, and how accessible such an alternative is.

4.2 Availability of Alternative Service in Russia

In the Soviet Union, conscientious objection to military service was sparsely recognized. Some alternative service was recognized and implemented, mainly within the armed forces, but there was no specific right to conscientious objection and the access to alternative armed service was arbitrarily implemented.[113] The practice was also to recognise conscientious objectors not as persons exercising

[109]According to ISW these were 267 000 conscripts in 2019, 263 000 in 2020 and 261 000 in 2021. See: Stepanenko, Kagan Babcock-Lumish (2022).
[110] See: Zoya Sheftalovich "Full Text of Putin's Mobilization Decree — Translated" (POLITICO, 21 September 2022) <https://www.politico.eu/article/text-vladimir-putin-mobilization-decree-war-ukraine-russia/> (accessed 2023).
[111] Pjotr Sauer, "Russia Rushes through Law to Tighten Military Conscription" (The Guardian, 12 April 2023) <https://www.theguardian.com/world/2023/apr/12/russia-military-conscription-law-kremlin> (accessed 18 April 2023).
[112] Russian Federal law No. 127-F3 (Федеральный закон от 14.04.2023 N 127-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации) (adopted 11 April 2023, entered into force 14 April 2023) – changing Article 10 of Russian Federal Law No. 53-F3 (Федеральный закон от 28.03.1998 N 53-ФЗ "О воинской обязанности и военной службе) (adopted 6 March 1998, entered into force 12 March 1998), see also: Tatiana Stanovaya "Russia's New Conscription Law Brings the Digital Gulag Much, Much Closer" (Carneige Endowment for International Peace, 17.4.2023) https://carnegieendowment.org/politika/89553 (accessed 4.10.2023).
[113] Anton Bebler, "Conscientious Objection in Socialist States: A Comparative Perspective" (1991) Communist and Post-Communist Studies Vol. 24(1) p. 105.

their own free will and moral convictions, but rather as mentally unstable or deranged, carrying with it severe social stigma and limitations on being able to perform many jobs or acquire higher education.[114]

In contemporary Russian domestic law, the alternative service of conscientious objectors is defined in Federal legislation through the Civilian Service Act, No. 113-FZ. In article 2 it is stated that every Russian citizen is entitled to have compulsory military service replaced by civilian alternative service if such military service would go against their beliefs (*убеждениям*) or religion (*вероисповеданию*), or if they belong to one of the indigenous peoples of the Russian federation and leads a traditional life.[115] In exercising this right, a person will be examined by a draft commission (*призывная комиссия*) which includes a hearing by their military commissariat (*военный комиссариат*) as well as undergoing a medical examination.[116] The application to replace armed service with alternative service has a deadline of half a year before the draft is to take place, meaning 1st of April for the autumn contingent and 1st of October for the spring contingent. If one has been granted a deferment from the draft for reasons such as temporary illness or university studies one has a time window of ten days from the termination of such a deferment to submit an application for alternative service.[117] The burden of proof for the veracity of the convictions of a person seeking alternative service falls on the applicant. The military commissariat only examines in person requests and makes its judgement based on statements of the applicant, as well as persons willing to vouch that their beliefs are genuine.[118] Documents required are the applicants *curriculum vitae*, a letter from their place of work or study, as well as other documents that the applicant deems relevant.[119] The final decision of the military commissariat is adopted through simple majority where at least two thirds of the members of the draft commission are present.[120] A negative ruling can be based on the applicant, 1) missing the deadline of the application, 2) the documents do not correspond to the citizens arguments that the service is contrary to their beliefs or religion, 3) the documents provided contain deliberately false information, 4) they failed to show up to the hearings twice without good reason, or 5) they previously have been given the opportunity to perform alternative civilian service but have avoided it.[121] The last of these is significant as it closes the door to alternative military service for those who later in their life have developed a conscientious

[114] Ibid. p. 107.
[115] Russian Federal Law No. 113-FZ (Федеральный закон от 25.07.2002 N 113-ФЗ «Об альтернативной гражданской службе) (adopted 28 of June 2002, entered into force 10 July 2002), art. 2.
[116] Ibid, art. 10(1).
[117] Ibid. art. 11(1).
[118] Ibid art. 12.
[119] Ibid. art. 11(2).
[120] Ibid. art. 12(3).
[121] Ibid art. 12(4).

objection to military service and therefore have not immediately exercised their right to such an alternative. This could in practice mean that a person either is a conscientious objector from youth or is considered to have reneged that right. If an application is refused by the draft commission, the applicant may appeal the decision in the local courts with the implementation of the decision being suspended during the court proceedings.[122] When granted alternative service an applicant is assigned a place of alternative military service by the military commissariat on recommendation by the draft commission.[123]

To be consistent with the requirements laid out by the HRC, alternative service needs to be "compatible with the reasons for conscientious objection, of a non-combatant or civilian character, in the public interest and not of a punitive nature".[124] The Council of Europe's Committee of Ministers have in *Recommendations No. R(87)8 to Member states Regarding Conscientious Objection to Military Service* recommended the following principles for a procedure determining the legitimacy of a person's beliefs.[125] 1) "States may lay down a suitable procedure for the examination of applications for conscientious objector status or accept a declaration giving his reasons by the person concerned" 2) "Persons liable for conscription shall be informed in advance of their rights." 3) Time limits should be given "having due regard to the requirement that the procedure for the examination of an application should, as a rule, be completed before the individual concerned is actually enlisted in the forces". 4) The examination should include "all the necessary guarantees for a fair procedure". 5) "An applicant shall have the right to appeal against the decision at first instance" 6) "The appeal authority shall be separate from the military administration and composed in such a manner as to ensure its independence". 7) The law may also provide for the possibility for and obtaining conscientious objector status in cases where the requisite conditions for conscientious objection appear during military service or periods of military training after initial service."

The OSCE recognizes that if alternative service is perceived as a significantly less onerous alternative than military service it strongly incentivises people to seek this for other reasons than conscientious ones.[126] This being coupled with the prospects of being required to live in barracks and take part in military exercises as well as the potential to be deployed on the battlefield leaves

[122] Ibid. art. 15.
[123] Ibid. art. 14(1).
[124] UNHCR Commission on Human Rights, Res 1998/77, "Conscientious Objection to Military Service" UN Doc E/CN.4/RES/1998/77, §4.
[125] Council of Europe Committee of Ministers, "Recommendations No. R (87) 8 Regarding Conscientious Objection to Military Service" (9 April 1987).
[126] OSCE, "Human Rights of Armed Forces Personnel: Compendium of Good Practices and Recommendations" (2021) p. 127.

alternative service as a very enticing offer.[127] Due to these reasons, there is a legitimate reason to examine the genuineness of a person's beliefs as well as implementation of a longer alternative service than the military kind. Such measures do however have to be balanced and reasonable to avoid them from taking the form of punishments, rather than light deterrents.[128]

In the case Dyagilev v. Russia, The ECtHR was tasked with examining the procedures for conscientious objection to military service in Russia. The case concerned a person requesting to swap out his armed military service to the civilian service alternative on the grounds of his pacifistic beliefs. These pacifistic beliefs had been realized as he attended an event organized by the Russian non-governmental organization Committee of Soldiers' Mothers while searching for a way to legally avoid military service.[129] During the hearing at the local military commissariat, the Russian authorities did not find his convictions to be sufficiently proven to be genuine on the ground that he had not provided the sufficient documentation. He had only provided the authorities with his *curriculum vitae* as well as a letter of recommendation from his employer.[130] The applicant subsequently had a second opportunity to provide sufficient evidence of his convictions, for example a witness testimony, as he challenged this decision to the St. Petersburg City Court. He then again submitted the same lacklustre evidence as before.[131] In the words of the Russian domestic courts:

> "... the right to have compulsory military service replaced with its civilian alternative does not imply that a citizen can unconditionally choose between the military and civilian types of service, and it does not mean that an individual's negative attitude towards military service in itself ... guarantees the right to have compulsory military service replaced.
>
> This position is also reflected in the practice of the European Court of Human Rights, which has stated that only when opposition to military service is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs does it constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 [of the Convention] ...
>
> [The court] finds that it is not sufficient for a citizen to simply indicate that his personal convictions conflict with his obligation to serve in the army in order to have compulsory military service replaced.

[127] Ibid. p. 127.
[128] Ibid. p. 127.
[129] *Dyagilev v. Russia*, App no 49972/16 (Judgement, Final) (ECtHR, 10 March 2020) §8.
[130] Ibid. §9.
[131] Ibid. §12.

> An individual must substantiate such an assertion, indicate the reasons and circumstances that impelled him to ask for the replacement [of military by civilian service], list facts confirming those of his deep beliefs that conflict with the [the obligation to perform] military service, and adduce relevant evidence."[132]

The position of the Russian domestic courts is to highlight the reason of conscience as a requirement for being granted alternative service. A simple disliking of military service does not entitle a person to this alternative. The reasons of conscience must also be sufficiently proven before a military commissariat, something that the domestic courts have found to be in line with the practice of the ECtHR.

In his submission to the ECtHR, the applicant, Dyagilev, argued that there was no independent mechanism in Russia that examines requests for alternative service on conscientious grounds, as well as that his request had not been treated in full compliance with domestic Russian procedure.[133] He also argued that the insignificant number of annual applications for alternative service as well as the significant increase in the length of the alternative service as compared to regular military service should suffice to prove that one seeking this remedy has genuine convictions.[134] The applicant criticised the composition of the draft committee as there were no independent experts or members of the public and that its funding was reliant on the military commissariats.[135] The judicial appeal process was also challenged by the applicant as the court could not rule on whether an applicant was to be granted access to alternative service but only if the application would be returned to the commission for reconsideration.[136] The Russian Government submitted that the procedure for determining whether a person qualifies for alternative service is effective and independent, providing a statistic from the Ministry of Defence claiming that of 4110 applications made between 2014 to 2017, almost 98% of them had been allowed.[137] This figure was challenged by the Movement of Conscientious Objectors, a domestic non-governmental organisation acting as a third-party intervener, who provided that out of those applications that they had assisted in between the years 2015-2017, only 115 out of 242 applications had been granted.[138] They heavily criticised the procedures, claiming that all the decisions de facto are made by the head of the military commissariat, with the other members of the draft committee simply concurring and that procedural rules

[132] Ibid. §15.
[133] Ibid. §40.
[134] Ibid. §41.
[135] Ibid. §42-44.
[136] Ibid. §48.
[137] Ibid. §50, 53.
[138] Ibid. §56.

frequently being violated.[139] This being worsened by the fact that only four out of fifty six appeals before domestic courts had been decided favourably to the applicant.[140]

In its decision, The ECtHR relied on the judgement in *Bayatyan v. Armenia* (2011) that deeply held opposition to military service due to conscientious or religious reasons is included within the negative obligation for states not to interfere with a person's freedom of thought, conscience, and religion, which is guaranteed under article 9 of the ECHR. Limiting the right through denying a conscientious objector alternative service is not considered to be necessary in a democratic society.[141] The Court, however, also admitted that states may require substantiation of whether the beliefs are genuine, and if that substantiation is not sufficient deny such alternative service. States, however, carry the positive obligation that such procedures must however be effective and accessible as well as independent.[142] When examining whether this is the case with the Russian procedure, the Court states that it is unfortunate that there is such a high variability in the composition of the draft commissions, but has not found anything suggesting that there has been any incentives or pressure put on the commission to deny alternative service from applicants.[143] The Court was satisfied with the appeals process before domestic courts and did not consider itself in a position to make any determinations on the differences in the statistics provided by the state and the third-party intervener, simply proclaiming that it confirms "the absence of institutional bias against individuals seeking the replacement of military service with its civilian alternative".[144] It was therefore concluded that as it is not, except for in cases of arbitrariness or manifest unreasonableness, the task of the Court to make a determination of the applicants statements before the domestic authorities and it did not find any violation of fair-trial guarantees.[145] The ECtHR was therefore of the opinion that there was no reason to doubt the authority's assessment that "the applicant had failed to substantiate a serious and insurmountable conflict between the obligation to serve in the army and his convictions".[146]

In a sense one could end the query here as we have established a few facts. 1) Conscientious objection to military service is a human right recognized in the ECHR and the ICCPR through their articles on freedom of thought, conscience, and religion. 2) This right is guaranteed in Russia both through its inherence to international law, but also through the constitutionally guaranteed right to apply for alternative military service. And 3), a competent international court, the ECtHR, has a

[139] Ibid. §55.
[140] Ibid. §56.
[141] Ibid. §59-61.
[142] Ibid. §62-64.
[143] Ibid. §72-74.
[144] Ibid. §76, 81.
[145] Ibid. §87, 92.
[146] Ibid. §94.

lately as the year 2020 ruled that the Russian system for determining the validity and genuineness of one's conscientious objection to military service is sufficiently fair. This would at a glance mean that there is a sufficient domestic remedy for Russian conscripts that are conscientiously opposed to fighting in Ukraine. In turn meaning that an application for asylum based on such reasons would be unfounded. But such a conclusion is reductive and ignores a lot of facts that will be discussed below.

4.3 Potential and Real Persecution of Conscientious Objectors in Russia.

The case of *Dyagilev v. Russia* (2020) was decided with a four to three vote, where the three judges who did not agree to the ruling issued a joint dissenting opinion. They argued that the review of the applicants request for alternative military service had been ineffective at all tiers.[147] The Judges acknowledge the principle of subsidiarity, that the Court should not question the assessment of evidence by a domestic court, but also highlight that the Draft Commission had arbitrarily confined themselves as the recency and spontaneity of the applicants adoption of pacifism requires examination beyond the documents provided to the committee.[148] That the St. Petersburg City Court stated that "spontaneously crystallised convictions cannot serve as grounds for requesting permission to perform alternative civilian service" the Judges considered an even graver error as, while such spontaneity might cast doubt on the genuineness of the convictions, it does not work as proof that the convictions would not be bona fide.[149] The Judges argued that the assessment of the applicants case was plagued by an overly burdensome standard of proof, highlighting how the UN Human Rights Council in resolution 24/17 welcomed a development where many states accept the genuineness of an individual's conscientious objection without inquiry.[150] The Judges also found issue with the lack of suspensive effect in cassation proceedings, meaning that if a case is appealed to a higher instance, then an individual may be forced to perform military service in the interim until the final decision is reached.[151] If someone is then found to be a genuine conscientious objector it means that their rights to freedom of thought, conscience, and religion has been violated during that period, something that carries with it even more dire consequences in times of war. This could therefore leave open the possibility that a conscientious objector, while appealing their request for alternative service, could be sent to fight in Ukraine against their deeply held beliefs.

[147] *Dyagilev v. Russia*, App no 49972/16, (Joint Dissenting Opinion of Judges Pinto De Albuquerque, Keller and Schembri Orland), (ECtHR, 10 March 2020) §4.
[148] Ibid. §5,6.
[149] Ibid. §7-9.
[150] Ibid. §11. See also: UNHRC Res 24/17, "Conscientious Objection to Military Service" (8 October 2013) UN Doc A/HRC/RES/24/17.
[151] Ibid. §17,18.

Of interest to this study is also the Judges' general comments on the problems with the Russian system of determining who is a genuine conscientious objector. They express regret that the Court could not solve the discrepancy in the statistics on how many applicants are granted or denied alternative service yearly, noting that this fact remains unclear.[152] Another complaint the judges have is that the Russian draft commissions are not chaired by a legal expert, nor does it include any civil-society experts with specialist knowledge. This alongside the fact that one third of the commission may be absent means that military officials may be in the majority when the decision is made means that the procedure is inadequate.[153]

There are however certain arbitrary complications designed to make the alternative service not be too enticing. For example, the alternative service is significantly longer than regular military service. It also prioritises placing conscientious objectors outside of their area of residence.[154] With all these restrictions it might be expected that only the sincerest conscientious objectors would opt for this alternative. But there also exists the problem of accessibility to this alternative. The application for alternative service also has to be done six months prior to the drafting campaign that the applicant would be a part of.[155] The procedure is also backwards in the way that only persons deemed fit for military service may take part in this alternative service, but this determination is done in conjunction with the draft, meaning that anyone unexpectedly being deemed fit for duty would not be able to apply for alternative service as the time limit had run out.[156] This procedure ostensibly eases the burden on the military bureaucracy, but heavily restricts the ability for Russian conscripts to exercise their constitutionally guaranteed right to conscientious objection. The possibility to exercise selective conscientious objection is even further restricted as once one is placed in active military service, that being in cases both contractual as well as in conscription, such a person may not in practice seek alternative service, although there being no constitutional hindrance for this.[157] This in essence means that once inducted into the armed forces, a person may not exercise selective conscientious objection in conflicts that would go against their own convictions. In cases where the soldier comes to develop different opinions on warfare during their lifetime is not accommodated within this system as well as if a soldier is opposed to participation in a certain conflict.

After the start of the war in Ukraine, it has been reported that persons seeking to exercise their right to alternative service on the grounds of conscientious objection have been met with intensified

[152] Ibid. §20.
[153] Ibid. §20-21.
[154] Citizen Army Law, "On the implementation of the right to conscientious objection to military service in Russia in 2004-2016" (European Bureau for Conscientious Objection, 2016) p. 7.
[155] Ibid. p. 7.
[156] Ibid. p. 7.
[157] Ibid. p. 7.

intimidation attempts. It is reported that Russian drafting committees have been unwilling to recognize pacifist beliefs as legitimate and have even brought criminal litigation against applicants for alternative service based on them "discrediting" the Russian army.[158] It is also possible that a conscientious objector appealing their draft order would be hit with all the restrictions of their rights that the amendments in Federal Law No. 125-F3 introduced, making it hard to sustain oneself during the process.[159]

In one case reported by the independent news organization Meduza an applicant for conscientious objector status compared the Russian war in Ukraine to that of the Second World War stating that while the latter was justified, the current war in Ukraine was criminal and senseless. While granted alternative service by an agitated draft committee, he later started getting harassed by law enforcement as an unannounced police official had been part of the draft hearing and reported him for "discrediting the army".[160] A lawyer working with people seeking to exercise their right to conscientious objection to military service stated the following to Meduza:

> "[Enlistment office employees] discourage people, they say the law concerning alternative service was overturned. Or that you'll serve for four years without pay, we'll send you to Siberia to chop wood — stuff like that," the lawyer explains. "If the conscript knows his rights and turns to human rights defenders for help, he'll have a greater chance of getting alternative service."".[161]

In March 2023, the first appeal against a mobilisation order on the grounds of conscientious objection was won in a Russian court. This would at first glance provide evidence that the institution of alternative service in Russia is working as intended and capable of guaranteeing the rights of conscientious objectors in Russia. The case, however, warrants further attention as it highlights some serious flaws leading to conscientious objectors being drafted and sent to the battlefield before having the ability to exercise their right.

[158] Nadezhda Svetlova, ""Our Entire Society Is Built on Threats" How Russia's Military Enlistment Offices Intimidate Conscripts Who Seek Alternative Service" (Meduza, 25 July 2022) <https://meduza.io/en/feature/2022/07/25/our-entire-society-is-built-on-threats> (accessed 30 March 2023).
[159] Russian Federal law No. 127-F3 (Федеральный закон от 14.04.2023 N 125-ФЗ), See also: Tatyana Stanovaya (Carnegie, 17.4.2023).
[160] Nadezhda Svetlova, (Meduza, 25 July 2022).
[161] Ibid.

The 23-year-old evangelical Christian St. Petersburg resident Pavel Mushumansky received a mobilisation order at the start of the war and immediately appealed it.[162] Already at this junction warning bells are starting to sound as Mr. Mushumansky already was registered as a conscientious objector to armed service as he had gone through 22 months of alternative service in the laundry room of a mental hospital. This proves that conscientious objectors, while spared from the basic draft which for the most part consists of military training, is in practice not exempted from being drafted to fight in a real war, which constitutes an even graver infringement of that individuals' human rights. When visiting the draft office to argue against the draft order, Mr. Mushumansky was held against his will and sent to a local military base where he was invited to follow the rest of his unit to Ukraine. The officers promised him that he would only be required to perform unarmed service in a non-combat role, something that Mr. Mushumansky did not believe and therefore refused. During his stay at the local military base, he refused to wear his military uniform and only participated in cleaning otherwise reading the bible, praying and talking religion with the other recruits. The last of which was not popular as he seems to have been isolated so as not to "corrupt" the other draftees. In the meantime, his parents were challenging the draft order in court, and in November 2022 the order was invalidated. The decision was subsequently appealed by military officials dragging the process out to March 2023 where it was upheld.

Apart from the brazen infringement on the right to conscientious objection of one who already has proven the genuineness of these beliefs through the completion of alternative service, it also shows the problems with the lack of suspension that an appeal has on draft decisions as it was Mr. Mushumanskys parents who had to act as intermediaries and assist him in handling the appeal process. It is also worth noting that a successful appeal also only brings the topic back to the draft committees and does not in fact equate to a granting of alternative service.

Another story of a conscientious objector being forced into military service through the draft is that of Kirill Berezin, another St. Petersburg resident who when receiving a draft summon tried to enlist for alternative service due to his pacifist views but was detained at the enlistment office and subsequently sent to a combat unit.[163] Staying in the Belgorod region at a makeshift military camp

[162] See: Alina Ampelonskaya, "«В части называли святым». Как мобилизованному удалось доказать свое право не служить" (Fontanka 19.3.2023) <https://www.fontanka.ru/2023/03/19/72146069/> (accessed 26.9.2023). For an English version see: Anna Razumnaya, "'God will ask me why' How a St. Petersburg draftee won an exemption from military service based on his Christian faith" (Meduza, 20.3.2023) <https://meduza.io/en/feature/2023/03/20/god-will-ask-me-why> (accessed 26.9.2023) or Dasha Litvinonva, "Russia Oks Alternative Civil Service for Mobilized Believer" (AP news, 16.3.2023) <https://apnews.com/article/russia-ukraine-mobilization-civil-service-102939bcdef665e4233584d00a55e994> (accessed 26.9.2023).

[163] Marina Tsyganova, "Явка с повинной. Как мобилизованный пацифист сбежал из части перед отправкой в Украину" (BBC Russian, 1.11.2022) <https://www.bbc.com/russian/features-63463485> (accessed 26.9.2022).

in poor conditions, Mr. Berezin was threatened by his commanding officers while appealing the decision:

> "Berezin says that Lieutenant Colonel Smerdov threatened him and promised to send him to the front. "I told him that while the court was deliberating, I couldn't be sent anywhere. He said he'd give me a rifle butt to the head and, while I was unconscious, shove me in a Kamaz [a Russian truck brand]," the conscript said."[164]

With the threat of being transferred to an unknown location, Mr. Berezin fled back to St. Petersburg in a taxi. His subsequent appeal to be afforded alternate military service was denied, but he managed to secure himself a non-combat role as a mechanic and driver in the Leningrad region.[165]
While individual news articles may be argued to be anecdotal and/or insufficient, being provided with this many cases paints a picture of a systematic repression of the right of conscientious objectors to military service in the days of the draft. Conscientious objectors trying to exercise their international and constitutional human right are being met with threats, misinformation and detention in an effort to discourage and even disempower them from it.
As another Russian lawyer working with conscientious objectors to military service says:

> "It's difficult to give general advice to someone who fears being drafted in Russia, someone who doesn't want to fight in Ukraine. No one can say what another person should do — leave Russia, go into hiding, or send a letter to the army recruitment office requesting that military service be replaced with alternative, civilian service (…) People have to choose which strategy to pursue — because anyone in the army reserve is fair game in the draft — and no strategy is fail-proof."[166]

In the following chapter the first of these alternatives will be examined. If a person chooses to leave Russia and travel to an EU country because they fear being forcibly conscripted to fight in Ukraine, could such a person be eligible international protection?

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[164] "A mobilized pacifist seeks to do alternative service – The story of Kirill Berezin, who took a taxi home from the front then turned himself in" (Meduza, 3.11.2022) <https://meduza.io/en/feature/2022/11/03/a-mobilized-pacifist-seeks-to-do-alternative-service> (accessed 26.9.2022).
[165] Marina Tsyganova ""Мне не придется стрелять в людей". Мобилизованному пацифисту Березину нашли применение без оружия в тыловой части" (BBC Russian, 10 December 2022) <https://www.bbc.com/russian/news-63910972> (accessed 27.9.2023).
[166] "Prepare to Stand for your Convictions – During Mobilization, Escaping the Draft is a Legal Problem for Many Russians. Here's a Military Lawyers Advice for Those who do not Want to Fight" (Meduza, 22 September 2022) <https://meduza.io/en/feature/2022/09/22/prepare-to-stand-up-for-your-convictions> (accessed 27.9.2023).

5. Russian Conscientious Objectors as Refugees?

5.1 Legal sources of International Protection

5.1.1 International Protection under the 1951 Refugee Convention

Previous chapters have established that conscientious objection is a human right that in contemporary jurisprudence is recognised and protected under the ICCPR and ECHR through the right to freedom of thought, conscience, and religion. It has then also subsequently been established that while conscientious objection to military service is protected under Russian domestic law, the *de facto* implementation of this protection leaves much to be desired – especially in war time. Thus, it is now time to discuss whether conscientious objectors, who have exhausted all legal domestic remedies of exercising this right, yet are still forced to perform military service, could rely on international protection in an EU member state to avoid such an infringement on their rights. In order to approach the topic this chapter will analyse the legal sources of international protection that the EU member states have bound themselves to. First analysing the 1951 Refugee Convention, as well as the UNHCR's role in interpreting the convention and the signatory state's role of implementors of the Convention. After this follows an analysis of the EU Qualification Directive and its binding norms on EU member states implementation of the 1951 Convention, as well the subsidiary protection introduced under it. Further on in the chapter doctrine and jurisprudence on conscientious objection to military service as refugees is contrasted to the ongoing war in Ukraine, state practice of the EU member states as well as observable trends of Russian males applying for asylum in the EU.

The right to seek and enjoy asylum from persecution was first recognised as a human right in article 14 of the Universal Declaration of Human Rights (1948).[167] The right is however not extended to those that have made themselves guilty of serious non-political crimes or acts contrary to the purposes and principles of the UN.[168] The norm would a few years later be affirmed through hard law-instruments, as the 1951 Convention Relating to the Status of Refugees and its subsequent 1967 protocol (in this study referred to as the 1951 Convention) defines who is a refugee and lays out certain standards for how they are to be treated. In the 1951 Convention, a refugee is defined in article 1(A). In essence, a Convention refugee – as it is oftentimes called – is identified as a person outside their country of origin, that is unable to enjoy of the protection of this country of origin or to return there. The inability to enjoy that protection should also be based on a well-founded fear of

[167] Universal Declaration of Human Rights, adopted through UNGA Res 217(III) International Bill of Human Rights, UN Doc A/RES/217(III) art 14(1).
[168] Ibid. art 14(2).

persecution. This feared persecution should be for reasons of the applicant's race, religion, nationality, membership of a particular social group or political opinion.[169] This connection between the well-founded fear of persecution being causally linked to one or more of the Convention grounds is often referred to as the nexus clause.[170] In article 1(F) of the 1951 Convention several factors are listed that would exclude a person from being considered a refugee. These include if the potential refugee has committed war crimes, crimes against peace or crimes against humanity. Another reason for exclusion of eligibility is if the applicant for international protection has committed a serious non-political crime outside the country of refuge prior to that of entering the country. The third reason is if a person has made themselves guilty of acts contrary to the purposes and principles of the United Nations.[171]

The international body responsible for overseeing the 1951 Convention – the UNHCR – is the leading actor responsible for interpretation and normative guidance on the contents of the treaty and the rights enshrined therein.[172] Through compromise, it is however the states themselves who control the implementation of the treaty and subsequently the refugee status determining processes of persons applying for asylum within their jurisdiction.[173] The state parties' interpretation of the convention should however, put rather simply, be that of a living instrument, purposive and in context rather than literal and with regard to the jurisprudence of the domestic courts in other member states so as to avoid there being many different interpretations of the same legal source.[174] As such, the analysis of whether Russian conscientious objectors are eligible for international protection will have to be two-pronged, as the international norms and the UNHCR:s authoritative guidelines will be analysed in chapter 5.3 and the state practice of EU-member states regarding past domestic legal proceedings determining asylum claims of Russian conscientious objectors will be analysed in chapter 5.4.

[169] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, (1951 Convention) art 1. See also: Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, Oxford University Press, 2021) p. 24.
[170] Michelle Foster, "Causation in Context: Interpreting the Nexus Clause in the Refugee Convention" (2002) Michigan Journal of International Law Vol. 23(2), p. 266.
[171] 1951 Convention art 1(F).
[172] James C. Hathaway "Refugees and Asylum" in Brian Opeskin, Richard Perruchoud, Jillyanne Redpath-Cross (ed.) "*Foundations of International Migration Law*" (Cambridge University Press, 2012), p. 179.
[173] Ibid. p. 179.
[174] Ibid. p. 182.

5.1.2 International protection under the EU Qualification Directive

Further expanding the topic, the European Union has made attempts to harmonize and further the mechanisms for protection of refugees among its member states. The 1997 Treaty of Amsterdam gave the EU powers to adopt legally binding instruments within this area, while the 1999 Tampere Declaration set out the goal of creating a Common European Asylum System (CEAS).[175] This in turn lead up to the 2004 EU Qualification Directive (last updated 2011) which builds upon the foundation laid out in the 1951 Convention. The Directive clarifies the grounds for international protection and the obligations of EU member states, while also leaving open the possibility for member states to have more favourable provisions for persons seeking international protection than those contained within the directive.[176] It also introduced the alternative measure of subsidiary protection, a measure which allows for protection of individuals who do to qualify as Convention refugees but still can be shown to be at risk of suffering serious harm if returned to their country of origin.[177] Subsidiary protection is defined as complementary and additional to the refugee protection enshrined in the 1951 convention.[178] This means that subsidiary protection is not to be seen as an alternative to refugee status – but rather as a mean to protect people in need that don't fall within the ambit of the relatively narrow refugee definition criteria. Relatedly, the main human rights instruments of interest in this study, the ICCPR and the ECHR, also contain certain rudimentary forms of international protection through article 7 of the Covenant and article 3 of the European Convention respectively. The articles do not explicitly adhere to the principle of non-refoulement but do so through the prohibition on subjecting a person in the jurisdiction of a state party to torture or to cruel, inhuman or degrading treatment or punishment.[179] As such while the main focus is on whether Russian conscientious objectors to military service could qualify as refugees under the 1951 Convention, it is also of relevance to examine whether such applicants could legally be refouled from the EU to Russia or if some form of subsidiary protection could be relevant if they were to be

[175] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, (adopted 2 October 1997, entered into force 1 May 1999) OJ C 340 11997D/TXT, art 73k, European Council, "Tampere European Council 15 and 16 October 1999" (Presidency Conclusions), §13-17.
[176] Directive 2011/95/EU of the European Parliament and Council of December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (EU Qualification Directive) (2011) OJ L 337/9, §14.
[177] EU Qualification Directive, art. 2(f).
[178] Ibid §33.
[179] ICCPR art 7, ECHR art. 3, See also: Hathaway (2012) p. 181.

deemed not to qualify for refugee status. The eligibility criteria for subsidiary protection are defined as following:

> ”A person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.”[180]

The serious harm that is laid out in article 15 include the death penalty, torture or inhuman or degrading treatment or punishment as well as “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.[181] Article 17 concerns exclusion clauses which are in line with those of the 1951 Convention. The Qualification Directive also lays out situations when a member state may lawfully refoul a refugee, being when they may be considered a danger to the security of the member state in which they are present, or if they have been convicted, by a final judgement, of a particularly serious crime and as such is considered to constitute a danger to the community.[182]

5.2 What Constitutes Persecution and a “Well-Founded Fear” thereof?

Much importance is put on the term *persecution* when assessing the need for international protection. Nevertheless, the word has not been sufficiently defined in the 1951 Convention.[183] Nor does the Convention lay out a procedure on implementation or for determining refugee status, instead leaving it up to the states to adopt sufficient measures as they see fit.[184] The UNHCR handbook provides some clarification for how states should interpret persecution. Firstly, through Article 33 on the principle of non-refoulement, it can be inferred that threat to life based on race, religion, nationality, political opinion or membership of a particular social group always amounts to persecution.[185] This is however not a comprehensive definition as other serious human rights violations also may

[180] EU Qualification Directive, art 2(f).
[181] Ibid. art 15.
[182] Ibid. Art. 21(2).
[183] Özgür Çinar “Conscientious Objectors Seeking Asylum, a Comparative Perspective, (2021) The International Journal of Human Rights Vol. 25(2), p. 184.
[184] Goodwin-Gill, McAdam (2021) p. 65.
[185] UNHCR “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees“ (UNHCR Handbook) (first issued September 1979, reissued February 2019) UN Doc HCR/IP/4/ENG/REV.4, §51.

constitute persecution, the Handbook clarifies.[186] Hathaway highlights the failure of state protection from sustained or systemic violations of basic human rights as strong evidence of persecution.[187]
In the EU Qualification Directive, there are some examples of what could constitute persecution, but the list should be considered non-exhaustive.[188] The inclusion of the term basic human rights is also unclear apart from the fact that non-derogable rights are included within this definition. Those being, in the context of the ECHR, the right to life as well as the prohibitions on torture, slavery and punishment without law, while in the context of the ICCPR also include the right to freedom of thought, conscience, and religion.[189] The latter being especially important in the case of conscientious objection. Further guidance can also be found in the EU Directive on Common Procedures for Granting and Withdrawing International Protection laying out a procedure for determining refugee status among member states. In its guidance on when to consider a country of origin as safe, in essence establishing that there is no persecution, is as follows:

> "A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:
> (a) the relevant laws and regulations of the country and the manner in which they are applied;
> (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
> (c) respect for the non-refoulement principle in accordance with the Geneva Convention;
> (d) provision for a system of effective remedies against violations of those rights and freedoms."[190]

The definition of acts of persecution in the EU Qualification Directive are acts that either are "sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights" especially those which are non-derogable or of such accumulation in various measure, some

[186] Ibid §51.
[187] Hathaway (2012) p. 185.
[188] Çinar (2021) p. 185
[189] Ibid. p. 185.
[190] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast) (2013) OJ L 180/60 Annex 1.

of which would constitute violations of human rights, that it in effect would amount to persecution.[191]

A *well-founded fear of persecution* is framed by Kim as an evidentiary burden through which the likelihood of persecution is established.[192] The standard of proof in a refugee determination process is therefore if the fear of such persecution is "well-founded".[193] Hathaway places well-founded fear somewhere between a mere *speculative* chance of persecution and a *probable* chance of persecution, highlighting formulations such as "reasonable possibility" or "serious possibility" as good practices.[194] In other instances the circumstances of the case may determine that persecution is at hand, including the applicant's subjective opinions and feelings – which may vary greatly from person to person.[195] The UNHCR also highlight circumstances where the cumulative nature of a situation may be so great that a well-founded fear of persecution may be derived from considering the situation as a whole, while different elements of the situation taken separately might not amount to persecution.[196]

It has been argued that in determining if the fear of persecution is well-founded, the analysis is often split into whether there is a subjective and an objective fear of persecution, where the latter carries much more weight in courts as the subjective fears can be assumed if an asylum application has been lodged.[197] There is no requirement that past persecution has taken place for a fear of persecution to be objectively well-founded. Such a fact would however constitute good evidence for such a fear, just as credible testimony or country of origin data also would be.[198] The important dimension is however the predicting of future harm. Goodwin-Gill and McAdam describe the practice of determining whether an individual may fear being subjected to persecution as, in essence, an attempt at prophesy as the determination is not of what has happened in the past, but rather, what may happen in the future.[199]

In determining what may constitute persecution in military matters, the UNHCR gives further guidance in their Guidelines on International Protection No. 10. Within it they highlight examining

[191] EU Qualification Directive §9.
[192] Grace Kim "Abandoning the Subjective and Objective Components of a Well-Founded Fear of persecution" (2021) Northwestern Journal of Law and Social Policy vol. 16, p. 212.
[193] Ibid. p. 198.
[194] Hathaway (2012) p. 184.
[195] Ibid. §52.
[196] Ibid. §53.
[197] Kim (2021), P. 210, 212.
[198] Hathaway (2012), p. 184.
[199] Goodwin-Gill, McAdam (2021) p. 65.

country of origin data in conjunction with the applicant's personal background, profile and experience as well as that of others in similar situations.[200] Further clarifying that:

> "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. By way of example, disproportionate or arbitrary punishment for refusing to undertake State military service or engage in acts contrary to international law – such as excessive prison terms or corporal punishment – would be a form of persecution. Other human rights at stake in such claims include non-discrimination and the right to a fair trial right (*sic*), as well as the prohibitions against torture or inhuman treatment, forced labour and enslavement/servitude. (…) (I)ndirect consequences may derive from non-military and non-State actors, for example, physical violence, severe discrimination and/or harassment by the community. Other forms of punitive retribution for draft evasion or desertion may also be evident in other situations, such as suspension of rights to own land, enrol in school or university, or access social services. These types of harm may amount to persecution if they are sufficiently serious in and of themselves, or if they would cumulatively result in serious restrictions on the applicant's enjoyment of fundamental human rights, making their life intolerable." [201]

To qualify for the protection afforded by the 1951 convention the persecution would also have to be based on the nexus of the well-founded fear of persecution being based one of the convention grounds laid out in Article 1(A), of which closest to hand for this current topic is political and religious-based persecution. The refugee determination process may therefore in practice become an exercise in determining whether there is an objective reason to fear persecution while also tying this to the nexus of it being for reasons of a refugee convention ground.[202] This connection to a convention ground does not have to be sole cause for the fear of persecution it still should be so in part.[203] As such a few words on how the Convention grounds religion and political opinion can be tied to conscientious objection is warranted before continuing the analysis.

To determine a religious-based claim the state authorities must tackle questions such as, what is a religion? What constitutes persecution in the context of religious practice? And when is the persecution for reasons of the individual's religious beliefs? According to Musalo, these questions have become even more unclear today than they were at the time of the drafting of the 1951 Convention.[204] Not much discussion on the matter was included in the *travaux prepatories* of the

[200] UNHCR, "Guidelines on International Protection No. 10, Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees" (12.11.2014) UN Doc HCR/GIP/13/10/Corr. 1. §13.
[201] Ibid. §14,15.
[202] Kim (2021) p. 210.
[203] Foster (2002) p. 335-336.
[204] Karen Musalo "Claims for Protection Based on Religion or Belief" (2004) 16 International Journal of Refugee Law 165, p. 169.

1951 Convention but the UNHCR has at a later stage given further guidance.[205] For example stating that:

> "No universally accepted definition of "religion" exists, (…) Its use in the 1951 Convention can therefore be taken to encompass freedom of thought, conscience or belief. As the Human Rights Committee notes, "religion" is "not limited … to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions". It also broadly covers acts of failing or refusing to observe a religion or to hold any particular religious belief. The term is not, however, without limits and international human rights law foresees a number of legitimate boundaries on the exercise of religious freedom…"[206]

The clear line drawn to the human right of freedom of thought, conscience, and religion means that an analysis of religion as one of the Convention criteria may have a lot to draw from the analysis of the treaties within which this right is enshrined. As such, the right to conscientious objection as derivative from the right to thought, conscience and religion may be argued to connect it to the "religion" Convention ground. In cases where the conscientious objection to military service is based in the objector's religion this connection is even more clear. Of interest is paragraph 73 of the UNHCR Handbook stating that apart from special cases, "mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status".[207] In practice this means that a member of a religious community, take for example a Jehovah's Witness, would need to substantiate that they are forced by the state to perform military service which goes against their beliefs, the simple prospect of this being a possibility would most likely not be considered a sufficient ground for refugee status. The EU Qualification directive on the other hand defines religion as the holding of theistic, non-theistic and atheistic beliefs and, *inter alia,* the "expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief"[208] Under this definition one also could make the argument that conscientious objection would qualify as the personal conduct mandated by a person's belief, thus also fitting in under such a definition.
Political opinion also warrants examination as a Convention ground. It is not necessary for a person actually to hold or voice a particular political opinion (or religion for that matter), only that it is attributed to them by the agents of persecution.[209] Hathaway describes the approach to what exactly the term "political" contains within the context of the 1951 Convention as controversial as it is

[205] Ibid. p. 170.
[206] UNHCR, "Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees" (28.4.2004) HCR/GIP/04/06) §4.
[207] UNHCR Handbook §73.
[208] EU Qualification Directive, art, 10(1b).
[209] Ibid. art 10(2), see also: UNHCR Handbook §80, UNHCR Guidelines on International Protection no. 6, §9.

broader than only party politics, but also narrower than the traditional definition involving any matter engaging the machinery of state, government or policy.[210] Some scholars have also pointed out that the burden of proof may be higher when it comes to presenting an asylum claim within the area of political repression.[211] In the EU Qualification directive political opinion is defined as " the holding of an opinion, thought or belief on a matter related to the potential actors of persecution (…) and to their policies or methods".[212] It can thus be argued that conscientious objection fits in under the political opinion-criteria as well due to the fact that those expressing conscientious objection would often be attributed, if not directly expressing, political opinions on the conduct of the state waging the conflict. This may be especially significant in case of selective conscientious objection as that concerns not an absolute rejection of military service, but rather a rejection of some particular form of military service that often would come to be attributed as a political stance. But as selective conscientious objection also is based in the individual's conscience, both forms of conscientious objection can in certain cases fall under either Convention ground. Thus, meaning that a well-founded fear of persecution based in the consequences of an applicant's conscientious objection to military service could meet the criteria for refugee status under the 1951 Convention.

The following chapter will apply the legal sources, definitions, and principles above to further analyse the topic of conscientious objection to military service as understood within international refugee law. The UNHCR practice and guidelines specifically referring to the matter will be contrasted to what this implies for Russian conscientious objectors. After that a deeper examination of selective conscientious objection through the UNHCR interpretation of the 1951 Convention and its apparent requirement of the outside factor of international condemnation of the conflict that is selectively conscientiously objected to will be examined. Lastly the EU Qualification Directive's divergent practice on conscientious objection and the criticism levied against this will be discussed.

5.3 Determining Refugee Status Eligibility of Conscientious Objectors to Military Service.

The position of the UNHCR on conscientious objection and the act of draft evasion that some objectors may be forced into was initially laid out in an Amicus Curiae brief submitted to the United States Court of Appeals.[213] In it, the UNHCR spoke out in support of two Jehovah's Witnesses from El Salvador that were seeking asylum after draft-dodging due to conscientious reasons. The UNHCR

[210] Hathaway (2012) p. 187, See also: UNHCR Handbook §32.
[211] Baillet (2006) p. 146.
[212] EU Qualification Directive, art 10 §1(e).
[213] UNHCR, "UNHCR Intervention Before the United States Court of Appeals for the Ninth Circuit in the Case of *Canas-Segovia and al. v. United States Immigration and Naturalization Service*" (31 March 1989) No. 88-7444.

held that in cases where a conscientious objector faces punishment through generally applied conscription laws for exercising that objection, one cannot expect of the applicant to prove their government's intent to persecute them, as it places an unjustified burden on the applicant.[214] Therefore, in cases of sanctions for refusing military service, especially when there are no provisions for alternative service, conscientious objectors may be considered to suffer persecution.[215] This can be described as drawing a line between prosecution and persecution, as the former being derived from a law of general application and often not amounting to the latter. Subsequently, the UN Commission on Human Rights also has encouraged states to consider granting asylum to conscientious objectors that have been forced to leave their country of origin if they fulfil the refugee status requirements of the 1951 Convention.[216] The requirement that the unwillingness to perform military service must stem from a conscientious reason is further emphasized in the UNHCR Handbook, stating the following:

> "Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. (...) A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution."[217]

The UNHCR handbook further that if such a fear of persecution could be tied to disproportionately severe punishment for the offence of draft-evasion or desertion on account of the applicant's race, religion, nationality, membership of a particular social group or political opinion there would be ground for refugee status.[218] It also explicitly lists conscientious objection to military service both based on political, moral or religious reasons as grounds from which a claim to refugee status may spring. Stating that:

> "Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions. (…) The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status

[214] Ibid p. 4-5.
[215] Ibid p. 38.
[216] See for example: UNHRC Res 1998/77, §7 and UNHRC Res 24/17 §13.
[217] UNHCR Handbook §167,168.
[218] Ibid. §169.

> should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies. In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience."[219]

Worth noting here is that the UNHCR refers to the state practice of instituting alternative service as giving rise to the validity of refugee claims with basis in conscientious objection to military service rather than the right being derived from the ICCPR or ECHR. But as that state practice is in line and often based on the jurisprudence under these conventions a link could still be drawn between the increasing acceptance of conscientious objection as a human right and a need to grant international protection to those who have a well-founded fear persecution for exercising such a right. Such a well-founded fear of persecution would be tied to a real and present risk of being forced into armed service, specifically if such service would bring with it a risk of being associated with grave breaches of international law. As discussed, being forced into such a situation would constitute a breach of a person's right to freedom of thought, conscience, and religion. Repercussions for refusing to comply with such orders could entail being subjected to disproportionate prosecution such as overly lengthy prison sentences, or even in the most extreme cases, execution if attempting to exercise conscientious objection through non-legal means such as desertion or draft evasion. The off chance of being forced into armed service would possibly not amount to a well-founded fear of persecution. But on the other hand, there may not be a requirement of an immediate draft order. Rather, a probable likelihood of such an order coupled with the consequences for refusing such orders is considered. Here country-of-origin information is important as we can recall the reports of how conscientious objectors in Russia are treated coupled with the recent amendments of law No. 127-F3 restricting many rights of persons refusing draft orders. If fear of such persecution could be tied to it being based on the nexus of one or more convention grounds, such as religion or political opinions, there may be a clear case that such an applicant could qualify as a convention refugee. And as the conscientious objection to military service ultimately is based on the applicant's convictions such a connection may easily be made.

The UNHCR also touches upon conscientious objection in their Guidelines on International Protection No. 6 discussing religious-based refugee claims, stating that prosecution of conscientious

[219] Ibid. §172,173.

objectors through such generally applied law may be considered persecution when: 1) it impacts differently on particular groups, 2) where it is enforced or applied in a discriminatory manner, 3) where the punishment itself is excessive or disproportionately severe, or 4) where the military service cannot reasonably be performed by an individual because of their genuine beliefs or religious convictions.[220] On the other hand the Guidelines state that if the avenue of alternative service (or community service as the UNHCR names it) is imposed there would be no basis for a refugee claim on grounds of conscientious objection to military service.[221] At least unless such service would be so burdensome that it would amount to a form of punishment or would require carrying out acts that also clearly defies the claimants convictions.[222] Or in the case where there would be no harsh penalties from the authorities for refusing armed service but the conscientious objector nevertheless would have a "well-founded fear of serious harassment, discrimination or violence by other individuals (for example, soldiers, local authorities, or neighbours)".[223]

Ascertaining whether a soldier has deserted for conscientious or other reasons is often not a straightforward process. This is because a deserter might be wary to disclose all the reasons for their refusal to fight, especially if they feel reasons worry about repercussions from the government or armed forces they previously have fought for. For example, would deserters from the Wehrmacht during the second world war do best in not disclosing any anti-fascist sentiments or criticise the war effort if they would have any hope to avoid serious repercussions or even executions.[224] If applied this to the case of this study one could speculate in how a deserter from the Russian armed forces, or a conscientious objector to the war might be inclined to not be too public in their armed service until safely outside of the reach of Russian authorities. In line with several other instruments and recommendations, such as that of the ECtHR, the UNHCR handbook does recommend an investigation into the genuineness of the beliefs of the conscientious objector.

> "The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions."[225]

[220] UNHCR, "Guidelines on International Protection No. 6 (28.4.2004) §26.
[221] Ibid. §26.
[222] Ibid. §26.
[223] Ibid. §26.
[224] Niebergall-Lackner (2016) p. 2.
[225] UNHCR Handbook §174.

As for selective conscientious objectors, the right to international protection is not as clear cut as for the more principled conscientious objectors that are opposed to all armed service. The UNHCR handbook does not exactly allow for picking and choosing when to exercise one's conscience regarding military actions if one is not a total conscientious objector. If the military action however would constitute a grave breach of international law, then a refusal to participate in that act could mean that ensuing repercussions could amount to persecution. The UNHCR thus recommends the following:

> "Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft evasion could, in light of all other requirements of the definition, in itself be regarded as persecution."[226]

A criticism of selective conscientious objection as a basis on which a claim for international protection could be built could be that it in theory could widen the qualification of convention refugee status to any draft-aged male citizen of a state engaged in such internationally condemned military action that is outside their country of origin.[227] In such a case overburdening the system with about half of the population of a state potentially qualifying for refugee status. Such criticism however builds and falls on the assumption that large groups of persons would avail themselves to the arduous and uncertain process of applying for asylum status for reasons other than a conscientious objection to taking part in internationally repugnant actions.

Bailliet identifies a major dividing line between those objections to a military action that is based on political opposition and those based in a religion or conscience. In determining an asylum claim, the former requires an external assessment determining if the military action has been internationally condemned, while the latter requires an internal assessment of the applicants' subjective beliefs.[228] While, in theory, religion and political opinion are of equal rank as persecution grounds falling under article 1(A) of the 1951 Convention, in practice the above formulation requiring international condemnation has resulted in asylum claims based on selective conscientious objection being

[226] Ibid. §171.
[227] Alexandra McGinley, "The Aftermath of the NATO Bombing - Approaches for Addressing the Problem of Serbian Conscientious Objectors (2000) 23 Fordham International Law Journal p. 1495.
[228] Bailliet (2006) p. 346.

dismissed as political objections that do not merit international protection, rather than an expression of conscience.[229] Often the term religion is also restrictively interpreted to include only organized religion, not personal convictions, leading Bailliet to ponder whether a moral code should not be held as equally important to religious views within refugee law.[230]

To fulfil the requirements of the 1951 Convention, a Russian conscientious objector could be required to fulfil these criteria.[231] They would have to be outside of Russia. There would have to be a genuine risk of, for example, a draft call or a reasonable suspicion that such orders would be forthcoming. The circumstances of this drafting would constitute the infliction of serious harm, such as forcing them to take part in military service that go against their conscience or association with acts that would constitute a breach of international legal norms. A genuine invoking of absolute or selective conscientious objection would also need to have been dismissed in a manner that could constitute a failure of state protection of their rights. The persecution this could amount to would also have to be causally connected to a protected form of civil or political status – in this case the right to freedom of thought, conscience, and religion. And lastly, the applicant would have to be deemed to be in need of and deserving protection, meaning that they would not have committed acts that would fall under the exclusion clauses of the 1951 Convention. Incidentally they could also perhaps argue that international protection is needed exactly to avoid being forced to associate themselves with such an act, or the need could arise simply from the conscientious aversion to war in general.

T specificities of the EU Qualification Directive is also worth discussing as persecution following a refusal to perform military service is included in the recognised acts of persecution that may trigger a right to international protection in an EU member state in cases where the performance of such service would include crimes or acts that would constitute a reason for exclusion from international protection.[232] Those being defined in article 12(2) as crimes against peace, humanity or war crimes as well as serious non-political crimes or acts contrary to the purposes and principles of the United Nations. The approach found in the Qualification Directive is therefore considered much stricter than the one of the UNHCR, highlighting the risk of being associated with grave breaches of international law instead of personal convictions as the basis for international protection.[233] The approach of the EU has been criticised by the UNHCR, as the international body stated that:

[229] Ibid. p. 345-346.
[230] Bailliet (2006) p. 346.
[231] Compare: Hathaway (2012) p. 183.
[232] EU Qualification directive (2011) article 9(E).
[233] See: Çinar p. 184, see also: Bailliet p. 368.

> "(The) UNHCR welcomes the recognition that prosecution or punishment for refusing to perform military service can constitute persecution. UNHCR understands that the provision will also apply where the refusal to serve relates to a conflict that in and of itself is contrary to public international law, such as for example when it has been condemned by the Security Council. Additionally, in line with the UNHCR Handbook and evolving human rights law, punishment for refusal to perform compulsory military service in the form of draft evasion or desertion may also be considered to be persecutory, if the reasons for refusal to serve are based on deeply held moral, religious or political convictions (conscientious objection). The question as to whether the objection is selective is irrelevant in this regard. UNHCR trusts that Member States will take this aspect into account."[234]

Through this definition on conscientious objection to military service, the EU Qualification Directive differs in approach when compared to that of how the UNHCR has approached the topic. It is sort if ironic that the EU Qualification Directive explicitly mentions prosecution for acts of selective conscientious objection, while neglecting to touch upon absolute conscientious objection, as the former has a much vaguer and more uncertain status as an internationally recognized human right than that of the latter. Nevertheless, these guidelines and principles precented in this chapter substantiate that conscientious objection to military service, both of an absolute and a selective kind, may very much constitute a ground for refugee status. Refugee law has however not always been implemented that way in practice. In the following chapter domestic cases concerning Russian conscientious objectors will be analysed to point out certain obstacles such applications previously have encountered. This will be followed up with an analysis of the current situation to discern if it is reasonable to assume that a Russian conscientious objector to the war in Ukraine could receive international protection in an EU member state on such premises.

5.4 Russian Conscientious Objectors in Court

As the refugee status determination process is handled not on an international, but rather, on the domestic level it is of relevancy to highlight a few domestic court cases handling conscientious objectors seeking asylum. Especially as the state practice concerning conscientious objectors seeking asylum has been criticised by some scholars as overly formalistic and prone to deny protection to genuine conscientious objectors.[235] In the interest of brevity and as the aim of the study

[234] UNHCR Annotated Comments on the EC Council Directive 2004/83/ECof 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or aas Persons who Otherwise Need International Protection and the Content of the Protocol Granted (OJ L 304/12 of 30.9.2004) p. 21.
[235] See: Karen Musalo "Conscientious Objection as a Basis for Refugee Status: Protection for the Fundamental Right of Freedom of Thought, Conscience and Religion". (2007) Refugee Survey Quarterly Vol. 26 (2) p. 76.

is to contextualize the topic through specifically focusing on Russian conscientious objectors, the cases studied have been limited to those concerning Russian conscientious objectors having been determined by a court in a European state. The cases concern applicants voicing conscientious objection to two other recent conflicts where one of the belligerent parties were the Russian armed forces. Both cases have been chosen due to their availability and influence on Finnish and British domestic jurisprudence and policy of that time, serving as representative of European state practice regarding Russian conscientious objectors. Analysing this precedent aims to help in casting light on questions that also are relevant for contemporary cases. Essentially highlighting different hurdles that Russian conscientious objectors have been faced with in applying for international protection after refusing to fight in wars waged by the Russian state.

In Finland the two, closely interlinked cases of Kozlov and Varfolomeyev both set a problematic precedent in the international protection of conscientious objectors. The case concerns two separate hijackings done in 1990 by Soviet defectors determined to avoid serving in the Soviet war in Afghanistan due to conscientious objection to military service. Both hijackers demanded that their separate flight land in Stockholm, but due to complications instead found themselves on the Helsinki airport. Mr. Kozlov and Mr. Varfolomeyev sought asylum based on conscientious objection. Both applicants had been labelled as mentally ill for their refusal to serve in the Afghan war.[236]

The case quickly became highly politicized, not least due to Finland's difficult relationship to the Soviet Union. The Finnish government referred to hijacking of a plane being such a serious non-political crime that it would negate a person's right to international protection.[237] This view was not shared by the UNHCR that highlighted that such a measure may be permissible if it is the only way to escape the clutches of a repressive government, such as was the case with the Soviet Union.[238] A psychological examination done by Finnish authorities determined that Mr. Varfolomeyev neither had suffered from any mental issues nor was suffering from them at present.[239] In the end the two defectors were sent back to the Soviet Union and were sentenced to five years in a penal colony. The cases were brought to the ECtHR on among other the basis that Finland had breached Article 3 of the ECHR as the extradition of these individuals may expose them to measures constituting torture or inhuman/degrading treatment. Both cases (*Kozlov v. Finland* (1991)*, Varfolomeyev v. Finland*

[236] See: "Finland's History of Forced Returns: Deporting Conscientious Objectors and a Sedated Family" (YLE News, 13 April 2017) <https://yle.fi/a/3-9564745> (accessed 27.10.2023).

[237] Susanna R, 'Sisäministeri: Kaappari menettää oikeutensa turvapaikkaan Konekaappauksen tehnyt Kozlov ei ole pakolainen' (*Helsingin Sanomat*, 3 July 1990) <https://www.hs.fi/kotimaa/art-2000002990570.html> (accessed 22 March 2023).

[238] Susanna R, 'YK:n pakolaisvaltuutettu: Konekaappaus ei estä turvapaikan myöntämistä' (*Helsingin Sanomat*, 4 July 1990) <https://www.hs.fi/kotimaa/art-2000002990800.html> (accessed 22 March 2023).

[239] Susanna R, 'Sisäministeri Jarmo Rantanen: Varfolomejevilla ei ole näyttöä poliittisesta vainosta' (*Helsingin Sanomat*, 3 August 1990) <https://www.hs.fi/kotimaa/art-2000002998330.html> (accessed 22 March 2023).

(1991)) were deemed inadmissible by the European Commission on Human Rights as it was argued that:

> "It is up to the applicant to produce prima facie evidence to show that he has serious and substantial grounds for fearing treatment contrary to Article 3 (Art.3) of the Convention. It is commonly recognised that the human rights situation in the Soviet Union has dramatically improved during the latter half of the 1980's. This has inter alia been reflected in the treatment of prisoners of conscience."[240]

The Finnish government stands by its handling of the situation as interior minister Maria Ohisalo in 2021 stated that the authorities had acted accordingly to the law at the time. She stated that the Finnish government had no intentions of digging further into the case but welcomes research done on the topic.[241] What can be learned from this is that there is a historical precedent not to accept conscientious objectors from Russia into Europe. As already established, international legal norms concerning conscientious objection to military service have evolved since the 1990s, but contemporary UNHCR and UN Human Rights Commission recommendations still would have implored state parties to consider granting asylum to conscientious objectors. It is also significant to point out that the stigmatisation of conscientious objectors as mentally ill and the subsequent stripping of certain rights, despite a psychological examination done outside their country-of-origin disputing this, was not deemed to constitute persecution. At least in a sense that it would justify such an illegal action as hijacking an aeroplane to escape such persecution.

The domestic case *Krotov v. the Secretary of State for the Home Department in the United Kingdom* (2004) concerned a Russian conscientious objector, Mr. Krotov, who had been drafted to fight in the Second Chechen War but refused to fight and subsequently applied for asylum in the United Kingdom. In his application he had stated that:

> "I do not object to fighting for my country say, in the situation of the Second World War as opposed to one in which I am required to be sent into action in Chechnya and kill innocent civilians and destroy property in a reprehensible manner."[242]

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[240] *Kozlov v. Finland*, App no. 16832/90, (Admissibility decision, European Commission on Human Rights) (ECtHR, 28 May 1991) See also: *Varfolomeyev v. Finland*, App. no. 17811/91, (Admissibility Decision, European Commission on Human Rights, (ECtHR, 2 September 1991).

[241] Maria Ohisalo, (29.7.2021) "Vastaus kirjalliseen kysymykseen KKV 421/2021 vp. Vastaus kirjalliseen kysymykseen Suomen toteuttamista neuvostoliittolaisten turvapaikahakijoiden, rajanylittäjien ja lentokaappareihiden palautuksia." <https://www.eduskunta.fi/FI/vaski/Kysymys/Documents/KKV_421+2021.pdf> (accessed 25.3.2023).

[242] *Krotov v. Secretary of State for the Home Department,* United Kingdom: Court of Appeal (11.2.2004) (C1/2002/1537/IATRF), §2.

He therefore argued conscientious objection on a selective basis. In the opinion of the British immigration authorities this was insufficient for classifying him as a Convention refugee as he had provided no ideological basis for his unwillingness to serve.[243] They however added in a direct reference to the UNHCR Handbook that he might still qualify if the war in Chechnya had been condemned by the international community as contrary to basic human conduct but had not found that to be the case.[244] Neither had the documented cases of bullying or ill-treatment in the Russian armed forces been found to have been grounded in any 1951 Convention-reasons or amounting to inhuman or degrading treatment nor would the substantial prison sentences for deserters be considered "disproportionate".[245] In the ensuing appeal the appellation court was tasked with examining whether the selective conscientious objection expressed by Mr. Krotov was genuine and in line with the protections afforded under the 1951 Convention. They also examined the approach of the immigration authorities in examining the *in bello*-conduct requirement, especially the requirement of international condemnation. In the appeal it was submitted that there was sufficient objective evidence of *jus in bello*-violations, meaning that punishment for desertion should be regarded as persecution, referencing an earlier decision in the Immigration Appeal Tribunal stating that international condemnation may shed light on the determination process, but is not definitive as that would interpolate an additional requirement of international condemnation into the text of the 1951 Convention.[246] As international condemnation is hinged on political expediency an approach requiring such condemnation would severely compromise the protection of the rights enshrined in the 1951 Convention.[247] The representative for the UK immigration authorities, on the other hand, argued that as war is accepted as a derogation to the usual norms of civil society and conscientious objection is not explicitly recognized in international instruments an attempt to make exemptions from the generally recognized power of states to compel its citizens to fight needs to be sufficiently clear, certain and objective while compliant with domestic and international law.[248] It was argued that while an important guide, the UNHCR Handbook is insufficient in defining the norms of international humanitarian law of relevance, making international condemnation a more reliable method.[249] The UK Court of Appeal favoured the *in bello*-approach of the applicant over the international condemnation-approach of the immigration authorities, stating that:

[243] Ibid. § 1.
[244] Ibid. § 2.
[245] Ibid. §12,13.
[246] Ibid. §9,10. See also: *Foughali v. Secretary of State for the Home Department* United Kingdom: Immigration Appeal Tribunal (2.6.2000), (00/TH/01513) §28.
[247] Ibid. §22,43. See also: Bailliet (2006) p. 354-356.
[248] Ibid. §48.
[249] Ibid. §50.

> "If a court or tribunal is satisfied (a) that the level and nature of the conflict, and the attitude of the relevant governmental authority towards it, has reached a position where combatants are or may be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community, (b) that they will be punished for refusing to do so and (c) that disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict, then it should find that a Convention ground has been established."[250]

The Court also highlighted that it would be untenable to return an applicant to their home country if that would place them in a situation requiring them to participate in acts that would fall under the exclusion clauses of the very 1951 Convention that they just were denied protection under.[251] Unfortunately, the Court did not recognize conscientious objection to military service as an internationally recognized right, nor through being *ipso facto* protected under the 1951 Convention. Meaning that, despite the authoritative interpretations of the competent treaty bodies which have been analysed in this study, the Court still contends that conscientious objection to military service is an internationally recognized human right. They did however recognize that selective conscientious objection manifesting in a refusal to take part in inhumane acts would implicitly amount to a political opinion which is protected as a Convention ground.[252] As such Mr. Krotov's appeal was allowed and remitted to a differently constituted Immigration Appeal Tribunal.[253]
Evidence therefore shows that the international condemnation referred to in §171 of the UNHCR Handbook is, if not absolutely necessary, of major importance when applying for international protection due to conscientious objection to a specific military action or conflict.[254] If one would place an assumed selective conscientious objector to the war in Ukraine in the place of Mr. Krotov, one could argue that either approach argued in the Krotov-case to determine whether a soldier may be forced to participate in acts described in §171 of the UNHCR Handbook are more easily argued. As even if, through the looking glass afforded to us by hindsight, the prevalence of violations of international humanitarian law in the Second Chechen War is evident, the international

[250] Ibid. §51.
[251] Ibid. §39.
[252] Ibid. §45,46.
[253] Ibid.
[254] In passing one could also mention another case decided by the Norwegian Immigration Appeals Board that is not publicly available but referenced to by Bailliet who is in possession of the documents. (See: Bailliet (2006) p. 356.) – The case concerned a selective conscientious objector who sought asylum in Norway to, like Mr. Krotov, avoid military service in the second Chechen war. His application was rejected because of a lack of international condemnation. Especially since Norway had not condemned the military action, making the immigration authorities vary to stray too far from the interpretation of other state authorities. This case will however not be further analysed because of the inability to independently examine and verify the circumstances of the case.

condemnation has been greater in the contemporary war.[255] As the European Union and its member states has condemned Russia's war against Ukraine as "a brutal war of aggression", issued severe sanctions and acknowledged the ICC arrest warrant against the Russian head of state on account of suspected war crimes, one could assume that the "international condemnation"-criteria would be met.[256] So could one expect the EU member states to be welcoming to those that seek an escape from participating in this war?

5.5 European Responses to Russian Conscientious Objectors

As established, Russia's war in Ukraine constitutes both an illegal war of aggression as well as a war where the participants may be forced to be associated with the committing of war crimes. In such a case one could assume that the international community, in the very least the staunchly pro-Ukrainian EU-member states, would be very much in favour of those that refuse to participate in the war for absolute or selective conscientious reasons. Such has not been the case. Some EU member states were quick to ban Russian tourists from entering the countries on tourist visas as Poland and the Baltic states closed their borders to Russia on September 19th.[257] The last of the five EU countries bordering Russia, Finland, followed a few days later on the 30th, citing the need to halt transit through Finland to other Schengen countries and a wish to not endanger its international relations.[258] On the day the partial mobilisation in Russia was announced, the Baltic states stated that they would not offer refuge to any Russian fleeing the mobilisation.[259] The Estonian foreign minister Urmas Reinsalu stated that "a refusal to fulfil one's civic duty" would not constitute grounds for granting asylum, while his Latvian ditto cited security concerns.[260] Echoing such sentiments, Czech foreign minister Jan Lipavsky stated that:

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[255] On war crimes in Chechnya, see: "MSF Speaking Out Case Studies - War Crimes and Politics of Terror in Chechnya 1994-2004" (Médecins Sans Frontiers, September 2004).
[256] See: "EU Response to Russia's Invasion of Ukraine" (European Council, 25 October 2023) <https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/> (accessed 26.10.2023), see also: "Statement by the High Representative Following the ICC Decision Concerning the Arrest Warrant against President Putin" (Delegation of the European Union to Ukraine, 20 March 2023) <https://www.eeas.europa.eu/delegations/ukraine/statement-high-representative-following-icc-decision-concerning-arrest-warrant_en?s=232> (accessed 26.10.2023).
[257] Andrius Sytas, "Baltic States and Poland Close Doors to Russian Tourists" (Reuters, 19 September 2022) <https://www.reuters.com/world/europe/baltic-states-poland-close-doors-russian-tourists-2022-09-19/> (accessed 18 April 2023).
[258] "Finland Shutting off Tourist Visas for Russians on Friday" (YLE News, 29 September 2022) <https://yle.fi/a/3-12643656> (accessed 18 April 2023).
[259] "Baltic Nations Say They Will Refuse Refuge to Russians Fleeing Mobilisation" (Reuters, 21 September 2022) <https://www.reuters.com/world/europe/latvia-says-it-wont-offer-refuge-russians-fleeing-mobilisation-2022-09-21/> (accessed 18 April 2023).
[260] Ibid.

> "I understand that Russians are running from Putin's more and more desperate decisions. But those who flee their country because they don't want to fulfil their duties there do not meet the criteria for a humanitarian visa".[261]

In contrast to these statements the German line has been more open to accepting Russian refugees as defectors from the Russian army under some conditions would be accepted as in the words of Minister of the Interior Nancy Faeser:

> "As a rule, deserters threatened by severe repressions will receive international protection in Germany. (…) Anyone who courageously opposes Putin's regime and thereby puts oneself in great danger can apply for asylum in Germany because of political persecution."[262]

German state practice does however not seem to be in line with this statement as the non-governmental organization PRO ASYL has reported that of the two asylum cases regarding Russian conscientious objectors in their possession one case saw asylum granted – but not due to the draft, rather due to their public political activities. The other application was rejected due to the immigration authorities adopting a standard of "considerable probability" that the applicant would be forcibly conscripted – something the applicant could not prove.[263] This points to a difficult balancing act that conscientious objectors may be forced into, as a premature asylum application could be rejected on the notion that there is not enough evidence that the applicant would be drafted, but if such a draft notice would be issued the applicant would not be able to legally leave Russia under the newly adopted law No. 127-F3.

Could the cumulative nature of the restriction of both civil and political, as well as economic and social rights that a failure to abide by a draft order introduced by law No. 127-F3 amount to persecution? On one hand it is the prerogative of the state to be able to raise and maintain an army. On the other hand, the excessive restrictions of several rights of a person refusing or dodging the draft order could very well be seen as making their life intolerable. Weighing up these two opposing viewpoints would be the domestic remedies for exercising conscientious objection in Russia.

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[261] "Germany Ready to Accept Russian Deserters and Conscientious Objectors" (Meduza, 22 September 2022) <https://meduza.io/en/news/2022/09/22/germany-ready-to-accept-russian-deserters-and-conscientious-objectors> (accessed 18 April 2023).

[262] Ibid. See also: 'SPD Und Grüne Wollen Asylstatus Für Russische Deserteure' (Frankfurter Allgemeine Sonntagszeitung, 23 September 2022) <https://www.faz.net/aktuell/politik/ausland/spd-und-gruene-wollen-asylstatus-fuer-russische-deserteure-18337020.html> (accessed 21 January 2023).

[263] Rudi Friedrich, "Germany: Federal Office for Migration Rejects Asylum for Russian Refusers" (PRO ASYL, 17.2.2023) https://www.proasyl.de/en/news/germany-federal-office-for-migration-rejects-asylum-for-russian-refusers/ (Accessed 26.10.2023).

Essentially meaning an examination into whether the alternative service arrangements in practice are adequate to safeguard the rights of conscientious objectors. The partial nature of the mobilisation and the institutionalisation of conscientious objection to armed service through the alternative service option could however be used as an argument that there is no persecution of conscientious objectors to military service in Russia. As those conscientious objectors would not be expected to be drafted. This may raise the burden of proof for an applicant as they may be required to prove that they would have a high likelihood to be forced into military service. Another point of contention may be how strongly one could presume that a soldier would be required to be associated with any *jus in bello*-violations. If such a fact could be proved, especially in conjunction with the international condemnation that became a point of contention in the *Krotov case*, it would be a strong basis to build an asylum claim on. In the present case of Russia's aggression against Ukraine such arguments may even be more straightforward than in other international conflicts – especially concerning thew international condemnation.

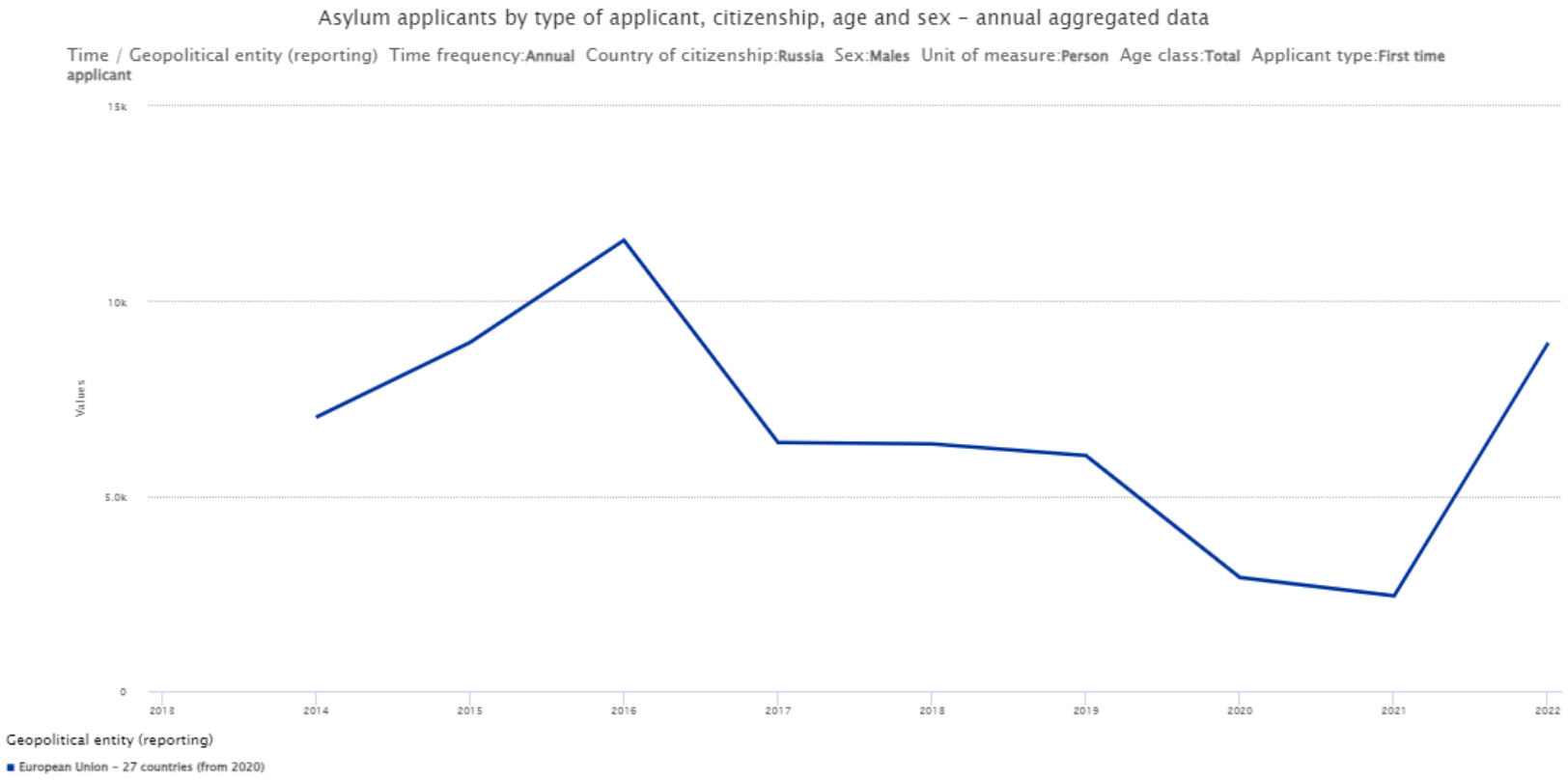
If a conscientious objector however is deemed not to qualify as a convention refugee, could they still be entitled to some form of subsidiary protection? Essentially, if we consider the non-refoulement dimension of the 1951 Convention and EU Qualification directive – as well as that of the ICCPR and the ECHR – can it be argued that a conscientious objector sent back to Russia would be subjected to cruel, inhuman, or degrading treatment? [264] Initially it can be stated that if sentenced for desertion or draft dodging the prison sentence laid out in domestic Russian law is lengthy but would hardly be considered to amount to a breach of the ECHR. On the other hand, if the worrying signs of conscientious objectors being forced into military service, especially into fighting in the war in Ukraine, before being able to exercise their right to conscientious objection through for example alternative service – one could argue that an applicant upon being returned to Russia would risk being subjected to inhuman or degrading treatment, or perhaps even more specifically, a serious and individual threat to their life through their forced participation in the war.[265] This would however likely be difficult to prove requiring more robust country-of-origin information than the anecdotal evidence presented in chapter 4.3.

[264] It may also be worth mentioning the alleged torture and executions of deserters from private military groups associated with the Russian war effort (such as the Wagner Group). (See: "Russia's Wagner Militia Suggests Deserter was – and wasn't – Executed" (Reuters, 13 February 2023) <https://www.reuters.com/world/europe/sledgehammer-execution-russian-mercenary-who-fled-shown-video-2023-02-13/> (Accessed 27.10.2023)) Even if it constitutes clear-cut instances of grave human rights abuses and could be argues to be conducted with a tacit toleration or even consent of the Russian authorities, it has still been deemed to fall outside of the scope of this study. Due to the unlikelihood of finding genuine conscientious objectors within a private military actor recruiting soldiers through monetary incentives, in contrast to the conscription-based regular Russian armed forces, further analysis of such instances has not been deemed warranted within the parameters of this study.

[265] See: EU Qualification Directive, Art 15(b,c).

So, against this background, are there any actual Russian conscientious objectors to military service that are applying for asylum in the EU? As already alluded to in the introduction, there is a significant amount of asylum applications in the EU originating from Russia (15 390 first time applications during 2022).[266] According to the United Nations Population Fund (UNFPA), the total population in Russia is about 144.4 million people.[267] If presuming that about half of them are male, while accounting for that sixty-six percent are working-age – between fifteen and sixty-four years old – the percentage of persons eligible for military service seeking asylum in EU member states are diminishingly small.[268] Taken over a longer period of time, the start of the war and the resulting mobilisation saw a spike in males with Russian citizenship seeking asylum in EU countries (8930 applications, compared to 2445 applications in 2021, 2910 applications in 2020 and 6040 applications in 2019). Such a spike may not entirely be dependent on the war however, as it also constitutes a return to normalcy after the Covid-19 pandemic-related travel restrictions. It also somewhat pales in comparison to the ten-year peak of 11 555 applications in 2016. See chart:[269]

[266] Eurostat "Annual Report on Migration and Asylum 2022 – Statistical Annex" (June 2023) <https://ec.europa.eu/eurostat/en/web/products-statistical-reports/w/ks-09-23-223> p.13.
[267] United Nations Population Fund, "World Population Dashboard – Russian Federation", https://www.unfpa.org/data/world-population/RU (accessed 26.10.2023).
[268] Ibid.
[269] Data source: Eurostat, <https://ec.europa.eu/eurostat/databrowser/bookmark/13a376c4-349b-4d96-a77a-3da1f06b95c6?lang=en>.



Asylum applicants by type of applicant, citizenship, age and sex – annual aggregated data

Source of data: Eurostat (online data code: MIGR_ASYAPPCTZA)
Last update 21/09/2023 12:00

eurostat

Out of this population it is also impossible to gage what percentage are basing their asylum application on absolute or selective conscientious objectors to military service. The statistics therefore do not corroborate that there is a significant number of Russian conscientious objectors attempting to receive international protection within the EU due to persecution based on their religious, political, or philosophical beliefs regarding the war in Ukraine. Although there are some examples that have been highlighted in the media. For example, a case in Spain where a Russian deserter applied for asylum based on selective conscientious objection to the war in Ukraine, especially to the *jus in bello*-violations his unit had been involved in.[270]

So, what could the reason for this statistical data be? One conclusion could be that there simply are no conscientious objectors in Russia or that those who exist do not face persecution. When faced with the cases presented in this study, it becomes clear that neither of those conclusions hold up to any scrutiny. As such, it must be that Russian conscientious objectors choose other avenues to avoid having their rights infringed upon than relying on international protection. As mentioned above in chapter 4.3 a drafted conscientious objector is presented three options. The first option is to trust in the domestic remedies and stand up for their rights against the domestic authorities. This has proved dangerous in the cases examined in this study as persons choosing this route have been detained and sent to military training camps on visits to the draft authorities. In those cases, the persons were, after months of legal wrangling and threats, afforded alternative and non-combat service roles. It is however important to note that one might only hear of the cases where the appeal is somewhat successful. When sent to fight in Ukraine a conscientious objector most likely would not have the same opportunity to have their story told. The second alternative was to disappear and stay hidden within Russia. Russia is an enormous country so the alternative may be realistic – albeit not an enticing one. The third option, going abroad is also not as narrow as to only include international protection in the EU. For example, if one has the money acquiring, a residence permit abroad may not be an issue.[271] Why so few have sought this remedy may therefore be explained on the existence of these other alternatives as well as the attitude towards Russian conscientious objectors in Europe, historically but also in contemporary discourse.

The tame European response also has some further historical precedent, as the same nations where reluctant to accept Serbian conscientious objectors to military service during the Kosovo war. As

[270] Pjotr Sauer, "Russian Soldier Seeking Asylum in Madrid Denounces ´Criminal´ Ukraine War" (The Guardian 17 November 2022). <https://www.theguardian.com/world/2022/nov/17/russian-soldier-seeking-asylum-in-madrid-denounces-ukraine-war> (accessed 26.10.2023).

[271] See: Franscesca Ebel, Mary Ilyushina, "Russians Abandon Wartime Russia in Historic Exodus" (The Washington Post, 13.2.2023) <https://www.washingtonpost.com/world/2023/02/13/russia-diaspora-war-ukraine/> (accessed 27.10.2023).

the NATO airstrikes where ongoing, there were leaflets dropped and television programming aired encouraging military-aged Serbian men to either dodge conscription or, if already in the armed forces, desert.[272] During the bombings an estimated 50 000 Serbians fled the country, among which 15 000-20 000 were draft evaders.[273] Although energetically argued for by scholars such as McGill, NATO states were reluctant to accept sufficient responsibility for these individuals, even as they acted both through encouragement, and in the interest of NATO states, through refusing to be part of an armed force that the military alliance was engaged in a military campaign against.[274] It would be likewise in the interest of EU member states due to their pro-Ukrainian stance that many Russians would exercise their right to conscientiously object to a conflict that the Union and its member states recognise as an illegal act of aggression.[275] But as in the case of the Serbian conscientious objectors and deserters such a factor is not mirrored by political action. One difference between the cases is however that for the Serbs political change came about rather quickly due to the end of the conflict and ensuing peace, but in the case of the Russians such a thing is impossible to predict. In such a case some sort of amnesty in Russia in line with the ICRC recommendations may also be required to help facilitate the re-integration of those seeking protection abroad so that they would not have to fear criminal proceedings for draft-evasion or desertion upon return.[276]

It has been argued that refusing asylum for conscientious objectors would leave those objectors with very little choice but to engage in those acts that they object to or to accept the consequences that this would bring about in their country of origin.[277] This is especially problematic in cases where the conscientious objection is rooted in a refusal to be associated with a *jus in bello* or *jus ad bellum*-violation. Recognizing the validity of such asylum claims would be in line with the UNHCR recommendations as well as legal doctrine on the subject. It would also be a recognition that even if a regular soldier may not have an undisputed right or obligation to assess the *jus ad bellum* justifications of a war through whichever just war-doctrinal stance they may adhere to, they do carry an obligation to adhere to the *jus in bello*. A stance that is further strengthened by remembering that duress is not considered to be a legitimising excuse when committing breaches of it. If the EU member states so strongly oppose Russia's justifications and conduct in its war against Ukraine, this stance should also be shown in protecting the rights and offering the rights to international protection of those Russians that conscientiously object to this war.

[272] McGinley (2000) p. 1482-1483.
[273] Ibid. p. 1484.
[274] Ibid. p. 1493-1497.
[275] See: UNGA, "Aggression against Ukraine" (1 March 2022) UN Doc A/ES-11/L.1.
[276] Jean-Marie Henckaerts, Louise Doswald-Beck (2005) p. 471.
[277] Bailliet (2006) p. 338.

6. Conclusions

To conscientiously object to military service is a human right. It has been recognized through the jurisprudence under the ICCPR and ECHR as an inseparable part of the freedom of thought, conscience, and religion and several international organizations and expert bodies have regularly recommended its implementation in national legislation. In Russia this right is constitutionally enshrined and made possible through allowing potential conscripts to apply for civil alternative service, albeit with several restrictions.

While a disunited ECtHR deemed this procedure to be adequate in protecting the religious and conscientious rights under the ECHR – the problems related to the alternative service, already highlighted by several judges of the Court, have become even more apparent during the war in Ukraine. For example, persons already having fulfilled their alternative service are reported to have been drafted and the appeals processes lack the suspensory effect needed to practice this right without risk of being wrongfully forced into the armed forces. This, coupled with the generally hostile attitude to conscientious objectors among the Russian authorities it may push such objectors to flee the country in search of international protection.

To selectively conscientiously object to military service is controversial and not always recognized as a human right. In practice it often means that a person, having sworn to and carrying the obligations to serve in the armed forces of a state, places their personal morals over their duty to the state. Allowing for such a practice may be seen as a tacit implication by the state that it agrees that what it is doing might not be fully justifiable. Regardless, the different doctrines of just war-theory all place some responsibility of the soldiers to determine whether they can stand by and take part in the conduct of their state and armed forces. Coupling this with the increasing international legal norms concerning warfare, both *jus in bello* and *jus ad bellum* giving a legal definition of an "unjust" war, means that selective conscientious objection should be considered a right.

If state practice on selective conscientious objection is lacking, practice on the international legal responsibility of soldiers is clearer. A regular soldier may for various reasons not be held responsible for *ad bellum*-breaches but may be held responsible for their conduct *in bello*. Duress has also not been held as a legitimate defence in cases of *in bello*-violations. In practice meaning that a person has the responsibility to not be placed in a situation where they are forced into taking part in such acts. Therefore, if a soldier's right to refuse to take part in a specific war is controversial on conscientious grounds, invoking international responsibility not to take part in *ad bellum* or *in bello*

violations may strengthen such a position. This is especially relevant as Russia is credibly accused of such international breaches by, among others, the UN General Assembly.

If Russia does not adequately accommodate absolute or selective conscientious objectors, then the following question is whether this could amount to persecution as defined in the 1951 Refugee Convention or the EU Qualification Directive. In determining the validity of an asylum application, it is examined whether the applicant has a well-founded fear of persecution. Such a determination would probably be based on a likelihood of the applicant being drafted and forced to fight in Ukraine despite their conscientious objection, as well as possible repercussions non-legal methods of refusing such military service. The country-of-origin information regarding Russian practice and the troubling reports presented in this study strengthens such an argument. Likewise, as the refusal to participate in military service would be sprung out of one of the protected convention grounds, either political or religious opinions, another requirement for international protection is seemingly fulfilled. In practice however, the refugee determination process is up to states to themselves interpret the international legal norms and decide upon the granting of international protection. The UNHCR gives guidance on how the 1951 Refugee Convention should be interpreted when it comes to conscientious objectors. Highlighting conscience as a valid ground above that of fear of combat or similar other reasons to avoid military service, and opening for selective conscientious objection in cases where the military action is condemned by the international community as contrary to basic rules of human conduct. State practice on the other hand has been restrictive regarding Russian conscientious objectors.

It is alarming that EU Member States are so reluctant to grant Russian conscientious objectors to military service international protection, both historically as well as during the contemporary war in Ukraine. Such policies may not only be harmful to the rights of those objectors. It also may be short-sighted of those propagating a more peaceful and humanitarian world to reject persons that refuse to fight in an illegal war where war crimes allegedly systematically are committed.

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