IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2012] NZIPT 800388**

AT AUCKLAND

Appellant:	**AF (Syria)**
Before:	B L Burson (Member)
Counsel for the Appellant:	C Curtis
Counsel for the Respondent:	No Appearance
Date of Hearing:	28 November 2012
Date of Decision:	20 December 2012

DECISION

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[1] This is an appeal against a decision of a refugee and protection officer, declining to grant refugee status and/or protected person status to the appellant, a citizen of Syria.

INTRODUCTION

[2] The appellant advances his claim for refugee and/or protected person status on a number of grounds. First, that he will be called up as a reservist into the Syrian Army and be forced to take part in the conflict inside Syria against his will. Second, that as an Assyrian Christian he is at risk of being targeted by groups opposed to the continued presence of his community in Syria. Third, he is at risk of being harmed by a Muslim man to whom he owes money. As will be seen, it is unnecessary for the Tribunal to address anything other than the first basis of claim.

[3] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[4] The appellant was born in the mid-1970s in a small village of approximately 4,000-5,000 people in the Hasaka province of Syria. The appellant is the eldest of five siblings born to his parents. His family are Assyrian Christians and their community comprised approximately 10 per cent of the village population. The majority were Kurds. There was a Shia Alawite community, comprising government officials, stationed in the village.

[5] The Assyrian community lived off the land and the appellant's family were no different. They made their livelihoods by growing crops such as cotton and barley. The appellant's life was hard but uneventful for present purposes. There were minor inter-communal tensions from time to time, typically relating to the harassment of Christian girls by Muslim youths, but the problems were resolved by the leaders of the communities. Nevertheless, over the past 20 years, life became progressively more difficult because of changes in the climate and the division of water away from the region to the urban centre of Hasaka. His two younger sisters married and emigrated, leaving the appellant and his two younger brothers at home.

[6] In 2009, the appellant met and married a New Zealand citizen of Assyrian ethnicity. Following the marriage ceremony in Syria, the appellant travelled to New Zealand in mid-2009. To pay for the wedding, the appellant borrowed a sum of money from a Muslim neighbour. The agreement was that the money would be repaid in 12 months' time. It was the appellant's intention to obtain work in New Zealand to pay back the loan. Additionally, he and an uncle borrowed money from another Muslim man with the intention of growing a cotton crop on land they had rented. They were to repay the creditor in cotton and anticipated the return would be good. The appellant planned to use his share of the profits generated from the surplus cotton to repay part of the debt he had incurred to fund the wedding.

[7] Unfortunately, the cotton harvest from the rented land was poor and the person demanded his money back. After arriving in New Zealand, the appellant struggled to find work. While repayment was made to this person, the appellant has been unable to pay back the money he had borrowed to fund the wedding.

[8] After approximately two years of living in New Zealand, the appellant separated from his wife. By this time the uprising in Syria had been underway for many months. Contact with his family had become difficult and he was in intermittent contact with them every two to four weeks.

[9] The appellant understands from his family that inter-communal tensions have increased following the uprising. Government forces have deserted the village and the power vacuum was exploited by local Kurdish political parties who have established an alternative power-centre. The appellant was told that, shortly after the uprising began, his two brothers, who at that time remained in Syria, had been prevented by local Kurds from farming land owned by the family. They were bluntly told that they were not welcome on the land as they were Christians. The appellant's mother is harassed more frequently because of her non-Muslim attire. More worryingly, he has been told, on a number of occasions unknown Muslim persons have come to the family house at night shouting anti-Christian abuse and throwing stones at the window. On one occasion, a window was broken as a result.

[10] In approximately mid-2012, shortly after his interview with the Refugee Status Branch, the appellant telephoned his parents. He was told by his mother that his youngest brother, who had now turned 18, had received his military service conscription papers. Not wanting him to be conscripted at this time, the appellant's father arranged for the brother to be smuggled across the border into Turkey. The appellant understands that he has made his way to Greece and then on to another western European country where he has lodged a claim for asylum.

[11] The appellant has also learnt that the man from whom he borrowed money to pay for the wedding has been attending the family home in the village, demanding his money and threatening to kill the appellant if he returns to the village.

[12] The appellant told the Tribunal that he is anxious about his safety if returned. If he is returned to Syria he would be questioned upon arrival. He believes he would be forced to join the Syrian Army. Even though he completed his military service a number of years ago, he is still eligible for call-up as a reservist. He does not wish to do so. As a Christian man he has been taught that it is wrong to kill and this is one of his core religious beliefs. He would not wish to fight and kill anybody. He had performed his previous period of military service during a time of peace and was considered by him to be more of a civic obligation. Had he received orders to actually do any fighting during his period of military service, he would have deserted because this would have conflicted with his religious beliefs.

[13] Beyond this he fears that he will be harmed by terrorist groups which have infiltrated Syria and which are targeting Christian populations. He has heard

reports of Christians being abducted. He believes terrorists are active in the vicinity of the village because, approximately three weeks ago, he learnt from internet reports that a Syrian air force plane had bombed the neighbouring village. It would not do so if there were no terrorists in the area. Upon hearing this news, he contacted his parents who told him they had witnessed the explosion. He persuaded his parents and other brother, who remains in Syria, to stay temporarily with a relative who lives elsewhere. He pleaded with his brother to leave Syria but his brother refused because there would be no one left to look after their parents.

Documents and Submissions Received

[14] On 26 November 2012, the Tribunal received written submissions from counsel in relation to the claim. In support, counsel provided a copy of:

(a) decision of the Refugee Review Tribunal of Australia *1112951* [2012] RRTA 281(1 May 2012);

(b) decision of UN Human Rights Committee in *Atasoy and Sarkut v Turkey* Communication Nos 1853/2008 and 1854/2008 (19 June 2012);

(c) country information relating to the situation for Assyrian Christians in Syria and threats issued by the Syrian Free Army against members of the Syrian Military Forces;

(d) letter from the Assyrian Association in New Zealand (23 October 2012) confirming the appellant's membership of the association; and

(e) copy of letter from the Holy Apostolic Catholic Assyrian Church of the East Diocese of Australia and New Zealand (9 November 2011) confirming the appellant's attendance at rituals and rites of the church.

[15] At the conclusion of the hearing counsel made oral submissions.

[16] On 28 November 2012, counsel filed further country information relating to the call-up of reservists by the Syrian government. On 17 December 2012, counsel filed further country information relating to the situations of Christians inside Syria.

ASSESSMENT

[17] Under section 198 of the Immigration Act 2009 ("the Act"), on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

(a) a refugee under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and

(b) a protected person under the 1984 Convention Against Torture (section 130); and

(c) a protected person under the 1966 International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[18] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant's account.

Credibility

[19] The Tribunal finds the appellant to be a credible witness. His evidence was consistent, spontaneous and plausible. His account is accepted in its entirety.

[20] The Tribunal finds that the appellant is an Assyrian Christian man from Syria in his mid-30s. He has borrowed a sum of money from a Muslim neighbour which remains owing. The man has recently come to the appellant's family home making threats over the debt.

[21] The appellant has been in New Zealand since 2009. Since the uprising began in Syria in early 2011, the appellant's family has encountered increased harassment from the Muslim community. From time to time, his mother is harassed for not adopting Muslim attire and unknown persons come to the family home at night shouting abuse and throwing stones. On one occasion, a window was broken. The family have also been prevented from farming some land that they own.

[22] The appellant's youngest brother has fled Syria in order to avoid his period of compulsory military service. The appellant himself has completed his period of military service and would refuse to serve in the army at the present time because

it is involved in conflict which would require him to kill people in breach of his genuinely held religious beliefs.

The Refugee Convention

[23] Section 129(1) of the Act provides that:

> "A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[24] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

> "... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[25] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

General principles

[26] For the purposes of refugee determination, "being persecuted" has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

[27] In determining what is meant by "well-founded" in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed

to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008), at [57].

[28] As to claims for refugee status based on an objection to performing military service, the relevant principles are set out in *Refugee Appeal No 75378* (19 October 2005). The Authority confirmed that punishment for refusing to perform compulsory military service in circumstances which give rise to a real chance that the claimant will be required to commit human rights abuses or act otherwise in breach of international humanitarian law can constitute being persecuted for the purposes of the Refugee Convention. It located the belief by a person that he or she should not be compelled against their will to perform such military service within the ambit of Article 18 ICCPR. This relevantly provides:

> "**Article 18**
>
> 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.
>
> …
>
> 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.
>
> …"

[29] The Authority stated:

> "**Article 18 ICCPR and Participation in "Internationally Condemned Conflicts"**
>
> General Principles
>
> [87] It is appropriate to note at the outset that the phrase "internationally condemned conflict" is apt to mislead. There is no need for the particular conflict to have been the subject of a formal condemnation by resolution of a supranational body, although plainly the existence of such condemnation would be relevant to the inquiry. Rather, what is happening on the ground as to observance of the laws of war by parties to the conflict is key - see *Krotov v Secretary of state for the Home Department* [2004] INLR 304, 323-324; *Ciric and Ciric v Canada* [1994] 2 FC 65.
>
> [88] At the heart of this lies the proposition that no one can be compelled to undertake military service where a real chance exists that this will require the refugee claimant to commit human rights abuses. In *Sepet and Bulbul*, Lord Bingham (supra) at p329, [8], puts it thus:
>
> > 'There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment: see, for example, *Zolfagharkhani v Canada* (Minister of Employment and Immigration) [1993] FC 540; *Ciric v Canada* (Minister of Employment and Immigration) [1994] 2 FC 65; *Canas-Segovia v Immigration and Naturalization*

> *Service* (1990) 902 F 2d 717; *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, paras 169, 171.'
>
> [89] In the Authority's view, it is the Article 18(3) requirement that any limitation on the right to manifest belief be in pursuit of a legitimate state aim, which provides the answer as to why it is that refugee status is appropriately recognised in these circumstances. Quite simply, the state does not enjoy the right to wage war in whatever manner it chooses…."

[30] Citing observations of the International Court of Justice in *Nicaragua v United States of America* (Merits) (1986) ICJ Reports 14 that Common Article 3 of the Geneva Conventions represents a peremptory norm of international law, the Authority went on to find, at [94]-[95] that, while military action in breach of "the laws of war" is, in a sense disproportionate, such actions are better understood as being fundamentally illegitimate. The Authority concluded, at [98]:

> "Any legitimate aim the state may have in conscripting persons for participation in armed conflict, does not extend to forcing participation in conduct that amounts to breaches of the laws of war. When military operations breach the laws of war, the aim of any conscription policy ceases to be for a legitimate aim."

[31] Reference to the "laws of war" in *Refugee Appeal No 75378* is to be understood as a reference to all relevant international law regimes which apply in situations of armed conflict, to which the Tribunal will turn below.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Syria?

Obligation to perform military service in Syria: General

[32] Liability for compulsory military service in Syria was detailed by the Immigration and Refugee Board, Canada, in *Syria: Compulsory military service, including age limit for performing service; penalties for evasion; occasions where proof of military service status is required; whether the government can recall individuals who have already completed their compulsory military service*, SYR102395 (8 March 2007). It notes that Syrian males are required to register for military service when they reach 18 years of age. Males may be conscripted between the age of 18 and 40 years. Sources cited indicated that the upper age limit for performing reserve duty is between 45 and 50 years.

The calling up of the reservists at the present time

[33] Country information confirms that individuals who have completed military service are considered reservists and have a continuing liability for military service recall. There are credible reports that the government has recalled reservists in

the wake of the uprising; See Michael Veiss "A Safe Area for Syria: An Assessment of Legality, Logistics and Hazards" *Strategic Research and Communication Centre* (24 December 2011) at p10.

[34] The Reuters report *Strained Syrian Army Calls up Reserves; Some Flee* (4 September 2012) also notes:

> "Syria is calling up former soldiers from the reserves active army service in growing numbers, a sign of the strain of efforts to crush the 17-month-old revolt against President Bashar al-Assad".
>
> Several fleeing reservists and a serving army officer told Reuters that thousands of men have been called up in the past two months to bolster the 300,000-strong army, and many of them are failing to report for duty.
>
> We have two choices: 'Stay and kill fellow Syrians or desert, and beyond the run from military courts' said a legal assistance summoned for duty in Damascus. Like others interviewed for this article, he asked not to be identified for security reasons.
>
> One army officer contacted in Homs said he believed that only half of those called up in recent months have reported for duty, although it was not possible to verify that figure or ascertain whether other units had experienced similar levels of reservists failing to report.
>
> The officer said many units had suffered heavy losses battling rebels.
>
> 'There is a shortage of men. A lot of fighters have been killed, and we have desertions' he said by telephone, sighing.
>
> …
>
> DEMAND RISING
>
> The Homs officer said reservists had been called up for several months but demand had risen in the past two months, especially during the surge in fighting in Damascus and Aleppo.
>
> 'We have yet to need full army mobilisations. But if the situation deteriorates in the coming months, we may need it. The country is in a state of war and we need everyone's help.'
>
> Residents in Damascus say checkpoints across the city now inspect young men's IDs to check they are not fleeing army service or have not been called up from the reserves. Some deserters do not leave their homes, fearing neighbours who may report them.
>
> …
>
> The army officer in Homs said men under 30 or men who had recently completed their army service were being called up by military headquarters first, as well as men who had specialised in artillery or armoured vehicle units."

[35] In response to the protracted fighting, in March 2012, the Syrian regime issued new travel restrictions banning all males between ages 18 and 42 from leaving the country; see David Enders "As Syria War rages, Assad bans military-age men from leaving" *Christian Science Monitor* (27 March 2012).

Application to the appellant's case

[36] The Tribunal is satisfied that, should the appellant be removed to Syria, he would be questioned upon arrival. Information regarding his time abroad and his reason for returning to Syria would no doubt be sought. During any interrogation of him it is likely to surface that he has completed his military service and is eligible for call-up. This also raises a significant possibility that the refusal of his brother to respond to his military service will come to light. Country information suggests that the appellant is not of an age that he is in the first round of reservists being called-up. Nevertheless, the possibility that, in light of his brother's defection, he would be conscripted in his place cannot be ruled out as remote or speculative, given the increasingly arbitrary and capricious nature of acts by agents of an autocratic regime, fighting for its very survival in a bitter civil war.

[37] Having determined that there is a real chance that the appellant would be called up for reservist duty upon arrival at the airport (or within a short time thereafter), the issue is whether this constitutes his being persecuted within the framework set out in *Refugee Appeal No 75378*. To answer this question, it is necessary to consider the nature of the conflict, the conduct of and the parties to it and, in particular, the conduct of the regular armed forces, as well as the international law framework applicable during times of armed conflict.

The conflict in Syria: basic overview

[38] A background to the Syrian conflict can be gleaned from the International Crisis Group Report *Popular Protest in North Africa and the Middle East (vi): The Syrian People's Slow-Motion Revolution* (6 July 2011) ("the ICG Revolution Report") and in International Crisis Group *Tentative Jihad: Syria's Fundamentalist Opposition* (12 October 2012) ("the ICG Jihad Report"). Only a brief narration is required for the purposes of this decision. In response to popular uprisings in Tunisia, Libya and Egypt which had seen the overthrow of deeply entrenched autocratic regimes, in early 2011, sections of Syrian society began to stir. Civil society groups organised small-scale meetings and demonstrations in support of what was happening elsewhere in the region. A rural migrant underclass concentrated in neighbourhoods around major urban centres, largely shut out of economic growth, became increasingly rebellious. Sensitive to what was happening, the regime made limited and ineffective concessions. As persons began to increasingly question the legitimacy of a regime of a similar ilk to those toppled elsewhere, the security forces clamped down with their customary tactics

of intimidation, arbitrary arrest and beatings. These heavy-handed responses by the security forces inflamed an already volatile situation.

[39] The touchstone was lit in March 2011 with the arrest, detention and ill-treatment of a group of children for writing anti-regime graffiti on a wall. This sparked widespread local demonstrations, not just against the treatment of the children, but against the social, political, and economic conditions in the country more generally. Following suppression by state forces of peaceful protests in Dar'a, including firing at a funeral procession, protest marches erupted in a number of cities throughout Syria.

[40] The conflict has escalated and continues to do so with large-scale urban combat operations involving relatively organised land forces supported (at least on the government side) by air-power, taking place alongside more asymmetric/insurgent warfare. According to a recent report by Chatham House, *Syria: Prospects for Intervention* (August 2012), there is an existing international dimension to the conflict. Various regional and international actors are intervening, mostly in semi-covert form, through provision of funds, weapons supply and training to the Free Syrian Army ("FSA"), and logistical and communication support.

[41] The conflict has caused significant internal and external displacement. According to a recent UNHCR report, as at November 2012 over 400,000 Syrian refugees have registered or are awaiting registration with UNHCR throughout the region. UNHCR expects "tens of thousands more" in the region who remain unregistered. The trend in displacement is increasing, with between 8,000 or 9,000 reported to have entered Turkey in a single night recently. Jordan, Iraqi Kurdistan and Lebanon have all received significant refugee flows; see UNHCR *Syria Situation Regional Update* (13 November 2012).

The parties to the conflict

[42] The conflict in Syria involves a multiplicity of combatant groups. On the government side, three main force types are engaged. These are detailed in the *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic Report* (23 November 2011) ("the IIC 2011 Report") at [18]-[20] as being:

(a) The national armed forces composed of the army, navy and air force. These forces number around 300,000 personnel in total. These are

organised into three corps with a total of 12 divisions and include specialist divisions such as the Republican Guard;

(b) The State security apparatus composed of a dense network of security and intelligence agencies. These are stated to play a "powerful role in Syrian society, monitoring and repressing opposition to the Government". These forces include Ministry of Interior Police Forces, Military Intelligence, the Political Security Directorate, and the General Intelligence Directorate; and

(c) Loyalist militia groups. These include the *Shabbiha* militia, composed of an estimated 10,000 civilians, armed by the government, and the People's Army, a Ba'ath Party militia with an estimated 100,000 reservists.

[43] Pitted against the state forces is a disparate array of groups. In July 2011 the group called the FSA was formed by a senior military officer, Colonel Riydah Al-Asaad, which has, over time, emerged as the most prominent military group. The ICG Jihad Report, (*op cit*) at p6, cautions against seeing the FSA as a "coherent organisation" and argues that it "more closely resembles a brand name than a unified military force". Nevertheless, senior military figures within the FSA have sought to create a more unified and robust command and control apparatus. In January 2012, shortly after his defection, Brigadier General Mustafa Al-Sheikh created the Supreme Military Council of the FSA to serve as a supervisory body overseeing regional military councils which were themselves tasked with coordinating strategy amongst local FSA factions. The results have been mixed, with effective command chains and structures operating with varying degrees of success depending on the locality; see ICG Jihad Report at pp22-24.

[44] Alongside the FSA, various Salafist groups have become involved in the conflict over time. The relationship between the FSA and the Salafist groups is also mixed, with some groups aligning themselves to the FSA and some acting outside its aegis. These groups have assumed a growing, if uncertain, influence on the dynamics of the conflict, although their relative size, effectiveness and cohesion is a matter of ongoing debate among analysts; see generally the ICG Jihad Report.

Relevant International Law framework

International Human Rights law

[45] Save for certain limited exceptions, international human rights law does not cease to apply during situations of armed conflict; see M Cherif Bassiouni International Criminal Law Sources *Subjects and Contents* (Vol 1) (Martinus Nijhoff, Leiden, 2008) at p290. The continuing applicability of international human rights law during armed conflicts – both international and non-international, has been addressed by multiple international bodies. The International Court of Justice ("ICJ") affirmed the applicability of international human rights law during armed conflicts in *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* ICJ reports (8 July 1996), at [25]:

> "The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."

[46] In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, ICJ Reports (9 July 2004), at [106]-[113], the ICJ confirmed the applicability of international human rights law to situations of military occupation. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda*), ICJ Reports (19 December 2005), at paragraph 216, the ICJ applied international human rights law to a situation of armed conflict:

> "The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory…It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories."

[47] The UN Human Rights Committee has also recognised the applicability of the ICCPR in situations of armed conflict in *General Comment No 31*, *Nature of the General Legal Duties Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (26 May 2004), at [11]:

> "As implied in General Comment 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."

[48] The Committee has reiterated this position in its observations on States' Periodic Reports *Concluding Observations of the Human Rights Committee in respect of the United States,* UN Doc CCPR/C/USA/CO/3 (2006), at [10]. In relation to the conflict in the Democratic Republic of Congo, the Committee has stressed the need for States Parties to "take all necessary steps to strengthen its capacity to protect civilians in the zones of armed conflict, especially women and children"; see UN Doc CCPR/C/COD/CO/3 (2006), at [13]. See also in this context *Concluding Observations in relation to Israel*, UN Doc. CCPR/CO/78/ISR (2003); *Sri Lanka*, UN Doc CCPR/CO/79/LKA (2003); and *Colombia*, UN Doc. CCPR/CO/80/COL (2004).

[49] At a regional level, other supra-national courts have applied relevant regional human rights treaties to situations of armed conflict. The European Court of Human Rights (ECtHR) has applied the European Convention on Human Rights to the conflict in the Russian Federation and to Turkish occupation of Northern Cyprus; see, respectively, *Isayeva, Yusupova and Bazayeva v Russia* Application Nos: 57947/00, 57948/00 and 57949/00 (24 February 2005) and *Cyprus v. Turkey* Application No 25781/94 (10 May 2001). The Inter-American Court on Human Rights has also applied international human rights law in a conflict situation; see *Bamaca Velásquez v Guatemala* (25 November 2000), at [207].

International humanitarian law

[50] The significance of attempts by the FSA to introduce a stronger command and control element to its operations lies in the effect this has on the classification of the hostilities under international law. If the conflict can be classified as an armed conflict, international humanitarian law becomes operative and certain actions by the belligerents are prohibited on the basis they constitute war crimes.

[51] A definition of armed conflict has emerged from the pre-trial decision of the ICTY (Appeals Chamber) in *Prosecutor v Tadic (Decision on the Defence Motion for an Interlocutory Appeal on Jurisdiction)* Case No IT-94-1 (2 October 1995). The Appeals Chamber stated, at [70], that an armed conflict exists whenever there is a "resort to armed force between states" or a situation of "protracted armed violence between governmental authorities and organised armed groups or between such groups within a State". Under this approach, the existence of an armed conflict is measured by two fundamental criteria:

(a) the intensity of the violence; and

(b) the organisation of the parties.

[52] Broadly, although post-*Tadic* it is possible to discern arguments in academic commentary in a favour of a unitary approach to all armed conflict, contemporary international humanitarian law continues to recognise two basic types of armed conflict: international and non-international armed conflicts. International armed conflict refers to an inter-state conflict; see Common Article 2 of the 1949 Geneva Conventions. The position is complicated by what is known as "internationalised" armed conflict, where foreign military intervention occurs in a previously existing non-international conflict. Where a state "has a role in organizing, coordinating or planning the military actions" of a given non-state armed group engaged in armed conflict with another state, this may also internationalise the conflict; see the discussion by Sylvain Vite "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91(873) *International Review of the Red Cross* at p71. In such cases, it is possible that the two different types of conflict take place at the same time; see the International Court of Justice decision in *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* (1986) ICJ Reports at p114.

[53] As for non-international armed conflicts, there are two main sources: Common Article 3 to the 1949 Geneva Conventions and the Additional Protocol II to those same Conventions. Using these sources as a starting point, it is possible under contemporary international humanitarian law to distinguish different minimum thresholds for classification as a non-international armed conflict; see Michael Cottier "Article 8: War Crimes" in O Triffterer *Commentary on the Rome Statute* (Hart publishing, Oxford, 2008), at p290; Andeas Zimmerman "Scope of application of Article 8 para 2(e)" in O Triffterer *Commentary on the Rome Statute* (Hart Publishing, Oxford, 2008) at p501.

[54] At the lowest is Common Article 3 to the 1949 Geneva Conventions, which provides they apply, as a minimum, "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties". Cottier observes that, while Common Article 3 does not expressly require the existence of 'organised armed groups', under customary international law, a confrontation between armed groups possessing a minimum degree of organisation is required.

[55] More stringent criteria for classification are defined in Article 1 of the 1977 Additional Protocol II to the 1949 Geneva Conventions. This provides that non-

international armed conflicts are all armed conflicts which do not constitute international armed conflicts:

> "... which take place in the territory of a high contracting party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

[56] From this approach, a number of fundamental criteria emerge:

(a) A confrontation between government forces and "dissident" armed forces;

(b) The dissident armed forces are under a responsible command; and

(c) The dissident armed forces control a part of the territory as to enable them to "carry out sustained and concerted military operations" and to implement the Protocol.

[57] According to the International Committee of the Red Cross *ICRC Commentary on the 1977 Additional Protocols to the Geneva Conventions of 1949*, at p1352, the existence of a responsible command:

> "... implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority."

As for the question of territorial control, the ICRC, *(op cit)* at pp1352-1353 notes:

> "In many conflicts there is considerable movement in the theatre of hostilities; it often happens that territorial control changes hands rapidly. Sometimes domination of a territory will be relative, for example, when urban centres remain in government hands while rural areas escape their authority. In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces. However, there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol."

[58] While in some contexts and, in particular, the prosecution of persons under international criminal law, these differences may resonate, for present purposes, these differences matter less. This is because both the Common Article 3 and Additional Protocol II prohibit similar, if not identical acts of a kind which usually feature in refugee claims of this nature. The prohibited acts include, *inter alia*:

(a) violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture; Common Article 3(1)(a); Additional Protocol II Article 4(2)(a);

(b) attacks against the civilian population: Common Article 3; Additional Protocol II Article 13(2); and

(c) pillaging (the unlawful appropriation of public and private property during armed conflict): Additional Protocol II Article 4(2)(g);

[59] In determining the threshold requirements for non-international armed conflict, other international bodies have built upon the approach in *Tadic*. Nevertheless, the International Criminal Tribunal for Rwanda ("ICTR") has cautioned that non-international armed conflict cannot be described in abstract terms and must be evaluated on a case-by-case basis; see ICTR, *Prosecutor v Rutaganda,* Case No ICTR-96-3, Judgment (Trial Chamber I), 6 December 1999 at [92].

[60] While the *Tadic* formulation is also reflected in Article 8 the Rome Statute of the International Criminal Court ("the Rome Statute") dealing with war crimes, it has not wholly displaced in that document the other approaches to the minimum threshold for non-international armed conflict.

[61] Before turning to consider the relevance of the Rome Statute in more detail, it must be stressed that, in general terms, other prohibited conduct such as genocide or crimes against humanity are prohibited by international humanitarian law without the need for the acts to be linked to an armed conflict (although such linkage may be required to bring the act within the jurisdictional competence of a relevant *ad hoc* tribunal). Nevertheless, to constitute a war crime, nexus to an 'armed conflict' as that term is defined under international humanitarian law must be established.

International criminal law

[62] Syria is not a party to the Rome Statute and the International Criminal Court may not exercise jurisdiction over international crimes alleged to have been committed on its territory unless the situation is referred to the Court by the UN Security Council; see Article 13(b) of the Rome Statute.

[63] Nevertheless, ICL is also a relevant body of law in cases of this kind due to the operation of Article 1F of the Refugee Convention. This relevantly provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He 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...."

[64] The drafters of the Convention understood that a person who had committed international crimes of this nature who faced a well-founded fear of being persecuted could not claim the benefit of the protection afforded by the Refugee Convention on the basis they were 'undeserving' of protection. The direct incorporation of international criminal law into refugee status determination via the mechanism of Article 1F(a), means that this body of law is also relevant to the inquiry in cases of this kind. Quite simply, a person ought not be obliged to undertake compulsory military service where this would render him or her liable to prosecution under international criminal law. The relevance of international criminal law as expressed in the Rome Statute was emphasised in *Attorney-General v Tamil X* [2011] 1 NZLR 72. The Supreme Court observed, at paragraph [47], that as "a recent international instrument which directly addresses the principles that govern liability for international crimes... it is appropriate to refer to it for authoritative assistance...".

[65] However, as a diplomatically negotiated treaty, the Rome Statute is the product of compromise and, unsurprisingly, not expressed with a consistent legal clarity; see here M Cherif Bassiouni "Preface to Second Edition" in O Triffterer *Commentary on the Rome Statute* (Hart Publishing, Oxford, 2008) at XXV-XXVIII. The significance of this drafting context for the present case is that the definition of war crimes under Article 8 represents something of a hybrid formulation; see the discussion by Gideon Boas, James L Bischoff and Natalie L Reid "Elements of Crimes Under International Law: War Crimes" in Boas, Bischoff and Reid *International Criminal Law Practitioner Library Vol II* (Cambridge, Cambridge University Press, 2008) at pp291-297.

[66] Article 8(2)(c) and (e) relate to war crimes committed in the context of non-international armed conflicts but the threshold requirements are not expressed in identical terms. Article 8(2)(c) which relates to acts including, *inter alia, v*iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; hostage taking; and summary executions, is drawn from Common Article 3 to the Geneva Conventions of 1949. Accordingly, Article 8(2)(d) defines the minimum threshold for a non-international armed conflicts in respect of acts specified under Article 8(2)(c) simply by reference to "situations of internal

disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature".

[67] Article 8(2)(e), which lists yet further acts including, *inter alia*, "intentionally directing attacks" against the civilian population or against individual civilians not taking direct part in hostilities, or "intentionally directing" attacks on humanitarian relief or peacekeeping operations, pillaging a town or place, conscription of children and sexual violence, come mainly from Additional Protocol II. For these acts, the threshold requirements to constitute war crimes are expressed differently. Drawing upon the decision in *Tadic*, Article 8(2)(f) provides that, for a non-international armed conflict to exist, the conflict must, *additionally* to the Article 8(2)(d) requirements, be one:

> "... that take[s] place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."

[68] For a discussion of the complexities produced by this bifurcation, see Andeas Zimmerman "Preliminary Remarks on Paragraphs 2(c)-(f) and 3: War Crimes Committed in an Armed Conflict not of an International Character" in O Triffterer *Commentary on the Rome Statute* (Hart Publishing, Oxford, 2008) at p479 and at pp492-493, 500-501. For the purposes of this decision, which clearly relates to a conflict involving Government forces, nothing turns on this distinction. In any event, to the extent that matters specified under Article 8(2)(e) also constitute beaches of international humanitarian law and international human rights law, these legal regimes would continue to apply.

Classification of the conflict in Syria

[69] At the present time, the conflict in Syria is clearly not an international armed conflict. While, as the Chatham House report makes clear, interventions of various kinds by regional and international actors *are* taking place, the conflict has not been "internationalised" under international law in that it is not clear that any outside state has a role in organising, coordinating or planning the military actions of the various non-state armed groups involved in the conflict.

[70] As to whether the conflict can now be classified as a non-international armed conflict, as far as the Tribunal is aware, the United Nations Security Council has not expressly applied international humanitarian law to the fighting between government forces and armed groups in Syria. This may, however, have more to do with the structure of the Security Council itself, rather than the reality of whether

a requisite minimum threshold exists. As observed in *Refugee Appeal No 75378* at [87], "what is happening on the ground … is key". This approach has been cited with approval by Guy Goodwin-Gill and Jane McAdam *The Refugee in International Law* (Oxford, Oxford University Press, 2007) at p109; Andreas Zimmerman and Claudia Mahler "The Definition of the Term 'Refugee' in A Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, Oxford, 2011), at p433.

[71] As to what is happening on the ground, at the time of its initial report, the Independent International Commission of Inquiry on the Syrian Arab Republic raised concern that the conflict in Syria risked, at that time, rising to a level of an internal armed conflict but that the Commission was at that time unable to verify the intensity of combat and details of armed groups such as the FSA; see IIC 2011 report, at [97]-[99]. However, by the time of its *Second Report* A/HRC/21/50 (15 August 2012) ("the IIC 2012 report") concerning the position in Syria post February 2012, the Commission concluded, at [12]:

> "In its previous reports, the Commission did not apply international humanitarian law. During the present reporting period, the Commission determined that the intensity and duration of the conflict, combined with the increased organisational capabilities of anti-government armed groups, has met the legal threshold for a non international armed conflict. From this determination, the commission applied international humanitarian law in its assessment of the actions of the parties during hostilities."

[72] That the conflict in Syria has now reached the point where it can be classified as a non-international armed conflict under international law was also the conclusion reached by the International Committee of the Red Cross ("ICRC"); see ICRC Confirms International Humanitarian Law Applies to Conflict in Syria (15 July 2012); see http://redcrosschat.org.

[73] In relation to the campaign conducted and fighting in Idlib Governate in March/April 2012, Human Rights Watch reached the same conclusion: see Human Rights Watch *They Burned My Heart: War Crimes in Northern Idlib During Peace Plan Negotiations* (May 2012) at p3. Human Rights Watch state:

> "The fighting in Idlib appeared to reach the level of an armed conflict under international law, given the intensity of the fighting and level of organisation on both sides, including armed opposition, who ordered and conducted retreat. This would mean that international humanitarian law… would apply in addition to human rights law. Serious violations of international humanitarian law are classified as war crimes."

[74] While a formal Security Council resolution applying international humanitarian law to the conflict in Syria is plainly a relevant consideration, this is unlikely to be forthcoming notwithstanding what is taking place on the ground. Giving particular weight to the views of the IIC and ICRC which now accept that the threshold requirements exist, the Tribunal finds for the purposes of determining this appeal, that the conflict in Syria can be characterised now as a non-international armed conflict.

Complicity of Syrian Regular Army Forces in War Crimes

[75] The IIC 2011 report notes, at [39]-[41], that regular military units have become involved in a number of operations which have resulted in war crimes. Testimonies from defectors to the Commission acknowledge that in policing operations and when quelling protests, state forces have shot at unarmed protestors. Defectors stated that they had received orders to shoot at unarmed protestors without warning and that military units had conducted joint operations with security forces and *Shabbiha* militias under "shoot to kill" orders. At [44], the Commission noted:

> "The rationale for the use of force and orders to open fire on demonstrators were echoed in numerous testimony of other former soldiers who had been dispatched to different locations at different times."

[76] The Commission also noted that roadblocks and checkpoints have been set up to prevent free movement of people and to shoot at persons who tried to pass; see [47].

[77] If anything, the involvement of the regular Syrian military forces has increased since the IIC issued the 2011 report. This dynamic is discussed in detail in the International Crisis Group *Syria's Mutating Conflict Report* (1 August 2012) at pp6-9, noting that, at least in the initial stages of the uprising, the security intelligence forces were largely involved in suppressing anti-regime activity though disproportionate violence, and that there was a *deliberate shift from a security to a military- orientated solution* in early 2012.

[78] The conflict in the Baba Amro district of Homs has marked a significant turning point in the conflict in so far as the involvement of the army is concerned. The operation, which saw slow but relentless shelling of the area and the advance of a ground troop operation, has had implications for the future conduct of military operations involving the regular Syrian Army. ICG argue:

> "Baba Amro became a template for the military solution. From strict counter-insurgency it morphed into collective punishment and verged on a wholesale scorched earth policy. As an increasing number of areas were destroyed, the regime made fewer efforts to protect or support affected civilians.

[79] In this context, ICG note that, in the areas the military forces entered, looting "assumed industrial-style proportions, with army trucks ferrying out war booty". Troops also resorted to arson.

[80] The killing of unarmed civilians by pro-government forces, including regular military units, has also continued. Commenting on the military operations carried out against various towns in Idlib district, Human Rights Watch *(op cit)* at p4 state:

> "During the attacks in Idlib Governate documented in this report, government forces killed some civilians with open fire from machine guns, tanks or helicopters, often several hundred metres away from their target. In several cases documented by Human Rights Watch, government forces opened fire and killed or injured civilians trying to flee the attacks. The circumstances of these cases indicate that the government forces failed to distinguish between civilians and combatants and to take necessary precautionary measures to protect civilians. Government forces did not provide any warning to the civilian population about their attacks."

[81] That Syrian government forces – including regular army forces – are involved in indiscriminate attacks in which persons not taking part in the hostilities including children have been killed is also detailed in the Amnesty International Briefing: *Syria: Indiscriminate Attacks Terrorise and Displace Civilians* MDE24/078/2012 (19 September 2012). Symptomatic of this lack of respect for international humanitarian law, international human rights law and international criminal law have been recent attacks on breadlines and bakeries; see Human Rights Watch *Syria: Government Attacking Breadlines Civilian Deaths at Bakeries are War Crimes* (30 August 2012).

[82] The above acts may amount to war crimes under both Common Article 3 and Additional Protocol II as they constitute:

(a) violence to life and persons, in particular murder of all kinds; Common Article 3(1)(a); Additional Protocol II Article 4(2)(a);

(b) attacks against the civilian population: Common Article 3; Additional Protocol II Article 13(2); and

(c) pillaging (the unlawful appropriation of public and private property during armed conflict): Additional Protocol II Article 4(2)(g);

Complicity of Syrian Regular Army Forces in crimes against humanity

[83] Quite apart from the commission of war crimes by units of the regular armed forces, the Tribunal observes that in the IIC 2011 report the Commission concluded that, although the conflict could not be classified as a non-international armed conflict, even at that time, the conduct of the security forces constituted a crime against humanity as defined under Article 7 of the Rome Statue. The Commission stated:

> "102 The Commission received numerous, credible and consistent first-hand reports about widespread and systematic violation of the human rights of civilians in the Syrian Arab Republic since March 2011. The scale of these attacks against civilians in cities and villages across the country, their repetitive nature, the levels of excessive force used consistently by units of the armed forces and diverse security forces, the coordinated nature of these attacks and the evidence that many attacks were conducted on the orders of high-ranking military officers all lead the Commission to conclude the attacks were apparently conducted pursuant to a policy of the state. The above conclusion finds support in the diverse sources of information. Multiple witnesses indicated that, on different days and in different locations, officers at the level of colonel and brigadier general issued orders through their subordinate units to open fire on protestors, beat demonstrators and fire at civilian homes. The Commission received credible evidence that it is unlikely the officers issued these orders independently given that the Syrian military forces are professional forces subject to military discipline. The Commission therefore believes that orders to shoot and otherwise mistreat civilians originated from policies and directives issued at the highest levels of the armed forces and the government."

[84] It is not necessary for the Tribunal to reach a final conclusion on this given its findings in relation to the commission of war crimes.

Application to Appellant's Case

[85] The Tribunal accepts that the appellant has a genuinely held conscientious objection, deriving from his religion, to performing military service of any kind where it would result in him killing another human being. However, it is not necessary for the Tribunal to determine whether or not international jurisprudence has developed to such a point that there is now an accepted right of conscientious objection deriving from Article 18 and Article 6 of the ICCPR as has been suggested by some. Rather, the appellant's claim can be disposed of on more orthodox grounds in that he should not be compelled to fight in a conflict which would require him to act in breach of international humanitarian law, international human rights law and international criminal law.

[86] There is ample country information confirming that regular units of the Syrian Army of a kind which the appellant is likely to be conscripted into are implicated in the commission of human rights abuses and war crimes. The

Tribunal is satisfied, for the reasons given, that these are occurring during a non-international armed conflict. Crimes against humanity may also have occurred. The appellant, if forced to commit these acts, would be personally responsible for his actions under international criminal law.

[87] This strikes at the heart of his right to freedom of religion and belief under Article 18 ICCPR. For the reasons given by the Authority in *Refugee Appeal No 75378*, it is fundamentally illegitimate for the state to require a soldier to act in a manner amounting to a breach of core norms under international human rights law, international humanitarian law, or international criminal law. For a person such as the appellant, who holds a genuinely held belief that he should not be compelled to serve in the armed forces at the present time, conscription amounts to an unlawful interference with his right to manifest his religion.

[88] The Authority emphasised, at [101]:

> "The imposition of a term of imprisonment in such circumstances amounts to serious harm for the purposes of the Refugee Convention. Any loss of personal liberty for refusal to participate in such conflicts, arising from genuinely held religious or other beliefs, undermines human dignity in a key way and is appropriately categorised as "being persecuted" – see J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) at p108."

Any imprisonment of the appellant for refusing to participate in the conflict in Syria where he could be compelled to commit serious human rights abuses or war crimes is appropriately categorised as being persecuted.

[89] In this case, however, there is an even more acute risk to him. There are credible reports of soldiers who refuse to obey to carry out acts amounting to war crimes being shot. This would plainly amount to arbitrary deprivation of life in breach of Article 6 ICCPR and would constitute being persecuted.

Is there a Convention Reason for the Persecution?

[90] The appellant's risk of being called up as a reservist takes place against the backdrop of an increasingly bitterly contested civil war. There can be little doubt that any rejection or protestation by him about being returned to military duty would be perceived as him holding anti-regime views. In the language of the Convention, a negative political opinion would be imputed to him. The second principal issue is also answered in the affirmative.

Conclusion on Claim to Refugee Status

[91] For these reasons, the Tribunal is satisfied the appellant is entitled to be recognised as a refugee under section 129 of the Act.

The Convention Against Torture

[92] Section 130(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

Conclusion on Claim under Convention Against Torture

[93] The appellant has been found to be a Convention refugee. The recognition of the appellant as a refugee means that he cannot be deported from New Zealand to Syria; see Article 33 of the Refugee Convention and sections 129(2) and 164 of the Act. The exception to section 129, which is set out in section 164(3) of the Act, does not apply. Therefore, there are no substantial grounds for believing the appellant would be in danger of being subjected to torture in Syria.

The ICCPR

[94] Section 131 of the Act provides that:

> "(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.
>
> ...
>
> (6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment."

Conclusion on Claim under ICCPR

[95] Again, because the appellant is recognised as a refugee, he is entitled to the protection of New Zealand from *refoulement* to Syria. For the reasons already given in relation to the claim under section 130 of the Act, there is no prospect of the appellant being deported from this country. Therefore, there are no substantial grounds for believing that the appellant is in danger of being subjected to arbitrary

deprivation of life or to cruel, inhuman or degrading treatment or punishment in Syria. Accordingly, the appellant is not a person who requires recognition as a protected person under the ICCPR.

CONCLUSION

[96] For the foregoing reasons, the Tribunal finds that the appellant:

(a) is a refugee within the meaning of the Refugee Convention;

(b) is not a protected person within the meaning of the Convention Against Torture;

(c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[97] The appeal is allowed.

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