

**SUBMISSION TO THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS FOR THE ANALYTICAL REPORT ON CONSCIENTIOUS OBJECTION TO MILITARY SERVICE, 2017**

**I THE INTERNATIONAL LEGAL AND NORMATIVE FRAMEWORK**

The development of international standards up to early 2013 was comprehensively summarised in the first Quadrennial Report (A/HRC/23/22, 3<sup>rd</sup> June 2013). This section will concentrate only on subsequent developments, but reference should be made to the comprehensive later overview of the current state of the standards and jurisprudence in Section 1.3.11 (pps 258 -293) of Freedom of Religion or Belief: an International Law Commentary by Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, published in March 2016 by Oxford University Press.

**A) THE UNITED NATIONS**

**1) HUMAN RIGHTS COMMITTEE**

In jurisprudence since 2013,<sup>1</sup> the majority of the Human Rights Committee has continued to find that the right of conscientious objection to military service is inherent in the right to thought, conscience, and religion, and consequently that failure to allow the exercise of the right is thus a violation of Article 18.1 of the ICCPR. Four members of the Committee, when participating in the examination of relevant communications, have, while invariably agreeing in finding a violation of Article 18.1, consistently adhered to the earlier reasoning that conscientious objection to military service is a manifestation of the freedom of thought, conscience, and religion, and therefore theoretically subject to limitation under Article 18.3. This debate has however not yet had practical implications; the Committee has never found such a limitation justified, and it is hard to imagine the circumstances in which it might do so.

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<sup>1</sup> Young-kwan Kim et al v Republic of Korea (CCPR/C/113/D/2179/2012), Zafar Abdullayev v Turkmenistan (CCPR/C/113/D/2218/2012), Mahmud Hudaybergenov v Turkmenistan (CCPR/C/115/D/2221/2012), Ahmet Hudaybergenov v Turkmenistan (CCPR/C/115/D/2222/2012), Sunnet Japparow v Turkmenistan (CCPR/C/115/D/2223/2012), Nasyrlayev v. Turkmenistan (CCPR/C/117/D/2219/2012), Aminov v. Turkmenistan (CCPR/C/117/D/2220/2012), Matyakubov v. Turkmenistan (CCPR/C/117/D/2224/2012), Nurjanov v. Turkmenistan (CCPR/C/117/D/2225/2012), Uchetov v. Turkmenistan (CCPR/C/117/D/2226/2012), Yegendurdyew v. Turkmenistan (CCPR/C/117/D/2227/2012)

The minority in the most recent cases have appended very brief individual comments indicating that their reasoning has not changed, and that they may not feel it necessary to continue making individual comments.

In the case of *Young kwan Kim et al v Republic of Korea*, the Committee also found a violation of article 9 of the Covenant (arbitrary detention), on the basis that any detention arising from the exercise of Covenant rights is by definition arbitrary. In this it may be noted that it duplicates the reasoning of the Working Group on Arbitrary Detention in its Opinions 8/2008 and 16/2008, regarding Turkey and Colombia. Such a violation might conceivably have been found in any case regarding an accepted conscientious objector, but this has otherwise not been argued before the Committee.

In all its Views regarding Turkmenistan, the Committee also found violations of Articles 7, because of allegations of individual mistreatment which were not challenged by the State; in all except that of Nurjanov, the Committee also found violations of Article 10, because of the general conditions of detention referred to in the communications.. Moreover in six of the cases it also found violations of Article 14.7, because of repeated convictions for the same offence. (In the cases of Abdullayev and Nurjanev, where the first conviction had resulted in a suspended sentence which was imposed only after the second conviction, so that only one term of imprisonment had been served, one member dissented from this finding.)

In the case of *X v. Denmark*. Communication No. 2007/2010, (March 2014) the Committee found that the deportation to Eritrea of an Eritrean national who would be obliged to perform military service contrary to his religious beliefs or face punishment for refusal carried a real risk of treatment in violation of Article 7 of the Covenant (Torture or inhuman or degrading treatment). Although noting that this could not be dissociated with the applicant's claim under Article 18, the Committee did not see the need to consider whether deportation to Eritrea would have constituted a separate violation of article 18.

The Committee has addressed issues of conscientious objection to military service in its concluding observations on Tajikistan<sup>2</sup>, Finland<sup>3</sup>, Ukraine<sup>4</sup>, Bolivia<sup>5</sup>, Kyrgystan<sup>6</sup>, Chile,<sup>7</sup> Israel<sup>8</sup>.

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2 CCPR/C/TJK/CO/2, 22<sup>nd</sup> August 2013, para 21

3 CCPR/C/FIN/CO/6, 22<sup>nd</sup> August 2013, para 14

4 CCPR/C/UKR/CO/7, 22<sup>nd</sup> August 2013, para 19

Austria,<sup>9</sup> Greece<sup>10</sup>, Republic of Korea,<sup>11</sup> Kazakhstan<sup>12</sup> and Azerbaijan.<sup>13</sup>

## 2) HUMAN RIGHTS COUNCIL

In Resolution 24/17, agreed without a vote on 30<sup>th</sup> September 2013, the Human Rights Council largely reiterates the recommendations regarding regarding best practice outlined in Resolution 1998/77 and subsequent resolutions of the former Commission of Human Rights. Additions are operative paragraphs welcoming developments in recent years, explicitly recognising that the right to conscientious objection to military service can be derived from the right to freedom of thought, conscience, and religion or belief, expanding on the fact that the right applies to all who are affected by military service, not just at the point of conscription, and upholding the freedom of expression of those who support conscientious objectors.

In resolutions on **Eritrea** in 2013, 2014, 2015 and 2016<sup>14</sup> the Human Rights Council has called for it to institute provisions for conscientious objection.

In the **UNIVERSAL PERIODIC REVIEW**, recommendations on recognising the right of conscientious objection to military service were received by **Eritrea** from Norway, Spain, Germany and Croatia (three recommendations including one calling for the release of all imprisoned conscientious objectors).<sup>15</sup> A number of other States made recommendations concerning forced recruitment and indefinite military service.

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5 CCPR/C/BOL/CO/3, 6th December 2013, para 21.

6 CCPR/C/KGZ/CO/2, 23 April 2014, para 23

7 CCPR/C/CHL/CO/6, 25<sup>th</sup> July 2014, para 24

8 CCPR/C/ISR/CO/4, 21<sup>th</sup> November 2014, para 23

9 CCPR/C/AUT/CO/5, 2<sup>nd</sup> December 2015, paras 33,34

10 CCPR/C/GRE/CO/2, 2<sup>nd</sup> December 2015 para 37

11 CCPR/C/KOR/CO/4, 2<sup>nd</sup> December 2015, para 44

12 CCPR/C/KAZ/CO/2, 9<sup>th</sup> August 2016, para. 46.

13 CCPR/C/AZE/CO/4, 16<sup>th</sup> November 2016 para 34

14 Most recently A/HRC/RES/32/24, 15<sup>th</sup> July 2016, para 6e..

15 A/HRC/26/13, 7<sup>th</sup> April 2014, paras 122.57, 122.58, 122.60, 122.61, 122.62 and 122.64.

Recommendations on making or improving provision for conscientious objection have been addressed to **Turkmenistan**<sup>16</sup>, by the USA, **Uzbekistan**<sup>17</sup>, by Slovakia and Slovenia, **Turkey**,<sup>18</sup> by Croatia, Germany and Slovenia, **Tajikistan**<sup>19</sup> by Argentina, and **Greece**,<sup>20</sup> by Slovenia and Uruguay.

As far as IFOR is aware, the only **SPECIAL PROCEDURE** of the Human Rights Council to have addressed the issue in the period since the last Quadrennial Report is the **WORKING GROUP ON ARBITRARY DETENTION**, which in an Opinion on the detention of two Jehovah's Witnesses for unauthorised distribution of religious literature<sup>21</sup>, dismissed the relevance of **Azerbaijan's** argument that in the ongoing state of war, and in the absence of provisions for alternative service it had been necessary to take legal action against some Jehovah's Witnesses for their refusal of military service. By contrast, the Working Group reminded the State of the Human Rights Committee's previous recommendation (to be subsequently repeated at the Committee's examination of the State's next Periodic Report, see above) that it make provision for alternative service for conscientious objectors.

### 3) UN HIGH COMMISSIONER FOR REFUGEES (UNHCR)

In December 2013, UNHCR issued new guidelines<sup>22</sup> on claims to refugee status related to military service. The guidelines cover not just conscientious objection, but also desertion and evasion or avoidance of military service for other reasons. With regard to conscientious objection itself they surveyed the most recent international jurisprudence and are therefore able to give much firmer advice on the situations in which conscientious objectors may qualify for refugee status.

## B) REGIONAL INSTANCES

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16 A/HRC/24/3, 5<sup>th</sup> July 2013, Para 113.74

17 A/HRC/24/7, 5<sup>th</sup> July 2013, paras 134.19, 134.20

18 A/HRC/29/15, 13<sup>th</sup> April 2015, paras 151.12, 151.13 and 151.14

19 A/HRC/33/11, 14<sup>th</sup> July 2016, para 118.47.

20 A/HRC/33/7, 8<sup>th</sup> July 2016, paras. 136.14, 136.15.

21 Working Group on Arbitrary Detention, Opinion No. 42/2015 concerning Irina Zakharchenko and Valida Jabrayilova (Azerbaijan), A/HRC/WGAD/2015/42, 15<sup>th</sup> March 2016.

22 HCR/GIP/13/10, United Nations High Commissioner for Refugees, GUIDELINES ON INTERNATIONAL PROTECTION NO. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees.

## 1) COUNCIL OF EUROPE

### EUROPEAN COURT OF HUMAN RIGHTS

In the case of *Enver Aydemir v Turkey*,<sup>23</sup> the applicant, a devout Muslim who had claimed a conscientious objection to service in the armed forces of the secular Turkish state claimed that his treatment at the hands of the Turkish authorities had violated Article 9 (right to freedom of thought, conscience and religion) and Article 3 (prohibition of inhuman or degrading treatment) of the European Convention. The Court rejected the application under Article 9, choosing to narrow the definition of conscientious objection to include only “a firm, fixed and sincere objection to participation in war in any form or to the bearing of arms”. Under Article 3, the Court did however find a violation, in that Aydemir had been assaulted while in pre-trial detention on 24th and 25th December 2009, and that the authorities had failed to exercise due diligence in conducting the subsequent investigation. Moreover, despite the narrow definition of conscientious objection adopted, it found that his repeated prosecution and conviction for refusal to wear military uniform, “the cumulative effect of [which] was likely to repress his intellectual personality”.

In *Savda v Turkey (no. 2)*,<sup>24</sup> the applicant, who had in 2012 been the first non-religious conscientious objector to successfully claim a violation of Article 9 (right to freedom of thought, conscience and religion) of the European Convention, was found to have suffered a violation of Article 10 (freedom of expression) in that subsequently, following a demonstration in August 2008 outside Israeli Consulate in Istanbul in solidarity with Israeli conscientious objectors, he had been sentenced to five months' imprisonment under Article 318 of the Turkish penal code for “inciting the population to evade military service”. The Court observes that “while the statements contained in the declaration at issue give the whole a connotation hostile to military service”, and sets a new precedent by finding that “that “inciting the population to evade military obligations” can not in itself suffice to justify the interference with the applicant's freedom of expression.”

In the case of *Papavasilakis v Greece*<sup>25</sup> the Court held, unanimously, that there had been a violation of Article 9 (freedom of thought, conscience and religion) of the European Convention, in particular because the Greek authorities had failed in their duty to ensure that the interviewing of conscientious objectors by the Special Board took place in conditions that guaranteed procedural efficiency and the equal representation required by domestic law. Papavasilakis had been interviewed by a Board made up

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23 Application no.25012/11, judgment of 7th June 2016

24 Application no. 2458/12; judgment of 15<sup>th</sup> November 2016

25 Application no. 66899/14, judgement of 15<sup>th</sup> September 2015

primarily of servicemen, two of the civilian members of the Board being absent but not replaced. Moreover, the civilian domestic court to which the decision had been appealed had not examined the facts of the case. This case is noteworthy as representing the first occasion representing the first time that any international judicial instance has found a violation of the freedom of religion of an objector through the implementation, rather than absence, of procedures for recognising the right of conscientious objection to military service.

## COMMITTEE OF MINISTERS

At its 1157<sup>th</sup> meeting, the Committee of Ministers, which is charged with considering the implementation of judgements from the European Court for Human Rights, addressed the “Ülke group of cases” from Turkey in which to the 2006 judgement regarding Ülke himself itself had been joined the cases from 2012 of Ercep, Demirtas and Savda. The Ministers' Deputies

“1. noted that there are no arrest warrants issued against the applicants in the Ülke group of cases for any crimes related to failure to carry out military service;

2. noted, however, with concern that the applicant in the case of Ercep is still under the obligation to pay an administrative fine [for] draft evasding and the applicant in the case of Feti Demirtaş was convicted and sentenced to imprisonment for disobedience to a military order, although his conviction is not final yet.

3. urged the Turkish authorities to take the necessary measures to ensure that the consequences of the violations found by the Court in these cases are completely erased for the applicants;

4 . urged the Turkish authorities to take the necessary legislative measures with a view to preventing the repetitive prosecution and conviction of conscientious objectors and to ensuring that an effective and accessible procedure is made available to them in order to establish whether they are entitled to conscientious objector status;

5. invited the Turkish authorities to provide information to the Committee of Ministers on the measures taken or envisaged in order to ensure that conscientious objectors are not tried before military courts in the light of the findings of the European Court in the cases of Ercep, Savda and Feti Demirtaş.

At the 1212<sup>th</sup> meeting in November 2014 the Committee of Ministers closed by final Resolution the examination of the case *Bayatyan v. Armenia*, having examined the updated action report provided by **Armenia** to the 1193<sup>rd</sup> Meeting from 4<sup>th</sup>–6<sup>th</sup> March 2014 on its measures to implement the verdicts in the cases of *Bayatyan v Armenia*, *Tsathuryan v Armenia* and *Bukhatharyan v Armenia*. As well as confirming that the compensation awarded by the European Court of Human Rights had been paid to all three, and that their criminal records had been previously quashed, Armenia had given details of the revised Alternative Service Laws passed in May and June 2013, after consultation with the Venice

Commission. The Committee of Ministers declared itself satisfied that all the measures required had been adopted, in particular, noting that the duration of alternative military and labour services had been reduced to 30 and 36 months respectively and that the alternative labour service was currently supervised by relevant government agencies and that no military control was allowed.<sup>26</sup>

## EUROPEAN SOCIAL CHARTER

In its latest Conclusions on **Greece**<sup>27</sup>, the European Committee on Social Rights under the heading of “Other aspects of the right to earn one’s living in an occupation freely entered upon”, reviewed its decision on the merits of 25<sup>th</sup> April 2001 regarding complaint No. 8/2000, *Quaker Council for European Affairs v Greece*, that the situation regarding “Service Alternative to Military Service” was not in conformity with the 1961 Charter, on the ground that the length of alternative service was excessive. In its previous Conclusions (XX-1/2012) the Committee had noted that “outside the reference period the length of alternative service had been reduced, thereby bringing the situation into conformity with the Charter”, and its own subsequent monitoring had seemingly confirmed this. The Committee however noted representations it had received from the European Bureau for Conscientious Objection and from the Greek National Commission for Human Rights to the effect that for at least two groups of conscientious objectors the situation was not in conformity with the Charter, “those who are required to do a full 15-month alternative service instead of the full 9-month military service, and those who are required to do a reduced 5-month alternative service instead of a reduced 3-month military service.” The Committee requested that Greece's next report provide more information on this.

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<sup>26</sup> Council of Europe, Committee Of Ministers, 8th Annual Report of the Committee of Ministers 2014, March 2015, pp. 167-8.

<sup>27</sup> Conclusions XXI-1 - Greece - Article 1-2, 9<sup>th</sup> December 2016, published January 2017.

## 2) EUROPEAN UNION

The **European Court of Justice**, which has normally ruled on trade disputes, found itself considering questions of Refugee and Human Rights Law when in September 2013, the *Bayerisches Verwaltungsgericht München* (Bavarian Administrative Court, Munich) sought an “advisory opinion” in the case of André Shepherd, a former **USA** serviceman who in an appeal against his denial of asylum in **Germany** had claimed that under Qualification Directive 2004/83/EC issued by the Council of the European Union, he should not be returned to the USA, where he would face persecution. Article 9 para 2 of the Directive states: “Acts of persecution (...) can, inter alia, take the form of: ... (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include (...) 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.”

The judgement issued by the Court on 26<sup>th</sup> February 2015 established that the Directive

- covers all military personnel, including logistical or support personnel;
- concerns the situation in which the military service performed would itself include, in a particular conflict, the commission of war crimes, including situations in which the applicant for refugee status would participate only indirectly in the commission of such crimes if it is reasonably likely that, by the performance of his tasks, he would provide indispensable support to the preparation or execution of those crimes;
- does not exclusively concern situations in which it is established that war crimes have already been committed or are such as to fall within the scope of the International Criminal Court’s jurisdiction, but also those in which the applicant for refugee status can establish that it is highly likely that such crimes will be committed.

In all of the foregoing, the Court followed the earlier advisory opinion by its own Advocate General, but thereafter it rather questionably departed from her advice. In assessing the credibility of the claims that war crimes might be committed it held that “the possibility that military intervention was engaged upon pursuant to a mandate of the United Nations Security Council or on the basis of a consensus on the part of the international community or that the State or States conducting the operations prosecute war crimes are circumstances which have to be taken into account” In IFOR's opinion, this not only hopelessly confuses *jus in bello* with *jus ad bellum*, but is of a detached level of abstraction which bears no relation to the actualities of armed conflict situations.

Moreover, in referring to the relevance of procedures allowing application for conscientious objector status, the Court omitted the Advocate General's reference to whether such procedures were “plausibly available” - a crucial argument in the facts of the specific case.

Finally, whereas the Advocate General had carefully set out the considerations which needed to be assessed in order to determine whether a person refusing military service could qualify as a member of a particular social group subject to discriminatory treatment, including “whether he holds a conviction of sufficient cogency, seriousness, cohesion and importance; [... and] his objection stems from a belief that is fundamental to his conscience”, and had also suggested that “it was necessary [...] to assess whether prosecution or punishment for desertion is disproportionate. In that regard it is necessary to consider whether such acts go beyond what is necessary for the State concerned to exercise its legitimate right to maintain an armed force,” the Court pre-empted any finding of fact by ruling that “the measures incurred by a soldier because of his refusal to perform military service, such as the imposition of a prison sentence or discharge from the army, may be considered, having regard to the legitimate exercise, by that State, of its right to maintain an armed force, not so disproportionate or discriminatory as to amount to acts of persecution” .<sup>28</sup>

In view of this advice, the German Court in 2016 turned down Shepherd's appeal. A further appeal is however contemplated.

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28 Court of Justice, Judgment of the Court (Second Chamber) in the Case C-472/13 Andre Lawrence Shepherd v Bundesrepublik Deutschland, 26 February 2015.

## II STATE LAW AND PRACTICE:

### A) ENCOURAGING DEVELOPMENTS

As noted in the section above, concerning the Committee of Ministers of the Council of Europe, **Armenia** in 2013 introduced an amended Law on Alternative Service which satisfied the Venice Commission that it had addressed the various shortcomings of the previous arrangements.<sup>29</sup> By the end of the year all imprisoned conscientious objectors had been released, and no new cases of imprisonment have since been reported. In particular Jehovah's Witnesses, who had not found acceptable the form of alternative service previously available did not object to performing alternative service under the revised law.

The other developments mentioned in this section are steps in the right direction, but in most cases much further progress will be required before the situation can be described as satisfactory.

**Belarus** finally promulgated a Law on Alternative Service in June 2015, implementing a right of conscientious objection to military service provided for in the 1994 Constitution, but hitherto not available in practice. The Law has grave limitations, particularly in that it is accessible only to members of a small number of religious denominations, and that the duration of alternative service is discriminatory and punitive by comparison with that of military service.

In **Greece**, the Deputy Minister of Defence in November 2016 assured a delegation from the European Bureau for Conscientious Objection that an executive order had already been issued that the non-refundable “administrative fine” of 6,000 Euros levied on all those charged with failure to respond to a call-up to military service would henceforth be charged only once in an individual case. As a fresh call-up notice can be issued at any time, there was hitherto theoretically no limit to the financial penalty which could be faced by a conscientious objector.

On 23<sup>rd</sup> March 2017, the “conscience committee” of **Israel's** Defence Force recognised Tamar Ze'evi, a conscientious objector and released her from military service. Such a decision in the case of a “selective objector” as opposed to an outright pacifist is unprecedented in recent years, however it

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29 See paragraph 51 of the 2013 Quadrennial Report.

affected only one of the three female conscripts currently suffering repeated convictions and was taken only after she had served six consecutive sentences in military prison, a total of 115 days. It has also been reported that Jalaa Zaher, a Druze objector who had been imprisoned for a total of 80 days after four consecutive convictions, was exempted from military service three weeks earlier, on March 6<sup>th</sup>, but we have no details..

On 19<sup>th</sup> November 2013, the Constitutional Chamber of the Supreme Court of **Kyrgystan** announced that it was suspending proceedings against ten Jehovah's Witnesses who had refused to perform either military service or the alternative service available on the grounds that various Articles of the Alternative Service Law, notably Article 32.4 which required those performing alternative service to make payments into a special account of the Ministry of Defence conflicted with Article 56.2 of the Constitution, which guaranteed the purely civilian nature of alternative service. The Court directed the Government to amend the law accordingly. Prosecutions of Jehovah's Witnesses seem to have ceased, but at the latest report<sup>30</sup> there was no progress with the amended Law.

The **Republic of Korea** continues not to recognise conscientious objection and routinely to impose 18-month prison sentences on those who refuse military service. Nevertheless the courts are increasingly questioning the compatibility of this practice with the constitutional guarantees of freedom of conscience and the international jurisprudence. Since May 2015, nine not-guilty verdicts have been handed down by courts of first instance and unprecedentedly in October 2016 the Gwangju District Court found three conscientious objectors not guilty on appeal.<sup>31</sup> In 2013 the Constitutional Court, which had last upheld the existing interpretation as recently as 2011, agreed to consider seven cases referred to it by District Courts and an action brought by almost 500 Jehovah's Witnesses regarding the non-implementation of the Views of the Human Rights Committee in their cases. There were rumours that a verdict would be published in January 2017, but in the event the Court's attention seems to have been fully taken up by the ongoing Presidential impeachment case,

For some months, **Turkey** has refrained from imprisoning conscientious objectors for their refusal of military service, preferring instead to impose fines and suspended sentences. The legislative provisions

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30 Forum 18 News Service "Kyrgystan: Draft Religion Law still repressive, Alternative Service Law stalled?", 29<sup>th</sup> May 2015.

31 <https://www.jw.org/en/news/legal/by-region/south-korea/constitutional-court-release-significant-decision/> 20<sup>th</sup> December 2016.

have however not changed and the fragility of the situation became clear with the 10 month sentence handed down by a Military Court to Onur Erdem on 23<sup>rd</sup> March 2017.

### **Areas not under the control of the internationally-recognised government**

#### **North Cyprus**

A parliamentary committee in the self-styled “Turkish Republic of North Cyprus” , where the right has not hitherto been recognised, is currently investigating the possibility of instituting alternative service for conscientious objectors, and in September 2016 took evidence from representatives of the conscientious objection movement.

#### **Transdnistria, Moldova**

IFOR has been led to understand that in March 2014 the Supreme Soviet of Transdnistria adopted rules for a civilian alternative service for conscientious objectors, to take effect from the Autumn call-up that year,

#### **Rojava, Syria**

The Kurdish-populated region of Rojava, in north-eastern Syria has during the conflict of recent years achieved *de facto* autonomy. In 2015, conscription of males between the ages of 21 and 30 was introduced; reports in April 2016 indicated that the canton of Cizre had recognised and was implementing the right of conscientious objection to military service.<sup>32</sup>

By contrast to the above, **NO PROGRESS** has been reported from other areas not under the control of the internationally-recognised government. In a number of such areas, particularly **Abkhazia** and **South Ossetia**, both in **Georgia**, and **Nagorno-Karabakh, Azerbaijan** it is reported that conscription is imposed by the *de facto* authorities with no provision for conscientious objectors. IFOR is not aware of individual cases in the Georgian secessionist republics, but in **Nagorno-Karabakh**, Artur Avanesyan, a 19-year-old Jehovah's Witness was in November 2014 sentenced to 30 months' imprisonment for refusing military service. Avanesyan had at the request of the Nagorno-Karabakh authorities been arrested in and returned from Armenia, where he had applied to perform alternative

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32 War Resisters' International, “CO recognised in part of Kurdish Syrian region of Rojava”, in CO Update 91 (March-April 2016)

service under the new Armenian legislation (see above)<sup>33</sup>

IFOR has no information as to whether any form of conscription is practised in the area controlled by the so-called “Islamic State in Iraq and Syria” (DAESH). It however seems extremely unlikely that that regime would recognise a right of conscientious objection to military service.

### **Claims for refugee status by conscientious objectors**

A small number of conscientious objectors from **Turkey** have with the support of the European Bureau for Conscientious Objection successfully lodged claims for refugee status in Western Europe. They have included Ugur Bilkay and Okan Kale in **Italy** in 2013 and October 2014 respectively, and Yunus Ozdemir, whose application in **France** was accepted in February 2014.

It was very encouraging that the “Operational Guidance Note: Turkey” issued by the **United Kingdom** Border Agency in May 2013 took full account of the European Court of Human Rights findings in the cases of *Savda v Turkey*, *Ercep v Turkey*, and *Ulke v Turkey*, and largely reverses the UK authorities' earlier cautious advice, and jurisprudence, stating:

“Where an individual is able to demonstrate that [refusal to perform military service] is for reasons of their conscience and conviction, then the rationale of the decision in HJ(Iran) applies and the individual cannot be expected to modify their beliefs in order to avoid persecution. In such cases a grant of Humanitarian Protection may be appropriate. In addition, case owners should also consider whether the Turkish authorities would perceive the refusal to perform military service as being for a Refugee Convention reason. If this is the case then a grant of Asylum rather than Humanitarian Protection would be appropriate.”

Without the intervention of the European Bureau for Conscientious Objection, Yeda Lee, a conscientious objector from the **Republic of Korea** had obtained asylum in **France** in 2014, but such cases are rare. An earlier, anonymous, case in **Canada** in 2011 had been strengthened by the fact that the objector was also at risk of persecution on the grounds of sexual orientation.

It is generally, (but see the Human Rights Committee case of *X v Denmark* reported above) not universally, recognised that persons who have fled **Eritrea**, frequently in order to avoid military

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33 Forum 18 News Service, NAGORNO-KARABAKH: CONSCIENTIOUS OBJECTOR "A CRIMINAL WHO MUST PAY THE PRICE FOR HIS CRIME", 10<sup>th</sup> November 2014.

service, face severe treatment if returned. In the **United Kingdom**, the Upper Tribunal in 2016 issue a new Country Guidance case<sup>34</sup>, which goes much further than previously in recognising the real dangers for asylum seekers returning to Eritrea (especially for those who are classified as "deserters"). In such cases the necessity to prove conscientious objections is largely eliminated.

## **B) BEST PRACTICES**

In many States certain aspects of the present or past arrangements for conscientious objectors might be considered best practices, even while other aspects may fall short of international standards

Some specific examples which may be quoted are:

### **Availability of information**

In **Austria** the necessary forms for applying for recognition as a conscientious objector may be found on the website regarding obligatory military service.

### **Acceptance of claims without enquiry**

In **Finland**, and in **Germany** before the abolition of conscription, an application bearing a declaration of conscientious objection following the accepted format would automatically lead to the recognition of a claim of conscientious objection.

### **Duration of alternative service**

While some States argue that certain features of military service make it appropriate that alternative service should last longer, others have taken into account the length of time which such service takes out of the conscript's education and career development, and earning potential. **Denmark**, and before the suspension of conscription **Albania, Germany, Italy, Slovenia** and **Sweden** had all completely equalised at least the normal durations of military and alternative service.

### **Civilian administration of alternative service**

Conflicts of interest can arise when the assessment of an application for recognition as a conscientious objector, and the oversight of alternative service arrangements, is in the hands of military authorities. In **Switzerland**, all aspects of the consideration of applications and administration of alternative service

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34 <https://www.freemovement.org.uk/new-country-guidance-case-eritrea-finds-real-risk-return/>

are in the hands of purely civilian organisations reporting to the Ministry of Economic Affairs.

### **Serving members of the armed forces**

**Germany** is the one State known to have clear legal provisions to deal with requests for release on grounds of conscientious objection from persons who have joined the armed forces on a voluntary basis. According to figures published by the relevant department, The Federal Office of Family Affairs and Civil Society Functions (Bundesamt für Familie und zivilgesellschaftliche Aufgaben, BAFzA) 469 applications were received in the two years from 30th June 2014. Including a backlog, the Office considered handled 644 applications, 431 of which (66.9%) were accepted, 160 (24.8%) were rejected, and the remaining 53 (8.2%) were withdrawn or declared inadmissible. Officers or officer candidates who had completed a professional training in the army had to pay back training costs of between 1.200 and 69.000 Euros.

### III REMAINING CHALLENGES

#### A) Non-compliance with the rulings of international instances.

With the notable exception of Armenia (see the section on the Committee of Ministers of the Council of Europe, above), whereas in some individuals have been released from imprisonment or compensation has been granted as recommended by the Human Rights Committee or the European Court of Human Rights, none of the recommendations that the State should take action to avoid similar violations in the future have yet been acted upon, and in some cases aspects of the original violation continue. By contrast with the situation in Armenia is the parallel continuing consideration by the Committee of Ministers of the case of Osman Murat Ulke, where **Turkey** has still taken no action to end what the European Court of Human Rights in 2006 described as the state of “civil death”, amounting to cruel, inhuman or degrading treatment. In this context it is noteworthy that the majority of recommendations on conscientious objection made under the Human Rights Council's Universal Periodic Review have been rejected by the State Under Review, while others have been described by the State Under Review as “already in the course of implementation”, even when this is blatantly not the case. Under this context should also be mentioned the continued failure of the National Assembly in **Colombia** to act on the recommendation of its own Constitutional Court in 2009, repeated by the Human Rights Committee in 2010, that it should without delay bring in legislative provisions for conscientious objectors to military service. The Courts in Colombia have released a number of conscientious objectors from military service, but the process is not accessible or predictable and frequently is too slow to prevent initial recruitment; on 24<sup>th</sup> March 2017 it was reported that conscientious objector Diego Fernando Blanco Lopez had been forcibly recruited into the *Grupo de Caballeria Mecanicado No 4 Juan de Corral* of the Colombian Army based in Rionegro, Antioquia, even while as a student he should not have been eligible for recruitment.

#### B) Repeated imprisonment of conscientious objectors

A number of States persist in the repeated imprisonment of conscientious objectors for their refusal to perform military service. **Turkmenistan** has a specific provision that only after serving sentences on two occasions for refusal to report for military service will a man face no further call ups. Conscientious objectors in **Singapore** are routinely sentenced to 24 months' imprisonment, followed by a second sentence of 15 months' imprisonment. In **Israel** there is no limit to the number of sentences which may be handed down in an individual case: the individual sentences tend to be short, but there is a clear intention in this way of breaking the will of the objector, coercing a change of the conscientious

position. (The Israeli military does recognise some persons as conscientious objectors, and exempts them from service, - see the cases reported on pp-10,11 above but the criteria used are far narrower than those applied elsewhere, and the decision is arbitrary, with no judicial review.)

**C) Treatment of conscientious objection as a mental or social problem.**

This is another issue which is particularly marked in, but by no means unique to, **Israel**. Even the instances where conscientious objectors have received ten successive convictions for refusal of military service have been resolved within a year, but the most frequent outcome is that the objector consents to being examined by a military psychiatrist, and is classified as being unfit to serve due to suffering from a psychiatric disorder. The resulting “profile” can lead to lifelong stigmatisation and severe implications for employability. At its General Assembly in Athens in November 2016, the European Bureau for Conscientious Objection heard testimony from a conscientious objector in **Greece**, who was a member of the Greek Orthodox Church who had applied to perform alternative service as a conscientious objector. An “expert opinion” had been sought by the assessing committee from the Faculty of Theology at Athens University, which held that conscientious objection to military service was incompatible with the teachings of the Greek Orthodox Church [a finding which incidentally carries the highly questionable implication that members of that Church do not enjoy individual freedom of conscience]. When he persisted with his application he was taken before a psychiatrist who certified him as psychiatrically unfit for military service, causing him immense social and emotional harm. In many States, psychiatrists serve on the Committees charged with assessing applications for recognition as conscientious objectors; where there are provisions allowing the release of serving members of the armed forces who develop conscientious objections, military psychiatrists are often involved in the examination of the application. Conscientious objectors in **Turkey** who are known or suspected to be gay are expected to go through a humiliating procedure of medically proving this, whereupon they are released from military service with the so-called “rotten report” stating that they are unfit to serve because of severe social pathology.

**D) Continuing discrimination against persons who have not performed military service.**

The lifelong stigmatisations referred to in the previous paragraph are extreme examples of the continuing disadvantages which conscientious objectors can be experience over and above any immediate punishment for not reporting for military service. The various forms of such discrimination are detailed in the 2014 Quaker United Nations Office publication “Conscientious objectors to military service: Punishment and discriminatory treatment”, by Emily Graham

(<http://quno.org/resource/2014/6/conscientious-objectors-military-service-punishment-and-discriminatory-treatment>).

### **E) Reintroduction of conscription**

Wherever conscription has been abolished or suspended, a political minority has called for its reintroduction, generally citing alleged social benefits of military service rather than any military justification. At the time of the last quadrennial report such calls were little-heeded. The “professionalisation” of national Armed Forces seemed to creating an irreversible trend towards the elimination of obligatory military service.<sup>35</sup> With increasing international tensions, this trend has now been reversed. Within a year of suspending conscription into its armed forces, **Ukraine** had reinstated it: **Lithuania**, which had suspended conscription in 2009 reintroduced it as a temporary measure in 2015, and the following year made the reinstatement permanent; also in 2016 **Kuwait** announced that for the first time it was introducing military service for male citizens. At the beginning of March 2017, **Sweden** announced that conscription, suspended in 2010, would be reintroduced from 2018, and would be applied to both men and women - however the number of recruits sought initially is such a small proportion of those eligible that it is likely that as in a number of other States, including neighbouring Denmark, this will generally be found from among those who freely opt to perform military service. More disturbing are possible developments in **France**. In a speech on 18<sup>th</sup> March 2017, Emmanuel Macron, currently seen as the front-runner in the forthcoming presidential election, proposed to reintroduce obligatory military service, although for a duration of only a month, and to apply it universally, to women as well as men. This is in the context of an unconfirmed report received by IFOR that two months earlier, on 29<sup>th</sup> January, a revision of the National Service Code saw the deletion of Articles L116-1 to L116-9, setting out the provisions applying to conscientious objectors, which had been retained when conscription was suspended in 2001.

Ironically, in a time of peace, and when the very institution of obligatory military service may be coming into question, a relaxed attitude towards conscientious objection is common. At a time of perceived national danger such as can lead to the reinstatement of conscription, conscientious objections are likely to meet with far less sympathy, so that at such times “the right of conscientious objection is in most need of protection, most likely to be invoked, and most likely to fail to be

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35 See para 40 of the 2013 Quadrennial Report.

respected in practice”.<sup>36</sup> States which reinstate conscription ought to be strongly reminded of the internationally-accepted right of conscientious objection and encouraged to make appropriate provision, where none has existed in the past, or at the very least to reinstate the provisions which previously existed, but preferably bringing them closer into line with the international standards – in **Ukraine**, for example, it is believed that the previous provisions were reinstated along with conscription, but they were very unsatisfactory, being accessible only to members of a small number of specified religious denominations.

**F) Particular concerns regarding juveniles.**

The conscription of persons under 18 should be impossible. However when the age of conscription is stated in legislation as 18 and in the law the age of a child is reckoned not from the actual birthday but from the first of January in the year in which the birthday takes place a child could be conscripted shortly *before* the 18<sup>th</sup> birthday. This possibility certainly exists in **Greece** and **Cyprus**; IFOR is not aware of any individual cases. Other States, including **Austria**, have provisions that permit conscripts to opt to perform their military service early, from the age of 17. It is at least a moot point whether the fact that the choice of timing is freely made means that this is not a form of juvenile conscription. Even where no-one is actually called up until the age of 18, the registration process often starts earlier, as for example in **Denmark**. Where this is combined, in defiance of the international standards, with strict time limits for applications, as in the **Russian Federation**, or with a procedure which is not consistently easy to access, as in **Israel**, the result is that the application for conscientious objector status to have any chance of success must be initiated sometimes more than a year before the 18<sup>th</sup> birthday. In the Russian Federation few young persons have access to the relevant information in good time; the great majority of applications come from Jehovah's Witnesses, who are alerted by their communities to the necessary procedures.<sup>37</sup> Quite apart from difficulty of information, this means that the process must be launched at a young age, when the person's views may well be developing rapidly and more subject to change than later. There is a right to be protected from the serious consequences of inadequate reflection at this delicate time. The same consideration applies to those who may have the option to volunteer for military service before the age of 18; they deserve special protection against the

36 Human Rights Committee, Views adopted 29<sup>th</sup> March 2012, *Atasoy and Sarkut v Turkey*, individual concurring opinion by Sir Nigel Rodley and two other members.

37 Even Jehovah's Witnesses can find that bureaucratic delays can result in missing the deadline, as exemplified by the case of Vladislav Kozhaev, reported by Human Rights Without Frontiers, "Russian conscientious objector fails to obtain civilian service", 17<sup>th</sup> February 2017.

being committed for an extended period to the consequences of a decision made while still a minor. Finally, from a different rights of the child perspective, where the duration of alternative service is significantly greater than that of military service the potential for disruption to the family life of a conscientious objector may constitute another violation.

### **G) Serving members of the armed forces**

The very good practice in **Germany** has been quoted in Section 2 B above. Sadly it is the exception. Explicit legislative provisions permitting the release of conscientious objectors have not been traced anywhere else. Where, as in the **USA** and the **UK**, military regulations allow for the possibility, information about this, and the relevant procedures to follow is not readily accessible, and in many cases is obtained only as a result of outside counselling. It is not clear that there is effective access to civilian review, meaning that applications are being considered by military authorities who are by definition likely to be unable to sympathise with or even understand conscientious objections. The freedom of thought, conscience and religion is explicitly recognised in Article 18.1 of the ICCPR as including the freedom to change one's religion or belief; the ability to develop conscientious objections even when one initially volunteered for military service is a logical concomitant, but military authorities are predisposed to see these simply as an excuse for avoiding unpleasant assignments.

### **H) Selective objections**

There is logically no reason why objections to taking part in specific military operations or types of operations may not be as firmly based on a position of conscience as may an absolute pacifist position. Persons may accept the obligation to defend the homeland, but not be prepared to take part in aggressive military operations outside the national territory. Conversely they may not wish to be deployed in operations against against their own fellow citizens, or persons of the same ethnic minority. States are however reluctant to accept such objections. Rare exceptions when they still maintained conscription were that **Germany**, and at one time **Australia**, would not require conscripts to serve against their will outside the national territory. Young persons in **Israel** who express objections to participating in the military occupation of the Palestinian territories invariably face imprisonment. **Ukraine, Turkey** and **Syria** deploy conscripts in their ongoing civil conflicts and do not recognise conscientious objections to this.

Paradoxically, in circumstances where the objections might be considered to have a moral imperative broader than that of the individual conscience – where they are based on the action in question being contrary to international law and/or of a nature where there is a strong risk of being implicated in the

commission of war crimes or crimes against humanity – it is almost inconceivable<sup>38</sup> that the State in whose name the action is conducted will accept as fact or even as reasonable perceptions of fact the grounds on which the objections are based. Such arguments will usually be considered only by an outside tribunal in the context of a claim for recognition of the objector as a refugee. Even in this respect, the precedent set in *Shepherd* case, see Section I B 2 above, is not hopeful.

#### **I) Recognition of conscientious objectors as refugees**

Although there have been some positive decisions (see Section 2 above), conscientious objectors continue to have difficulty in obtaining recognition as refugees. In some cases the relevant tribunals are hard to convince that a country which is usually considered safe to return a person to, such as the **Republic of Korea**, may not be so for specific categories of person, such as conscientious objectors to military service. IFOR would argue moreover that the likelihood should always be borne in mind that the decision to flee the real risk of being embroiled in civil conflict, whether through government conscription or forcible recruitment into irregular forces, may often be grounded partly on considerations of conscience.

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38 But see the Pfaff case reported in para 47 of the 2013 Quadrennial Report.