

IS GERMANY THE NEW CANADA? ONE AMERICAN
DESERTER'S REQUEST FOR GERMAN ASYLUM

MAJOR CHRISTIAN L. DEICHERT*

What if every truck driver suddenly decided that he didn't like the whine of those shells overhead, turned yellow, and jumped headlong into a ditch? The cowardly bastard could say, "Hell, they won't miss me, just one man in thousands." But, what if every man thought that way? Where in the hell would we be now? What would our country, our loved ones, our homes, even the world, be like?¹

I. Introduction

In November 2008, most of the Soldiers of the 412th Aviation Support Battalion, based in Katterbach, Germany, were getting ready for their first Thanksgiving home after a fifteen-month deployment to Iraq. One member of the unit, Specialist André Shepherd, spent his Thanksgiving formally applying to the German government for political asylum.² As Shepherd is the first American deserter to request political

* Judge Advocate, U.S. Army. Presently assigned as Instructor, Operations and International Law Division, U.S. Air Force Judge Advocate General's School, Maxwell A.F.B., Alabama; LL.M., 2010, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2000, Georgia State University College of Law, Atlanta, Georgia; B.A., 1997, Davidson College, Davidson, North Carolina. Previous assignments include Office of the Staff Judge Advocate, 1st Armored Division, Wiesbaden, Germany, 2008–2009 (Chief of Client Services, 2009; Rear Detachment Officer in Charge, 2008); Darmstadt Legal Center, V Corps, Darmstadt, Germany, 2006–2008 (Officer in Charge, 2007–2008; Administrative Law Attorney, 2006–2007); Trial Defense Counsel, U.S. Army Trial Defense Service, Camp Arifjan, Kuwait, 2005–2006; Trial Defense Counsel, U.S. Army Trial Defense Service, Wiesbaden, Germany, 2004–2005; Office of the Staff Judge Advocate, U.S. Army Intelligence Center, Fort Huachuca, Arizona (11th Signal Brigade Trial Counsel, 2003–2004; Chief of Client Services and Claims Judge Advocate, 2002–2003; Chief of Legal Assistance and Tax Center Officer in Charge, 2001–2002). Member of the bar of Georgia. The author submitted this article in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

¹ CHARLES M. PROVINCE, *THE UNKNOWN PATTON* 32 (1982).

² See André Shepherd, *I Am Petitioning for Political Asylum in Germany*, CONNECTION E.V., Nov. 27, 2008, <http://www.connection-ev.de/z.php?ID=371>. Although the term "asylum" has different meaning in different contexts, this article will follow Hemme Battjes's example and adopt the definition used by the *Institut du Droit International* at its Bath Conference of 1950: "[T]he term 'asylum' means the protection offered by a

asylum under a new European Union (EU) law,³ the German government could set a dangerous precedent if it approves his application.

Shepherd, an Apache helicopter mechanic, deserted from his unit after he learned he would deploy again and lived in hiding until his unit eventually returned from its second tour in Iraq.⁴ In his asylum application, Shepherd stated that he deserted to avoid committing war crimes in Iraq and to avoid service in what he alleged to be an unlawful conflict.⁵ He cited to a 2005 German administrative court decision reinstating a *Bundeswehr* (German Army) major who was demoted for refusing to carry out duties that he felt could contribute to the conflict in Iraq.⁶ In evaluating Shepherd's asylum application, Germany must apply a 2004 EU Council Directive that expanded the definition of qualified refugees to include some military deserters.⁷

André Shepherd is not the first Soldier to object vocally to deployment to Iraq. As of February 2010, the protest group Iraq Veterans Against the War claimed to have over 1700 members.⁸ Nor is Shepherd the first Soldier to apply for asylum after having deserted. At the time Shepherd filed his initial asylum application, the Immigration and Refugee Board of Canada had rejected the asylum applications of at least ten American deserters, starting with Jeremy Hinzman in 2005.⁹

State on its territory or elsewhere to an individual who came to seek it." HEMME BATTJES, *EUROPEAN ASYLUM LAW AND INTERNATIONAL LAW* 5–6 (2006) (translating Institut du Droit International, *L'ASILE EN DROIT INTERNATIONAL PUBLIC* (1950)).

³ Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 302) 2-12 (EC) [hereinafter *Qualification Directive*], discussed in Part III *infra*.

⁴ See Mike Esterl, *U.S. Deserter "Having Time of My Life" as He Seeks Asylum in Germany*, WALL ST. J., Jan. 29, 2009, at A1, available at <http://online.wsj.com/article/SB123318899887026687.html>.

⁵ See Shepherd, *supra* note 2.

⁶ Bundesverwaltungsgericht [BVerwG] [Federal administrative court] June 21, 2005, 120 DEUTSCHES VERWALTUNGSBLATT 1455 (2005), discussed in Part IV *infra*. For an English summary and discussion of Major Pfaff's case, see Nikolaus Schultz, *Was the War on Iraq Illegal? The German Federal Administrative Court's Judgment of 21st June 2005*, 7 GERMAN L.J. 25, 26 (2006), Ilja Baudisch, *Germany v. N*, 100 AM. J. INT'L L. 911 (2006).

⁷ See *Qualification Directive*, *supra* note 3.

⁸ See IRAQ VETERANS AGAINST THE WAR (Sept. 16, 2010), <http://ivaw.org>.

⁹ See, e.g., *Hinzman v. Canada* (Minister of Citizenship & Immigration), [2007] 1 F.C.R. 561 (Can.). Although one American deserter successfully appealed the denial of her asylum application in November 2009, the Federal Court based its opinion on the deserter's allegations of persecution based on her sexual orientation and not based on her

However, Shepherd is testing new legal waters, and in doing so, he has become a “poster boy” for German peace activists.¹⁰

Shepherd is the first American deserter to apply for asylum in Germany under the new EU rules.¹¹ If Germany grants him asylum, it could have serious implications for the American military presence there and other EU nations. Though the American military presence in Europe has decreased since the end of the Cold War, over 50,000 servicemembers remain in Germany.¹² In 2008, only seventy-one Soldiers deserted from posts in Europe.¹³ If Germany recognizes Shepherd’s claims and grants him asylum, this number is bound to increase.

This article evaluates the legal claims Shepherd sets forth in his asylum application against the backdrop of the current status of German and European law. Part II examines the factual background of Shepherd’s case and lays out his claims. Part III addresses the development of the 2004 European Union legislation that forms the basis of Shepherd’s asylum claim. Part IV examines Shepherd’s argument that he deserted to avoid committing war crimes and crimes against peace. Part V analyzes Shepherd’s arguments on how he qualifies for protection under the Qualification Directive. Ultimately, this article concludes that, although Shepherd presents intriguing arguments, his claim for asylum is not supported by international law.

political opposition to the war. See *Smith v. Canada* (Minister of Citizenship and Immigration), [2009] F.C. 1194 (Can.).

¹⁰ Esterl, *supra* note 4.

¹¹ See Cordula Meyer & Simone Kaiser, *Deserting the Iraq War: US Soldier Seeks Political Asylum in Germany*, SPIEGEL ONLINE, Dec. 3, 2008, <http://www.spiegel.de/international/world/0,1518,594250,00.html>.

¹² In 1989, nearly 250,000 active duty servicemembers worked in Germany, over 200,000 of whom were soldiers. See U.S. DEP’T OF DEF., ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (30 Sept. 1989), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/Hst0989.pdf>. By 2009, approximately 52,000 active duty servicemembers remained in Germany, over 37,000 of whom were soldiers. See U.S. DEP’T OF DEF., ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (30 Sept. 2009), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst0909.pdf>.

¹³ See Esterl, *supra* note 4.

II. Background

André Shepherd enlisted in the Army in January 2004 and deployed to Iraq in September 2004, just after completing initial training as a helicopter mechanic.¹⁴ Shepherd worked in the 601st Aviation Support Battalion at Forward Operating Base Speicher near Tikrit, Iraq, maintaining AH-64 Apache attack helicopters.¹⁵ According to Shepherd, he began questioning the Iraq war during the deployment and did more research on the war after his unit returned to Katterbach, Germany.¹⁶

The problem was that the more I looked into the subject, the more uncomfortable I got. I spent a considerable amount of time cross-referencing and verifying the information that I was receiving, but I always arrived to the same conclusion: our military was being used as a tool for worldwide imperialism under the guise to spread “freedom” (i.e. control) to underprivileged nations, one bullet at a time. My entire world was turned upside down. All this time I believed in the integrity, honor, loyalty and justice of our Armed Forces. We were supposed to be the “good guys.” As an active member of the Army, I cannot be free from the guilt of having supported this war I was led to believe was justified.¹⁷

In early 2007, Shepherd learned that his unit, now designated the 412th Aviation Support Battalion, would deploy again to Iraq.¹⁸ In early April, he learned that he would deploy with them.¹⁹

¹⁴ See Shepherd, *supra* note 2.

¹⁵ See *id.* At the time, the 601st fell under 4th Brigade (Aviation), 1st Infantry Division (Mechanized).

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.* The unit moved from the 1st Infantry Division to the 12th Combat Aviation Brigade as part of a larger transformation of the U.S. Army in Europe. See Nancy Montgomery, *Army Announces Details of 2007 Transformation and Rebasing Plan*, STARS & STRIPES, June 9, 2006, <http://www.stripes.com/article.asp?section=104&article=37761>. The 412th deployed to Joint Base Balad, Iraq, from July 2007 to September 2008. See Sergeant First Class Chris Seaton, *Germany's 412th ASB Finishes Combat Tour in Iraq*, DEF. VIDEO & IMAGERY DISTRIBUTION SYS., Sept. 7, 2008, <http://www.dvidshub.net/news/23332/germanys-412th-asb-finishes-combat-tour-iraq>.

¹⁹ See Shepherd, *supra* note 2.

On the night of 11 April 2007, after ten days of deliberation, Shepherd quietly packed his things and deserted his unit.²⁰ He spent the next two years in hiding, first spending time with German punk rockers, then making connections with German peace organizations such as the Military Counseling Network, part of the German Mennonite Peace Committee.²¹ He wanted to settle in Germany but needed proof of his Army discharge before he could apply for permanent residency.²² Shepherd waited until his unit returned from its fifteen-month deployment before resurfacing so that he would not “have the risk of being sent back to Iraq.”²³ Finally, on 26 November 2008, Shepherd turned himself over to German authorities and submitted a formal application for asylum.²⁴ A few months later, on 4 February 2009, Shepherd and his German attorney, Dr. Reinhard Marx, presented their case to the German Federal Office of Migration and Immigration (*Bundesamt für Migration und Flüchtlinge*, or BAMF).²⁵

III. Asylum Law in Germany

In his application, Shepherd argues that he qualifies for asylum under German and European Union law.²⁶ The German Basic Law provides that “[p]ersons persecuted on political grounds shall have the right of asylum.”²⁷ Germany also implemented the Qualification Directive, enacted in 2004 by the European Union to establish minimum refugee

²⁰ See André Shepherd, *Statement of André Shepherd at Press-Conference in Frankfurt/M. (Germany)*, WAR RESISTERS’ INT’L, Nov. 27, 2008, <http://www.wri-irg.org/node/6108>.

²¹ See Esterl, *supra* note 4.

²² See James Ewinger, *AWOL Cleveland Soldier Seeks Asylum in Germany*, CLEV. PLAIN DEALER, Dec. 1, 2008, http://www.cleveland.com/news/index.ssf/2008/12/awol_cleveland_soldier_seeks_a.html.

²³ Shepherd, *supra* note 20.

²⁴ See Meyer & Kaiser, *supra* note 11.

²⁵ See *German Court Hears US Army Deserter’s Case for Asylum*, DEUTSCHE WELLE, Feb. 5, 2009, <http://www.dw-world.de/dw/article/0,,4005756,00.html>.

²⁶ See Reinhard Marx, *Antrag zur Anerkennung als Asylberechtigter für André Lawrence Shepherd* [Application on Recognition as an Asylum Seeker for André Lawrence Shepherd], CONNECTION E.V., available at <http://www.connection-ev.de/z.php?ID=362>.

²⁷ “Politisch Verfolgte genießen Asylrecht.” Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, B.G.Bl. 1, art. 16a (Ger.). For English translations of the German Basic Law, this article relies on the official English translation published by the Bundestag (German parliament) in 2008, which is available at http://www.bundestag.de/interakt/informationmaterial_alt/fremdsprachiges_material/downloads/ggEn_download.pdf.

status determination standards.²⁸ The Qualification Directive applied the general tenets of the 1951 Geneva Convention Relating to the Status of Refugees²⁹ to EU members and provided additional guidance on how to apply these tenets.

The Refugee Convention very generally defined a refugee as either any person who previously had been defined as a refugee or who, “owing to wellfounded [sic] fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”³⁰ The Refugee Convention created a two-pronged test: the person must have a fear of persecution and that fear must be reasonable (well-founded).³¹ Additionally, one or more of the specified reasons for the persecution must apply, such as belonging to a particular social group or having a particular political opinion.³²

The EU Qualification Directive essentially adopts the Convention’s basic definition of a refugee and expands on its terms. As in the Refugee Convention, there must be a reasonable fear of persecution, and the persecution must be for a qualifying reason. Article 10 restates the Refugee Convention reasons for persecution and defines them in greater detail.³³ Article 9 of the Qualification Directive provides guidance on what amounts to “acts of persecution.” Article 9(1) states that such acts “must . . . be sufficiently serious by their nature or repetition as to

²⁸ See Qualification Directive, *supra* note 3. Germany implemented the Qualification Directive through the Asylverfahrensgesetz [AsylVfG] [Asylum Procedures Act], Aug. 19, 2007, BGBl. I at 1970 (F.R.G.) and the Aufenthaltsgesetz [AufenthG] [Residency Act], Jul. 30, 2004, BGBl. I at 1950 (F.R.G.), as amended by the Asylum Procedures Act.

²⁹ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. See Qualification Directive, *supra* note 3, at 12–14.

³⁰ See Refugee Convention, *supra* note 29, art. 1A. The Refugee Convention also gave signatory states the option to apply this definition to any person or just those that were affected by events in Europe. See *id.* art. 1B. Although the original text of the Refugee Convention applied this definition only to persons affected by events prior to 1 January 1951, the 1967 protocol to the Convention incorporated its definition of “refugee” without temporal or geographical limits. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

³¹ See U.N. HIGH COMM’R ON REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶¶ 37–42 (1992) [hereinafter UNHCR HANDBOOK].

³² *Id.* ¶ 66.

³³ See Qualification Directive, *supra* note 3, art. 10.

constitute a severe violation of basic human rights.”³⁴ Article 9(2) lists specific examples of acts of persecution, including “prosecution or punishment, which is disproportionate or discriminatory” and “prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2).”³⁵ The three exclusion clauses are as follows:

A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that: (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes; [or] (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.³⁶

The above language is taken almost verbatim from article 1F of the Refugee Convention.³⁷

³⁴ *Id.* art. 9(2).

³⁵ *Id.*

³⁶ *Id.* art. 12(2). Paragraph 22 of the preamble to the Qualification Directive, which discusses “acts contrary to the purposes and principles of the United Nations,” essentially refers to acts of terrorism and the planning and financing of terrorism. See 2004 O.J. (L 304) 13. Referring to the nearly identical language in the Refugee Convention, the UNHCR noted that “crimes capable of affecting international peace, security, and peaceful relations between States would fall within this clause, as would serious and sustained violations of human rights.” U.N. HIGH COMM’R ON REFUGEES, BACKGROUND NOTE ON THE APPLICATION OF THE EXCLUSION CLAUSES: ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES ¶ 47, 4 Sept. 2003, available at <http://www.unhcr.org/refworld/docid/3f5857d24.html>.

³⁷ See Refugee Convention, *supra* note 29, art. 1F.

IV. Shepherd's Fear of Persecution

In his asylum application, Shepherd argues that he meets the criteria in the Qualification Directive because he has a reasonable fear of persecution. He states that he

refuses, for reasons of conscience, to continue his military service, because he does not wish to take part in a war by the United States against Iraq that is in violation of international law and the prohibition of violence stated under Article 2, Number 4 [sic] of the Charter of the United Nations³⁸ and, furthermore, does not wish to be involved in war crimes in connection with the deployment of his unit in Iraq.³⁹

Because he deserted in order to avoid committing acts that are listed as exclusion criteria at article 12(2), he argues that he qualifies as a refugee under article 9 of the Qualification Directive. Shepherd claims that the implied threat of prosecution for his desertion constitutes an act of persecution within the meaning of article 9(2)(e) of the Qualification Directive.⁴⁰

³⁸ "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2(4).

³⁹ Meyer & Kaiser, *supra* note 11.

⁴⁰ See Marx, *supra* note 26, para. III (citing Michael Bothe, *Der Irak-Krieg und das völkerrechtliche Gewaltverbot* [The Iraq War and the International Prohibition of Violence], 41 ARCHIV DES VÖLKERRECHTS [ARCHVR] 255 (2003); Holger Hestermeyer, *Die völkerrechtliche Beurteilung des Irakkriegs im Lichte transatlantischer Rechtskulturunterschiede* [The International Assessment of the Iraq War in Light of Transatlantic Differences in Legal Culture], 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 315 (2004); Alois Riklin, *Wertfreiheit, Bellum iustum und der Irak-Krieg* [Ethical Neutrality, Jus ad Bello, and the Iraq War], 45 ARCHVR 35 (2007); Markus Kotzur, *Gewissensfreiheit contra Gehorsamspflicht oder: der Irak-Krieg auf verwaltungsgerichtlichem Prüfstand* [Freedom of Conscience versus Duty of Obedience: The Iraq War on Trial in Administrative Court], 61 JURISTEN ZEITUNG [JZ] 25 (2006); Thomas Bruha, *Irak-Krieg und Vereinte Nationen* [The Iraq War and the United Nations], 41 ARCHVR 295 (2003); and Christian Tomuschat, *Völkerrecht ist kein Zweiklassenrecht: Der Irak-Krieg und seine Folgen* [International Law is Not a Second-Class Law: The Iraq War and Its Consequences], 51 VEREINTE NATIONEN 41 (2003)).

A. Deployment as a Crime Against Peace

Shepherd's first argument attacks the legal justification for the invasion of Iraq. He states that the invasion of Iraq was an illegal war of aggression, thus his deployment in furtherance of the war would constitute a "crime against peace"⁴¹ within the meaning of the Qualification Directive.⁴² In support of his argument, he cites to several scholarly articles⁴³ but relies mainly on the case of Major Florian Pfaff.⁴⁴

In April 2003, shortly after the invasion of Iraq, Pfaff, a *Bundeswehr* officer, refused to obey an order to participate in a software development project.⁴⁵ The goal of the project was to develop the *Standard-Anwendungs-Software-Produkt-Familien* (Standard Application Software Product Family), a suite of applications to help streamline German military operations.⁴⁶ When his superiors assigned him to work on the project as part of his regular duties, Pfaff refused, citing his right to conscience under article 4(1) of the German Basic Law.⁴⁷ He believed the software could be used to support Operation Iraqi Freedom, which he

⁴¹ Crimes against peace involve "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, art. 6a, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

⁴² See Marx, *supra* note 26, para. III.1.a.

⁴³ See *id.* para. III.1.a.aa.

⁴⁴ Bundesverwaltungsgericht [BVerwGE] [Federal Administrative Court] June 21, 2005, 120 DEUTSCHES VERWALTUNGSBLATT 1455 (2005). Although the court's decision does not actually name the plaintiff, Major Pfaff has since identified himself as the plaintiff in the action. See FLORIAN PFAFF, TOTSCHLAG IM AMT: WIE DER FRIEDE WERRATEN WURDE [Murder in Office: How the Peace Was Betrayed] (2008).

⁴⁵ See Schultz, *supra* note 6, at 26.

⁴⁶ See Bundesministerium der Verteidigung [Federal Ministry of Defense], *SASPF—Management of the Troops*, Aug. 25, 2004, http://www.bmvg.de/portal/a/bmvg/kcxml/04_Sj9SPyKssy0xPLMnMz0vM0Y_QjzKLd4k3cbcESYGZbub6kTAQjzX4_83FT9oNQ8fW_9AP2C3IhyR0dFRQC3ZZpd/delta/base64xml/L2dJQSEvUUt3QS80SVVFLzZfRF8zM1FF?yw_contentURL=%2FC1256F1200608B1B%2FN264WRA6167MMISEN%2Fcontent.jsp.

⁴⁷ "Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich." ["Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable."] Grundgesetz für die Bundesrepublik Deutschland [German Basic Law], art. 4(1).

believed to be illegal.⁴⁸ A German court-martial convicted Pfaff of insubordination and demoted him to captain; he appealed his conviction to the federal administrative court.⁴⁹ On appeal, the court found Pfaff's freedom of conscience under the German Basic Law trumped his duty to obey orders under German military law.⁵⁰ The court also "argued at great length that the prohibition of the use of force in international relations as provided for in Art. 2.4 of the [U.N.] Charter and corresponding *jus cogens* was *prima facie* violated."⁵¹

This article will not address the legality of the 2003 invasion of Iraq, which has been debated at length by legal scholars on both sides of the issue.⁵² Rather, this article focuses on the factual and legal differences between Pfaff's case and Shepherd's situation. Pfaff disobeyed his orders in early April 2003, over a month before the U.N. Security Council recognized the United States and United Kingdom as occupying powers and called on them to restore security in Iraq.⁵³ Shepherd, on the other hand, was scheduled to deploy in July 2007, under the authority of a U.N. mandate and at the invitation of the Iraqi government.⁵⁴

⁴⁸ See Baudisch, *supra* note 6, at 911. Major Pfaff objected to the amount of support Germany was providing to the invasion of Iraq. German troops had been sent to Kuwait, German Airborne Warning and Control System (AWACS) planes and crews were flying reconnaissance missions over Turkey, Germany had granted overflight rights to NATO forces flying to and from Iraq, and German troops were assigned to guard American military bases in Germany. *Id.*

⁴⁹ See Schultz, *supra* note 6, at 25. The *Bundeswehr*, wanting Major Pfaff discharged from service, also appealed the lower court's ruling. *Id.*

⁵⁰ See Baudisch, *supra* note 6, at 911. "Der Soldat muss seinen Vorgesetzten gehorchen." ["The Soldier must obey his superiors."] Soldatengesetz [Soldier's Act] [SG], § 11(1), last amended July 31, 2008 (BGBl. I S. 1629).

⁵¹ Schultz, *supra* note 6, at 37.

⁵² For arguments that the Iraq invasion was illegal, see, e.g., Sean Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004) (concluding the invasion was "without a persuasive legal justification"); Thomas Franck, *Iraq and the Law of Armed Conflict*, 80 INT'L LAW STUD. 15 (2006) (arguing that the invasion was "probably not . . . undertaken in compliance with the law governing recourse to force"). Compare these with arguments that the Iraq invasion was legal, see, e.g., Nicholas Rostow, *International Law and the 2003 Campaign Against Iraq*, 80 INT'L LAW STUD. 21 (2006) (arguing that the invasion of Iraq was a legitimate exercise of anticipatory self-defense); Michael Schmitt, *The Legality of Operation Iraqi Freedom Under International Law*, 3 J. MIL. ETHICS 82 (2004) (arguing that although U.N. Security Council Resolution (UNSCR) 1441 contained no legal mandate to use force, Iraq's material breach of the cease-fire in UNSCR 687 reactivated the authorization for use of force in UNSCR 678). For a more comprehensive bibliography, see Rostow, *supra*, at 32 n.8.

⁵³ See S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

⁵⁴ "The Security Council . . . [n]otes that the presence of the multinational force in Iraq is at the request of the Government of Iraq and reaffirms the authorization for the

Furthermore, it is well settled that crimes against peace “can only be committed by those in a high position of authority representing a State or State-like entity.”⁵⁵ As a specialist, Shepherd hardly qualifies.⁵⁶ For these reasons, Shepherd’s arguments regarding crimes against peace are unpersuasive.

B. Apache Mechanics as War Criminals

Shepherd also takes the position that his involvement in the repair and maintenance of AH-64 Apache helicopters equates to a war crime. He argues that the use of Apaches in urban warfare violates the principles of distinction and proportionality⁵⁷ and that the use itself is a

multinational force as set forth in resolution 1546 (2004) and decides to extend the mandate of the multinational force as set forth in that resolution until 31 December 2007.” S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006) (citing S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004)).

⁵⁵ U.N. HIGH COMM’R ON REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: APPLICATION OF THE EXCLUSION CLAUSES: ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES ¶ 11, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003).

⁵⁶ Although Shepherd acknowledges that individual Soldiers cannot normally commit crimes against peace, he does not concede the argument; rather, he maintains that even indirect participation in the Iraq war would be facilitating or encouraging a crime against peace. See Marx, *supra* note 26, para. III.1.b.

⁵⁷ It is generally agreed that there are four basic principles in the law of armed conflict. The first is military necessity.

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. The second is distinction. “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” *Id.* art. 48. The third is proportionality. It is prohibited to cause “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” *Id.* art. 51(5)(b). The last is unnecessary suffering. “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” *Id.* art. 35(2). Although the United States has not ratified

war crime.⁵⁸ Shepherd appears to take a lesson from Specialist Jeremy Hinzman's failed bid for Canadian asylum. Citing conditions at Guantánamo Bay and Abu Ghraib, Hinzman, an infantryman, argued that he could be called on to commit human rights violations in Iraq.⁵⁹ The court was not persuaded, noting that "[Hinzman's] argument is premised on it having been established that the violations of international humanitarian law that have taken place in Iraq rise to the level of being systematic or condoned by the State, and that, therefore, an involvement in the war would amount to complicity in a crime."⁶⁰ Unwilling to agree to this premise, the court held that Hinzman had not made any showing that "he would have personally been engaged in, been associated with, or been complicit in acts condemned by the international community as contrary to basic rules of human conduct."⁶¹

Here, Shepherd attempts to establish a greater connection between the duties he would have performed in Iraq and potential war crimes. In his application, Shepherd presents allegations of war crimes in Fallujah in 2004,⁶² as well as reports of civilian casualties resulting from helicopter raids.⁶³ He also points out that although the AH-64 was designed primarily for use against armored vehicles, "it has come to be used against individuals and buildings, sometimes with no knowledge by helicopter crews of who may be occupying buildings."⁶⁴ As a mechanic,

Additional Protocol I, the United States considers these and other provisions of AP I "as already part of customary international law." Memorandum from The Judge Advocates Gen. to Assistant Gen. Counsel (Int'l), Office of the Sec'y of Def., subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986).

⁵⁸ See Marx, *supra* note 26, para. III.1.b.dd.

⁵⁹ See Hinzman v. Canada (Minister of Citizenship & Immigration), [2007] 1 F.C.R. 608 (Can.).

⁶⁰ *Id.* at 609.

⁶¹ *Id.* at 587.

⁶² See Marx, *supra* note 26, para. III.1.b.bb (citing Spencer Spratley, *U.S. Military Committed War Crimes in Fallujah: Open Letter to the International Criminal Court of Justice*, GLOBAL RES., Mar. 14, 2008, <http://www.globalresearch.ca/index.php?context=va&aid=8340>).

⁶³ See *id.* para. III.1.b.ee (citing AMNESTY INT'L, CARNAGE AND DESPAIR: IRAQ FIVE YEARS ON (2008), available at <http://www.amnesty.org/en/library/asset/MDE14/001/2008/en/3f78611b-f1e9-11dc-adcd-cdafd0ab0dfe/mde140012008eng.pdf>).

⁶⁴ See *id.* (quoting Bill Rau & Karen Parker, *U.S. War Crimes in Iraq 2007–2008: An Up-Date*, CONSUMERS FOR PEACE, Apr. 1, 2008, available at <http://www.consumersforpeace.org/pdf/WAR-CRIMES-3.pdf>).

Shepherd states, he would be supporting the commission of war crimes by repairing and maintaining attack helicopters.⁶⁵

The use of Apache helicopters in urban warfare certainly carries with it a danger that civilians will be harmed. “The risk of [collateral damage and civilian injury] from air operations is magnified in the urban settings where military and civilian assets are collocated and often difficult to distinguish.”⁶⁶ However, although civilian casualties in war are tragic and should be avoided whenever possible, at times they are unavoidable. Additional Protocol I provides: “In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”⁶⁷ Not only do enemy combatants in Iraq make no effort to so distinguish themselves, it is standard practice among insurgents to “unlawfully feign civilian status to carry out attacks.”⁶⁸ These tactics “have in general placed all civilians in Iraq at greater risk of harm.”⁶⁹ The law of armed conflict recognizes this possibility and does not take a strict liability view of injury to civilians. Rather, it places lesser burdens on commanders, such as taking “all reasonable precautions to avoid losses of civilian lives and damage to civilian objects”⁷⁰ and taking “all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life.”⁷¹

Although the law of armed conflict does not hold commanders strictly liable for civilian casualties, Shepherd demands this standard regardless. He labels civilian deaths from Apache helicopters as attacks on innocent civilians and, therefore, war crimes.⁷² Accordingly, Shepherd holds that his role in repairing and maintaining Apache helicopters would make him guilty of war crimes.⁷³ “[W]ar crimes are such hostile or other acts of soldiers or other individuals as may be

⁶⁵ See *id.* para. III.1.b.dd.

⁶⁶ MATTHEW WAXMAN, RAND MONOGRAPH REPORT: INTERNATIONAL LAW AND THE POLITICS OF URBAN AIR OPERATIONS 24 (2008).

⁶⁷ AP I, *supra* note 57, art. 44(3).

⁶⁸ HUMAN RIGHTS WATCH, A FACE AND A NAME: CIVILIAN VICTIMS OF INSURGENT GROUPS IN IRAQ ch. XIII, Oct. 2, 2005, available at <http://hrw.org/reports/2005/iraq1005/>.

⁶⁹ *Id.*

⁷⁰ AP I, *supra* note 57, art. 57(4).

⁷¹ *Id.* art. 57(2)(a)(ii).

⁷² See Marx, *supra* note 26, para. III.2.b.cc.

⁷³ *Id.* para. III.2.b.gg.

punished by the enemy on capture of the offenders.”⁷⁴ Certainly, individuals who personally commit war crimes can be held responsible, as can a commander who knew or should have known that his or her subordinates were involved in war crimes.⁷⁵ However, Shepherd offers no support or basis for how support personnel may be held liable for the actions of the combat troops or commanders they support. This assertion is without merit.

Even assuming *arguendo* that Shepherd’s contentions regarding war crimes and crimes against peace are valid, his arguments are ultimately self-defeating. Article 12(2)(a) of the Qualification Directive specifically excludes a person from refugee status if there are serious reasons to believe that “he or she has committed a war crime or a crime against peace.”⁷⁶ If deploying to Iraq is a crime against peace, Shepherd is excluded from refugee status because he deployed to Iraq in 2004. Similarly, if repairing and maintaining AH-64 Apache attack helicopters for use in Iraq qualifies as a war crime, Shepherd is excluded from refugee status for having already done so.

V. Shepherd’s Reasons for Persecution

To qualify as a refugee, it is not enough for Shepherd to demonstrate a reasonable fear of persecution. The persecution feared must be “for reasons of race, religion, nationality, membership of a particular social group or political opinion.”⁷⁷ Shepherd alleges two reasons that the United States will persecute him: first, because of his political opinions about the war in Iraq; and second, because of his membership in a particular social group of deserters and conscientious objectors.

A. Political Opinions

Shepherd claims that he fears persecution for his political opinion, that is, his opposition to the war in Iraq.⁷⁸ As Shepherd recognizes, it is

⁷⁴ L. OPPENHEIM, 2 INTERNATIONAL LAW 251 (H. Lauterpacht ed., 7th ed. 1952).

⁷⁵ “[T]he law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.” *In re Yamashita*, 327 U.S. 1, 15 (1946).

⁷⁶ Qualification Directive, *supra* note 3, art. 12(2).

⁷⁷ Refugee Convention, *supra* note 29, art. 1A.

⁷⁸ See Marx, *supra* note 26, para. III.2.b.

not necessary for a refugee to have acted on his or her political opinions.⁷⁹ Despite this assertion, it is abundantly clear that Shepherd has done so, perhaps in an attempt to bolster his claims that the Army would persecute him. After filing his application, Shepherd gave a number of interviews denouncing the Iraq war⁸⁰ and published an open letter to President Barack Obama after the 2009 inauguration.⁸¹ In February 2009, he accepted the “Peace Through Conviction” prize from the Munich American Peace Committee.⁸²

However, there is a distinction between persecution for a particular political opinion and punishment for a politically motivated act. The *UNHCR Refugee Handbook* states,

Where a person is subject to prosecution or punishment for a political offence, a distinction may have to be drawn according to whether the prosecution is for political opinion or for politically-motivated acts. If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee.⁸³

By leaving his unit prior to his scheduled deployment, Shepherd, arguably, committed a punishable act: desertion with the intent to avoid

⁷⁹ *Id.* (citing JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 149 (1991)).

⁸⁰ See, e.g., Phillip Hen, *US-Deserteur: Von einem, der sich weigerte, jedem Befehl Folge zu leisten* [U.S. Deserter: From One Who Refused to Follow Orders], *FUDDER*, Apr. 29, 2009, <http://fudder.de/artikel/2009/04/29/us-deserteur-von-einem-der-sich-weigerte-jedem-befehl-folge-zu-leisten/>; Elsa Rassbach, *Soldier Seeking Asylum: “I Want to Be Able to Atone,”* *COMMON DREAMS*, May 28, 2009, <http://www.commondreams.org/headline/2009/05/28-4>.

⁸¹ See André Shepherd, *Open Letter from André Shepherd to Pres. Obama*, *TÜBINGEN PROGRESSIVE AMERICANS*, <http://www.tpa-active.com/index.php/issues/4-war-peace/32-open-letter-from-andre-shepherd-to-pres-obama>.

⁸² See Agence France-Presse, *US Deserter Receives German Peace Prize*, *MILITARY.COM*, Feb. 9, 2009, <http://www.military.com/news/article/February-2009/us-deserter-receives-german-peace-prize.html>. Shepherd did not attend the award ceremony in Munich because he was not allowed to leave the Karlsruhe area while his asylum application was pending. See *id.* However, he did prepare an acceptance speech. See André Shepherd, *Prize “Peace Through Conviction” for U.S. AWOL Soldier*, *CONNECTION E.V.*, Feb. 7, 2009, <http://www.connection-ev.de/z.php?ID=534>.

⁸³ *UNHCR HANDBOOK*, *supra* note 31, ¶ 84.

hazardous duty.⁸⁴ However, Shepherd has made no showing that, should he be prosecuted for desertion, he would face a disproportionate sentence based on his political opinions. To the contrary, Shepherd admits in his application that he likely faces from six months to several years of confinement.⁸⁵ As the German Constitutional Court has held, to prove political persecution, the allegedly persecutory acts must go “beyond what was normal in the country of origin.”⁸⁶

⁸⁴ The maximum penalty for desertion with the intent to avoid hazardous duty is reduction to the lowest enlisted grade, forfeiture of all pay and allowances, confinement for up to five years, and a dishonorable discharge. *See* UCMJ art. 85 (2008). Desertion is only punishable by death in a time of war, defined as “a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a ‘time of war’ exists.” *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(18)* (2008). To date, no such declaration or finding has been made regarding Operation Iraqi Freedom or Operation Enduring Freedom. Only one Soldier has been executed for desertion since the end of the American Civil War. Private Eddie Slovik first deserted for four months when he encountered shelling when landing at Omaha Beach in France in August 1944. He rejoined his unit in October 1944, then deserted again in November 1944 after he was wounded in the Hurtgen Forest in Germany. Of the approximately fifty death sentences pending at the time, General Dwight Eisenhower approved only Slovik’s to serve as an example. Slovik was executed by a firing squad on 31 January 1945. *See generally* WILLIAM BRADFORD HUIE, *THE EXECUTION OF PRIVATE SLOVIK* (1954). To date, seven U.S. Presidents have not acted on petitions to pardon Slovik posthumously. *See* Jennifer Reeger, *Deserter’s Execution Remains Vivid for Whitehall Man*, *PITTSBURGH TRIBUNE-REVIEW*, Jan. 30, 2011, http://www.pittsburghlive.com/x/pittsburghtrib/news/westmoreland/s_720477.html.

⁸⁵ *See* Marx, *supra* note 26, para. II. Given the length of Shepherd’s absence, his admission appears accurate; *see, e.g.*, *United States v. McPherson*, 68 M.J. 526 (Army Ct. Crim. App. 2009) (involving case of soldier who missed movement and deserted for six weeks and was sentenced to three months confinement and a bad-conduct discharge); *United States v. Mejia-Castillo*, No. 20040654, 2009 WL 6842543 (Army Ct. Crim. App. Mar. 26, 2009) (involving case of soldier who deserted for seven months and was sentenced to twelve months confinement and a bad-conduct discharge); *United States v. Worthington*, No. 20040396, 2006 WL 6625258 (Army Ct. Crim. App. Sept. 18, 2006) (involving case of soldier who missed movement and deserted for two months and was sentenced to eight months confinement and a bad-conduct discharge).

⁸⁶ Gert Westerveen, *Cases and Comments: IJRL/0098*, 4 *INT’L J. REFUGEE L.* 94, 95 (1992) (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Dec. 12, 1990, 2 BVerfGE 525/90 (F.R.G.)). The *Hinzman* court dismissed a similar argument, noting that if the Army court-martialed Hinzman for desertion, it “would be punishment for nothing more than a breach of a neutral law that does not violate human rights, and does not adversely differentiate on a Convention ground, either on its face, or in its application.” *Hinzman v. Canada* (Minister of Citizenship & Immigration), [2007] 1 F.C.R. 588 (Can.).

B. Deserters and Conscientious Objectors as a Particular Social Group

Although Shepherd describes himself as a “conscientious objector,”⁸⁷ he never attempted to apply for conscientious objector status.⁸⁸ Army Regulation 600-43⁸⁹ defines conscientious objection as a “firm, fixed and sincere objection to participation in war in any form or the bearing of arms, because of religious training and belief.”⁹⁰ Prior to deserting in 2007, Shepherd asked a noncommissioned officer in his unit about conscientious objection.

The answer I received was most troubling. I was told that it would take months for them to decide my claim. First, I would have to speak with a Chaplin [sic] and a counselor to verify my credibility, second to see a psychiatrist to give me a mental check-up, and then my claim would get sent to my commander to decide if I was qualified. I would have to disagree with all wars, not just the ones we know to be unnecessary and immoral as well as live a lifestyle according to my objections. I had to verify what he said, so I looked up the Army Regulations on the Internet so I could read them for myself. After studying the regulations carefully, I knew that this option would not work, as I still believe it is necessary to use force but only as the absolute last resort or for defense purposes.⁹¹

⁸⁷ See Marx, *supra* note 26, para. III.2.a.

⁸⁸ See Shepherd, *supra* note 2.

⁸⁹ U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006) [hereinafter AR 600-43].

⁹⁰ *Id.* at 27 (glossary). The regulation defines two classes of conscientious objectors: 1-A-0, persons who sincerely object to participating as a combatant but do not object to military service in a noncombatant status, and 1-0, persons who sincerely object “to participation of any kind in war in any form.” *Id.* Soldiers who qualify for 1-A-0 classification are retained in military service and reassigned to noncombatant duties, but Soldiers designated as 1-0 must be discharged “for the convenience of the Government.” *Id.* ¶ 3-1a.

⁹¹ See Shepherd, *supra* note 2.

At best, Shepherd could be described as a “selective” conscientious objector, a status which American law does not recognize.⁹² In *Gillette v. United States*,⁹³ the Supreme Court reviewed two cases, one involving a conviction for the willful failure of a draftee to report for induction, and the other a *habeas corpus* action brought by a soldier seeking discharge.⁹⁴ Both appellants had specific objections to participating in the war in Vietnam, but not to military service in general.⁹⁵ Although the Court did not doubt their sincerity, it “refused . . . to interpret the [Selective Service] statute to accommodate their claims.”⁹⁶ Because he would not be able to satisfy the requirements for conscientious objection under U.S. law, Shepherd argues that he had no alternative but to desert to avoid redeployment to Iraq.⁹⁷

This argument alone is insufficient under international law. The *UNHCR Handbook* specifically addresses the issue of selective conscientious objection:

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

⁹² For that matter, neither does German law. Article 4(3) of the German Basic Law provides: “Niemand darf gegen sein Gewissen zum Kriegsdienst mit der Waffe gezwungen werden.” [“No person shall be compelled against his conscience to render military service involving the use of arms.”] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [German Basic Law], art. 4(3). Although military service is compulsory in Germany, article 12a provides: “Wer aus Gewissensgründen den Kriegsdienst mit der Waffe verweigert, kann zu einem Ersatzdienst verpflichtet werden.” (“Any person who, on grounds of conscience, refuses to perform military service involving the use of arms may be required to perform alternative service.”). *Id.* art. 12a(2). These basic rights are applied through another statute, the Gesetz über die Verweigerung des Kriegsdienstes mit der Waffe aus Gewissensgründen (Kriegsdienstverweigerungsgesetz) [KDVG] [Law on the refusal to perform military service with weapons due to conscience (Conscientious Objector Statute)], last amended on July 31, 2008 (BGBl. I S. at 1629) (F.R.G.).

⁹³ 401 U.S. 437 (1971).

⁹⁴ *See id.*

⁹⁵ *See id.* at 439–40. *Gillette*, appealing his draft-dodging conviction, described the war in Vietnam as “unjust.” *Id.* at 439. *Negre*, appealing the denial of his habeas action, objected “to the war in Vietnam, not to all wars.” *Id.* at 440.

⁹⁶ Michael F. Noone, Jr., *Conscience and Security: An Introduction, in SELECTIVE CONSCIENTIOUS OBJECTION: ACCOMMODATING CONSCIENCE AND SECURITY* 1, 3 (Michael F. Noone, Jr. ed., 1989). The Court’s ruling is summarized in AR 600-43: “[R]equests by personnel for qualification as a conscientious objector after entering military service will not be favorably considered when these requests are . . . [b]ased on objection to a certain war.” AR 600-43, *supra* note 89, ¶ 1-5a.

⁹⁷ *See Shepherd, supra* note 2.

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 the light of all other requirements of the definition, in itself be regarded as persecution.⁹⁸

Shepherd appears to pursue this latter argument earlier in his asylum application, attacking the legality of the Iraq war.⁹⁹ However, apart from references to scholarly articles and the Pfaff decision,¹⁰⁰ he does not provide any evidence of collective international condemnation.¹⁰¹

Although the Refugee Convention does not further elucidate how a particular social group is defined, two approaches have formed in asylum law.¹⁰² One, the “protected characteristics” approach, asks “whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.”¹⁰³ This would include, for example, gender or ethnic background.¹⁰⁴ The other, the “social perception” approach, asks

⁹⁸ UNHCR HANDBOOK, *supra* note 31, ¶ 171.

⁹⁹ See Part IV *supra*.

¹⁰⁰ Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] June 21, 2005, 120 Deutsches Verwaltungsblatt 1455 (2005).

¹⁰¹ Despite the controversy over the decision to invade Iraq, neither the U.N. Security Council nor the General Assembly took any action to condemn the United States and the United Kingdom, although then-U.N. Secretary-General Kofi Annan *sua sponte* described the invasion in an interview as “not in conformity with the UN charter.” *Iraq War Illegal, Says Annan*, BBC NEWS, Sept. 16, 2004, <http://news.bbc.co.uk/2/hi/3661134.stm>. Contrast such inaction with the U.N. General Assembly’s condemnation of Serbian ethnic cleansing in Bosnia and Herzegovina. See, e.g., G.A. Res. 47/121, U.N. Doc. A/RES/47/121 (Dec. 18, 1992); S.C. Res. 819, U.N. Doc. S/RES/819 (Apr. 16, 1993).

¹⁰² U.N. HIGH COMM’R ON REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 5 (2002) [hereinafter U.N. HIGH COMM’R ON REFUGEES].

¹⁰³ *Id.* ¶ 6.

¹⁰⁴ See BATTJES, *supra* note 2, at 256.

“whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.”¹⁰⁵

Article 10 of the EU Qualification Directive essentially combines these two approaches, providing that a particular social group can be formed when

members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and . . . that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.¹⁰⁶

Rather than proscribe one approach or the other, article 10 requires that both tests be satisfied.¹⁰⁷ The Directive provides homosexuals as an example of a particular social group.¹⁰⁸ German courts have ruled that

¹⁰⁵ U.N. HIGH COMM’R ON REFUGEES, *supra* note 102, ¶ 7. The Wiesbaden Administrative Court applied a two-part social perception test in a 1993 decision granting asylum to an Iranian homosexual, asking first whether the public views a particular collection of individuals as a group, and second, whether in the eyes of an objective observer the public treats this group as undesirable. See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505, 534–35 (1993) (citing Verwaltungsgericht [VG] Wiesbaden [Wiesbaden Administrative Court], Apr. 26, 1983, No. IV/1 E 06244/81 (F.R.G.)).

¹⁰⁶ Qualification Directive, *supra* note 3, art. 10(d).

¹⁰⁷ See James Hathaway, *What’s In a Label?* 5 EUR. J. MIGRATION & L. 1, 17 (2003). The Hannover Administrative Court used a variant of this approach when a refugee from Ghana claimed that corrupt public officials qualified as a social group under the Refugee Convention. In addition to looking for similar characteristics among the group’s members, the court also required a showing of some degree of inner structure to the group. See Fullerton, *supra* note 105, at 533–34. However, the Qualification Directive does not require any particular degree of cohesion within a social group. See BATTJES, *supra* note 2, at 256.

¹⁰⁸ Qualification Directive, *supra* note 3, art. 10(d). In addition to sexual orientation, the 2001 draft of the Qualification Directive included “age or gender, as well as groups comprised of persons who share a common background or characteristic that is so fundamental to identity or conscience that those persons should not be forced to renounce their membership.” COMM’N OF THE EUROPEAN CMTYS., PROPOSAL FOR A COUNCIL DIRECTIVE ON MINIMUM STANDARDS FOR THE QUALIFICATION AND STATUS OF THIRD COUNTRY NATIONALS AND STATELESS PERSONS AS REFUGEES OR AS PERSONS WHO OTHERWISE NEED INTERNATIONAL PROTECTION art. 12 (2001).

homosexuals,¹⁰⁹ Sri Lankan Tamils,¹¹⁰ and Yezidi Turks qualify as particular social groups.¹¹¹

In his application for asylum, Shepherd maintains that he is a member of a particular social group of deserters and conscientious objectors,¹¹² and that the U.S. military will prosecute him for his affiliation to this particular social group.¹¹³ This argument presents a logical fallacy. Should Shepherd be prosecuted by the Army, it would be because he deserted his unit, regardless of the reason and regardless of whom Shepherd associated with following his desertion.

In claiming that his beliefs against the war qualify as an immutable characteristic, he cites to a 1989 resolution by the U.N. Commission on Human Rights.¹¹⁴ This resolution, adopted without a vote, recognized “the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought, conscience, and religion.”¹¹⁵ However, Shepherd fails to point out that the resolution does not address selective conscientious objection, but rather the right to object to military service in its entirety.

The resolution also called upon states to recognize the right of conscientious objection by providing alternate service.¹¹⁶ The U.N.

¹⁰⁹ See Fullerton, *supra* note 105, at 534–35 (citing Verwaltungsgericht [VG] Wiesbaden [Wiesbaden Administrative Court], Apr. 26, 1983, No. IV/IE 06244/81 (F.R.G.)).

¹¹⁰ See Gert Westerveen, *Cases and Comments: IJRL/0080*, 3 INT’L J. REFUGEE L. 337–38 (1991) (citing Verwaltungsgericht Berlin [VG] [Berlin Administrative Court], 1984, 22 A 811/82 (F.R.G.)). Tamils are a minority ethnic group in Sri Lanka that was largely disenfranchised by the Sinhalese majority after Sri Lankan independence in 1948; Tamil separatists fought a bloody civil war for a separate Tamil state from 1983 to 2009. See *Background Note: Sri Lanka*, U.S. DEP’T OF STATE (June 7, 2010), <http://www.state.gov/r/pa/ei/bgn/5249.htm>.

¹¹¹ See Westerveen, *supra* note 110, at 337–38. Yezidis are a Kurdish minority with traditions from Islam and Zoroastrianism; Muslims persecute Yezidis as heretics, contending that the Yezidi main deity, Tawsy Melek, is actually Satan. See *The Truth About the Yezidis*, YEZIDI TRUTH.ORG, http://www.yeziditruth.org/the_yezidis (last visited Jan. 18, 2010).

¹¹² See Marx, *supra* note 26, para. III.2.a.dd.

¹¹³ See *id.* para. III.2.a.ff.

¹¹⁴ See *id.* para. III.2.a.cc. Shepherd’s application incorrectly refers to the resolution as a U.N. General Assembly document.

¹¹⁵ Draft Report of the United Nations Commission on Human Rights, U.N. Doc. E/CN.4/1989/L.10/Add.15 (1989) [hereinafter U.N. Doc E/CN.4/1989/L.10Add.15].

¹¹⁶ See Kevin J. Kuzas, Note, *Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?* 31 VA. J. INT’L L. 446, 453 (1991) (citing U.N. Doc. E/CN.4/1989/L.10/Add.15 (1989)).

Commission on Human Rights reemphasized this in 1993, specifically reminding states with compulsory service of its recommendation for implementing alternate service “compatible with the reasons for conscientious objection.”¹¹⁷ Similarly, in 1997, the Commission passed another resolution encouraging states to “consider granting asylum to those conscientious objectors compelled to leave their country of origin because they fear persecution owing to their refusal to perform military service when there is no provision, or no adequate provision, for conscientious objection to military service.”¹¹⁸

It is clear from the language of these resolutions that the U.N. Commission on Human Rights was referring to nations that did not provide an alternative to compulsory military service. It was not calling for nations that already allow conscientious objection to expand existing conscientious objector rules. Shepherd’s application ignores the fact that the United States has not relied on the draft since December 1972.¹¹⁹ Shepherd admits in his application that his enlistment was voluntary, and although he mentions the stop-loss policy,¹²⁰ he makes no attempt to tie this policy in to his arguments on conscientious objection. He therefore leaves a hole in his argument by asserting a right to conscientious objection¹²¹ but failing to explain how that right applies to his situation.

Ultimately, Shepherd fails to satisfy the Qualification Directive’s test for belonging to a “particular social group” because his opinions about the war in Iraq do not rise to the level of immutable, unchangeable characteristics such as age, gender, family ancestry, or sexual orientation. Such opinions are already addressed by the provisions regarding political opinion in the Refugee Convention and the Qualification Directive. Shepherd’s argument for particular social group appears merely as an attempt to bolster his claim for refugee status.

¹¹⁷ HITOMI TAKEMURA, INTERNATIONAL HUMAN RIGHT TO CONSCIENTIOUS OBJECTION TO MILITARY SERVICE AND INDIVIDUAL DUTIES TO DISOBEY MANIFESTLY ILLEGAL ORDERS 56 (2009) (citing U.N. Commission on Human Rights Resolution 1993/84, Mar. 10, 1993).

¹¹⁸ U.N. Commission on Human Rights Resolution 1998/77, Apr. 22, 1998.

¹¹⁹ See Thomas Evans, *The All-Volunteer Army After Twenty Years: Recruiting in the Modern Era*, 27 ARMY HISTORY 40 (1993).

¹²⁰ See Marx, *supra* note 26, paras. I, II.

¹²¹ As Shepherd himself recognizes, however, there is no international convention or declaration that recognizes a right to conscientious objection. See *id.* para. III.2.a.cc; see also Cecilia M. Bailliet, *Assessing Jus ad Bellum and Jus in Bello within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum*, 20 GEO. IMMIGR. L.J. 337, 341 (2006).

VI. Conclusion

Although the Qualification Directive and the Pfaff decision appear to create a new mechanism for Soldiers seeking to avoid deployment, they are not a “get out of jail free” card, at least for André Shepherd. Shepherd may have had a stronger case had he objected during his first deployment, or had he taken a more direct part in hostilities. While Shepherd’s arguments likely will prove unpersuasive, it is very probable that others will attempt to succeed where Shepherd appears to have failed. In Canada, other servicemembers continued to petition for Canadian asylum even after the Canadian government denied Jeremy Hinzman’s asylum application.¹²² All things considered, while Shepherd’s bid for asylum may be the first such case in Germany, it likely will not be the last.

¹²² See, e.g., *Smith v. Canada (Minister of Citizenship and Immigration)*, 2009 F.C. 1194 (Can.); *Lowell v. Canada (Minister of Citizenship and Immigration)*, 2009 F.C. 649 (Can.); *Landry v. Canada (Minister of Citizenship and Immigration)*, 2009 F.C. 594 (Can.); *Glass v. Canada (Minister of Citizenship and Immigration)*, 2008 F.C. 881 (Can.); *Key et al. v. Canada (Minister of Citizenship and Immigration)*, 2008 F.C. 838 (Can.); *Colby v. Canada (Minister of Citizenship and Immigration)*, 2008 F.C. 805 (Can.).