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## **ANNUAL REPORT**

**Conscientious objection to military service  
in Europe 2014**

**Istanbul, October 2014**

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## FOREWORD by Friedhelm Schneider, EBCO President

In 2014 we are looking back to numerous commemoration events which – often in a military-centered perspective – focus on the centenary of the outbreak of the First World War. The European Bureau for Conscientious Objection and its member organisations have been involved in a series of activities, exhibitions etc. which draw the public attention to those who resisted war and to the history of the peace movement over the following century. Moreover there were other anniversaries, such as the beginning of World War II and the conscientious objectors and deserters related to it. EBCO's spring meeting in Brussels was marked by the 50 years of the recognition of conscientious objection in Belgium, the leading person of which had been EBCO's former President Jean van Lierde.

Of course this report does not focus on any of these commemorative events, but on the ongoing situation of conscientious objectors and wider issues of militarism in Europe today. The fact that our report is for the first time presented in Istanbul shows our deep concern about the obstinate violation of the Human right of conscientious objection to military service in Turkey. Though signatory state of the European Convention of Human Rights Turkey disregards constantly the judgements of the European Court of Human Rights that have been delivered in favour of Turkish conscientious objectors.

Countries of special concern are not only Turkey, Azerbaijan and Belarus, where there is still no legislation, but also Greece, where the persecution of unrecognised conscientious objectors from many years ago has continued, and the inequitable law continues to be applied in a discriminatory manner, and of course Northern Cyprus, where this spring EBCO board member Murat Kanatli underwent a 10-day prison sentence for his refusal to answer a call-up for one day's reserve service in 2009.

Another important issue which continued to require EBCO's commitment is the difficult situation of conscientious objectors as refugees. Some of the objectors who contacted us succeeded in obtaining refugee status (e.g. Ugur Bilkay in Italy and Yunus Özdemir in France) but the fact remains that there have also been failures and that some European governments are still far too ready to return people to countries where not only will they face imprisonment if they refuse to perform military service, but there are in grave danger of persecution for having attempted to "avoid" it. In this context we welcome the significant release of the new UNHCR guidelines on International Protection N°10 which specify claims to refugee status related to military service. In these days we are eagerly awaiting the opinion from the Court of Justice of the European Union expressing itself on the case of André Shepherd, US deserter who applied for refugee status in Germany. ***[A postscript has been added to the final edition of the report, detailing the opinion which was published on 11<sup>th</sup> November.]***

Summing up we have to realize like in 2013: The progress made in the field of international law and institutions often is not implemented in practice. We are extremely concerned about on-going violation of the right to conscientious objection to military service, and we see that there seems to exist a de facto impunity for states that do not respect this right. As long as we don't want to give up the significant value of human rights, this situation cannot be accepted.



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## 1. DEVELOPMENTS SINCE THE PREVIOUS REPORT (OCTOBER 2013)

### 1.1 INTERNATIONAL AND REGIONAL ORGANISATIONS AND MECHANISMS – STANDARDS AND JURISPRUDENCE

#### 1.1.1 Council of Europe

##### 1.1.1.1 European Court of Human Rights

The most significant new judgements of the European Court of Human Rights have concerned issues of human rights in the armed forces, rather than conscientious objection itself.

On 24<sup>th</sup> April 2014, in the case of *Perevedentsev v Russia* the Court found that the **Russian Federation** had failed to protect the life of 19-year-old conscript Mikhael Perevedentsev. *“The authorities had to have been aware that he had psychological difficulties and that dedovschina (systematic bullying) was rife in the Russian armed forces, bringing about lawlessness and gross abuse of human rights. Despite this, the Russian authorities failed to determine whether Mikhael Perevedentsev’s difficulties were of such seriousness that his life was at risk and to take appropriate measures to prevent that risk from materialising.”*<sup>1</sup>

And in two judgements issued on 2<sup>nd</sup> October 2014,<sup>2</sup> the Court ruled that the blanket ban on trade unions and similar organisations within the armed forces of **France** constituted a violation of Article 11 of the European Convention on Human Rights (freedom of assembly and association).

##### 1.1.1.2 Committee of Ministers of the Council of Europe

At its 1157<sup>th</sup> meeting, the Committee of Ministers considered the implementation of judgements from the European Court for Human Rights in the “Ülke group of cases”, from **Turkey** in which to Ülke itself had been joined the cases of Ercep, Demirtas and Savda. The Ministers’ Deputies (for formal purposes the members of the Committee are the foreign ministers of Council of Europe States):

“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 evading 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;

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1 European Court of Human Rights, press release, 24<sup>th</sup> April 2014, “Russian authorities failed to protect new recruit – found hanged during his military service – whose life had been at risk due to bullying in the army.”

2 *Matelly v France* (Application no. 10609/10), Chamber Judgement of 2<sup>nd</sup> October 2014; *Adefdromil v France* (Application no. 32191/09), Chamber Judgement of 2<sup>nd</sup> October 2014.



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 Erçep, Savda and Feti Demirtaş.”

**Armenia** reported to the 1193<sup>rd</sup> Meeting from 4<sup>th</sup>–6<sup>th</sup> March 2014 on its updated action plan to implement the European Court of Human Rights verdicts in the cases of *Bayatyan v Armenia*, *Tsathuryan v Armenia* and *Bukhatharyan v Armenia*.<sup>3</sup>

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 gave details of the Laws passed in May and June 2013, after consultation with the Venice Commission, and which were reported in EBCO's 2013 Annual Report.

### **1.1.1.3 Council of Europe Commissioner for Human Rights**

EBCO President Friedhelm Schneider, together with Derek Brett of IFOR and Can Baskent, a Turkish conscientious objector based in France, met on 28<sup>th</sup> January 2014 with Nils Muižnieks, the new Council of Europe Commissioner for Human Rights. They drew to his attention, in particular, the current situations in Greece, Turkey, Cyprus and Ukraine (see section 1.2 below). Relevant materials have since been sent to the Commissioner.

## **1 1 2 European Union**

### **1.1.2.1 Court of Justice of the European Union**

On 25<sup>th</sup> June 2014, the Court of Justice of the European Union, which sits in Luxembourg, held a hearing in the case of conscientious objector André Shepherd, a former United States serviceman who is seeking asylum in Germany (for a fuller account of the background see EBCO Report 2013, section 4.3).

After one tour of duty in Iraq, as an Apache helicopter mechanic, in 2004 Shepherd returned on leave to his unit stationed in Katterbach, Germany. There he reflected on the actions to which he had contributed, and read widely about the effects of U.S. military action on the civilian population in Iraq. This led him to believe that should he

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3 Committee of Ministers of the Council of Europe, Document DH-DD(2014)187, 7<sup>th</sup> February 2014.



return to Iraq he would be an accomplice to war crimes. He investigated the possibility of applying for release as a conscientious objector, but was told that as his was a "selective" objection it would almost certainly be denied. Detailed for a second tour of duty in 2007, Shepherd went "absent without leave", and the following year applied for asylum in Germany.

This application was turned down, but Shepherd lodged an appeal with the *Bayerisches Verwaltungsgericht München* (Bavarian Administrative Court, Munich), arguing among other things 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." In September 2013, the German court postponed the case in order to request an advisory opinion from the Court in Luxemburg, which is the authoritative interpreter of EU law, and posed eight specific questions. [see postscript below].

On 25<sup>th</sup> June, the two parties (the Federal Republic of Germany and Shepherd, represented by his lawyer, Reinhard Marx) were questioned by the five judges hearing the case. There were also interventions by the European Commission, and by the United Kingdom and Greece (all EU member states are entitled to state their opinions on an issue before the court). The Netherlands had submitted written comments in advance, but did not participate in the hearing. The German refugee organisation Connection e.V., which is supporting Shepherd, sent an observer and organised a press conference following the hearing, at which Shepherd himself and his lawyer spoke; EBCO was also represented by two observers.

## POSTSCRIPT

The «Advisory Opinion»<sup>4</sup> by Advocate General Eleanor Sharpston, originally promised for 23<sup>rd</sup> October, was eventually published on 11<sup>th</sup> November.

«This request», she begins, «confronts the Court with a singular and unusual case.»<sup>5</sup> She then proceeds to summarise the facts as referred and the arguments made at the hearing before addressing the eight specific questions posed:

**1)** Is Article 9(2)(e) of Directive 2004/83/EC to be interpreted as meaning that the protection afforded extends only to those persons whose specific military duties include direct participation in combat, that is armed operations, and/or who have the authority to order such operations (first alternative), or can other members of the armed forces also fall within the scope of the protection afforded by that legislation if their duties are confined to logistical, technical support for the unit outwith actual combat and have only an indirect effect on the actual fighting (second alternative)?

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4 Court of Justice of the European Union, OPINION OF ADVOCATE GENERALSHARPSTON Case C-472/13 Andre Lawrence Shepherd v Bundesrepublik Deutschland, 11<sup>th</sup> November 2014.

5 Ibid, para 1.



- «It seems to me that Article 9(2)(e) of the Qualification Directive covers all military personnel including logistical and support staff such as a helicopter maintenance mechanic. (...) There is nothing in the text of the Qualification Directive limiting the phrase 'where performing military service would include' to combat personnel.»<sup>6</sup>

The Advocate General points out that Article 12 of the Qualification Directive excludes from its protection not only persons who have directly committed committed crimes against peace, war crimes or crimes against humanity, but also those who 'otherwise participate in the commission of' such actions.

«Where a person is able to show that if he performed military service he would be involved in committing one of the acts identified as reasons for exclusion in Article 12(2) of the directive, there is no plausible reason for excluding him from the scope of Article 9(2)(e) of the Qualification Directive (there is, indeed, good reason to think that he may genuinely need protection).»<sup>7</sup>

«Furthermore, I can identify no reason why a person is, or should be, prevented from invoking Article 9(2)(e) of the directive because he is an enlisted recruit rather than a conscript. The wording '...refusal to perform military service ...' is sufficiently broad to encompass anyone in military service. No distinction is made by reference to the manner in which the person concerned was recruited, which is thus irrelevant.»<sup>8</sup>

She then observes that Article 9(2)(e) deals with «what performing that military service would *or could* entail. (...) It therefore refers to possible future actions, rather than acts that have occurred in the past. This assessment is thus fundamentally different from the *ex post* inquiry that is conducted either where criminal proceedings are set in train, or where a Member State seeks to show that a particular person should be excluded from the protection afforded by the Qualification Directive (...) Article 9(2)(e) cannot sensibly be construed as requiring the applicant for refugee status to demonstrate that he is within Article 12(2). Could he do so, he would by definition be ineligible for protection.»<sup>9</sup>

«Military personnel working at a US army base barber shop ensuring that serving personnel all have the standard hair cut are remote from combat operations and would therefore be unlikely to be able to demonstrate such a direct link. However, a person who arms aircraft with bombs or who maintains fighter jets is more likely to be able to show that his role is directly linked to such operations and therefore to the possibility of committing war crimes.»<sup>10</sup>

«A person who has a well-founded fear of persecution for reasons such as membership of a particular social group (Article 10(1)(d)) or his political opinions (Article 10(1)(e)) and who meets the conditions of Article 2(c) of the Qualification Directive must be granted refugee status (...) It seems to me that Mr Shepherd would clearly come within Article 10(1)(e) of the Qualification Directive. Holding a political opinion includes holding an opinion, thought or belief on a matter related to a State and its policies or methods. That must cover believing that one cannot perform military service in a conflict where to do so would possibly lead to committing war

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6 Ibid, paras 32, 33.

7 Ibid, para 34

8 Ibid, para 35

9 Ibid, paras 37, 38.

10 Ibid, para 45





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crimes.».<sup>11</sup>

«The expression 'conscientious objector' does not appear in the text of Article 10(1) of the Charter, which closely mirrors Article 9(1) of the ECHR. The European Court of Human Rights has nevertheless ruled that opposition to military service - where it is motivated by a serious and insurmountable conflict between the obligation to serve in an army and a person's conscience - constitutes a conviction of sufficient cogency, seriousness, cohesion and importance to be protected by Article 9(1) of the ECHR. Article 10(1) of the Charter should therefore be interpreted in a similar manner. Article 10(2) of the Charter does identify and recognise the right to conscientious objection in accordance with the national laws governing the exercise of this right.»<sup>12</sup>

«However, the term 'conscientious objection' (...) may also refer to persons who object to a particular conflict on legal, moral or political grounds or who object to the means and methods used to prosecute that conflict (...) Conceptually, it is perfectly plausible that both those whose objection to the use of force is absolute and those whose objection is more nuanced might (separately or together) form a group that 'has a distinct identity in the relevant country' (here, the US) 'because it is perceived as being different by the surrounding society'. Whether that is in fact the case would be for the competent authorities to determine on the basis of the evidence presented to them, subject to review by the national courts.»<sup>13</sup>

**2)** If the answer to Question 1 is that the second alternative applies:

Is Article 9(2)(e) of Directive 2004/83/EC to be interpreted as meaning that military service in a conflict (international or domestic) must predominantly or systematically call for or require the commission of crimes or acts as defined in Article 12(2) of Directive 2004/83/EC (first alternative), or is it sufficient if the applicant for asylum states that, in individual cases, crimes, as defined in Article 12(2)(a) of Directive 2004/83/EC, were committed by the armed forces to which he belongs in the area of operations in which they were deployed, either because individual operational orders have proved to be criminal in that sense, or as a result of the excesses of individuals (second alternative)?

- «In my view, neither alternative is determinative of whether or not Article 9(2)(e) of the Qualification Directive applies. What matters is the likelihood that the *applicant* risks committing war crimes. The person concerned must show why he believes that he would be at risk of committing such crimes if he performed his military duties. In a conflict where such acts are alleged already to have occurred systematically and where probative material is in the public domain, it may be (in relative terms) less difficult for an applicant to satisfy that test. Absent a change of policy before he is deployed to the theatre of war, he would have reasonable grounds for arguing that such acts might plausibly occur in the future and that he might be involved in them. Where such acts are alleged to have occurred in a conflict as individual or isolated instances, an applicant faces a more difficult task...»<sup>14</sup>

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11 Ibid, paras 47, 48

12 Ibid, para 52

13 Ibid, paras 53 and 56.

14 Ibid, paras 62 and 63.



**3)** If the answer to Question 2 is that the second alternative applies:

Is refugee protection granted only if it is significantly likely, beyond reasonable doubt, that violations of international humanitarian law can be expected to occur in the future also, or is it sufficient if the applicant for asylum sets out facts which indicate that such crimes are (necessarily or probably) occurring in that particular conflict, and the possibility of his becoming involved in them therefore cannot be ruled out?

«It seems to me that Question 3 is necessarily covered by the answer that I have proposed to Question 2. It is not necessary to establish beyond reasonable doubt that violations of international humanitarian law can be expected to occur.

**6)** (answered out of order for reasons that, in the full text, the Advocate General explains) Is it necessary, in order for refugee protection to be granted pursuant to Article 9(2)(e) of Directive 2004/83/EC, that the applicant for asylum could, if he performs his duties, be convicted under the statutes of the International Criminal Court (first alternative), or is refugee protection afforded even before that threshold is reached and the applicant for asylum thus has no criminal prosecution to fear but is nevertheless unable to reconcile the performance of the military service with his conscience (second alternative)?

- «I do not consider the provisions of the ICC's statute to be relevant. Article 9(2)(e) of the Qualification Directive is not aimed at those who might be prosecuted for committing international crimes. On the contrary: its purpose is to afford protection to persons who wish to *avoid* committing such acts when performing military service. Using the likelihood that soldier X would successfully be prosecuted for a war crime as the benchmark for deciding whether soldier X should be protected as a refugee because he wishes to avoid being placed in a position where he *could* successfully be prosecuted runs directly counter to that aim.»

**4)** Does the intolerance or prosecution by military service courts of violations of international humanitarian law preclude refugee protection pursuant to Article 9(2)(e) of Directive 2004/83/EC, or is that aspect immaterial? Must there even have been a prosecution before the International Criminal Court?

- «In my view the short answer to both those questions is 'no'. The existence of national or international machinery to prosecute war crimes may in principle be a deterrent to their commission. However, it is a sad but inescapable fact that, even though such machinery may exist, war crimes *are* sometimes committed in the heat of conflict (just as the presence in civilised legal systems of laws criminalising and punishing rape and murder do not, alas, guarantee that people will never be raped or murdered). If Article 9(2)(e) of the Qualification Directive is to have any value as a means of enabling those at risk of finding themselves forced to participate in committing war crimes to find a safe haven, it must operate independently of whether national or international machinery to prosecute and punish war crimes exists and is used».<sup>15</sup>

**5)** Does the fact that the deployment of troops and/or the occupation statute is sanctioned by the international community or is based on a mandate from the United Nations Security Council preclude refugee protection?

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<sup>15</sup>Ibid, para 68



- «Even where a conflict is preceded by a UNSC resolution authorising the use of force in certain circumstances and under certain conditions, that cannot mean that 'by definition' war crimes cannot and will not be committed. I therefore conclude, in answer to this question, that the existence of a UNSC mandate relating to the conflict in question does not (...) per se exclude the possibility that acts listed in Article 12 of the Qualification Directive have been or might be committed»<sup>16</sup>

**7)** If the answer to Question 6 is that the second alternative applies:

Does the fact that the applicant for asylum has not availed himself of the ordinary conscientious objection procedure – even though he would have had the opportunity to do so – preclude refugee protection pursuant to the abovementioned provisions, or is refugee protection also a possibility in the case of a particular decision based on conscience?

- «It is for the national [ie German] authorities to verify (if necessary, by receiving expert evidence) whether Mr Shepherd is correct in believing that he could not have qualified as a conscientious objector under US law. If he could have invoked that procedure with a reasonable prospect of success but did not do so, I can see no good reason why he should qualify for refugee status on a ground of persecution which (on this assumption) he would have been able to avoid without compromising his beliefs. Conversely, if as serving personnel he would have been precluded from seeking conscientious objection status on the basis of his objection to redeployment in Iraq, the fact that he did not lodge a request for such status cannot have any bearing on his application for refugee status under Article 9(2)(e) of the Qualification Directive<sup>17</sup>.

**8)** Does a dishonourable discharge from the army, the imposition of a prison sentence and the social ostracism and disadvantages associated therewith constitute an act of persecution within the meaning of Article 9(2)(b) or (c) of Directive 2004/83/EC?

- «All parties making observations to the Court, including Mr Shepherd, accept that States may impose penalties on military personnel who refuse to perform further military service where their desertion is *not* based on valid reasons of conscience and provided that any penalties and the associated procedures comply with international standards. As I understand it, Question 8 is therefore relevant only if the national authorities conclude that Mr Shepherd did *not* plausibly believe that he risked committing war crimes if he redeployed to Iraq (so that, in consequence, he is not covered by Article 9(2)(e)); but are satisfied that he nevertheless either fulfils both indents of Article 10(1)(d) (membership of particular social group) or comes within Article 10(1)(e) because of the political beliefs that he holds about the conduct of the Iraq war. One might perhaps describe such a view of Mr Shepherd as being that he is a 'deserter with a conscience'<sup>18</sup>.

«Court martial proceedings and/or a dishonourable discharge clearly fall within the phrase 'legal, administrative, police, and/or judicial measures in Article 9(2)(b). However, an applicant has to show that such measures are in themselves discriminatory or are applied in a discriminatory manner.<sup>19</sup> (...) There is no

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16 Ibid, paras 70, 71

17 Ibid, para 75.

18 Ibid, para 77.

19 Ibid, para 79.



information before the Court to indicate whether any possible prosecution, punishment or social ostracism which Mr Shepherd might face were he to be returned to the US would be sufficiently serious to cross that threshold. Those are (yet again) matters that will need to be determined by the competent national authorities, subject to review by the national court.»<sup>20</sup>

The Opinion of the Advocate General does not bind her fellow-judges; the final decision of the Court is expected early in 2015. Nor will that determine the individual case. The Advocate General repeatedly stresses that it is for the Bavarian Administrative Court to decide on questions of fact. Nevertheless, if the Court as a whole upholds the principles she has set out, this will be a major step forward for conscientious objectors who seek to make use of the Qualification Directive in seeking asylum in Europe.

### **1.1.2.2 European Parliament**

The European Parliament approved a resolution on 27 February 2014 on the situation of fundamental rights in the European Union (2012). Paragraph 36 of the Resolution *“Regrets the fact that young people in some Member States are still being prosecuted and sentenced to imprisonment because the right to conscientious objection to military service is still not adequately recognised, and calls on the Member States to stop the persecution of and discrimination against conscientious objectors”*.

### **1.1.3 United Nations**

#### **1.1.3.1 Human Rights Committee**

##### **1.1.3.1.1 Jurisprudence**

At its Session in March 2014, Human Rights Committee decided the case of “X”, who was under threat of deportation from Denmark to Eritrea.

Although he is an Eritrean national, X was born and brought up in Addis Ababa, Ethiopia, from where he fled to Denmark in 2010, and immediately applied for asylum. *“Following the rejection of his asylum claim, he was ordered to leave Denmark immediately.”*<sup>21</sup>

X *“refuses to bear arms owing to his adherence to the Christian Pentecostal Movement. He asserts that he will therefore be regarded as an opponent of the regime in Eritrea, where all men and women between the ages of 18 and 40 are required to perform military service even if they object on conscientious grounds”,* and that *“because he is of eligible age he would be conscripted if returned to Eritrea. He also argues that the Eritrean authorities subject conscientious objectors to coercion, incarceration without trial (sometimes for up to 14 years) and torture in detention.”* He further *“submits that ‘as a member of a banned church community’ he risks being persecuted upon arrival at the airport and further risks abuse or torture upon*

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<sup>20</sup>Ibid, para 83.

<sup>21</sup>CCPR/C/110/D/2007/2010, published 12<sup>th</sup> May, 2014, para 1.



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*objecting to bear arms.”<sup>22</sup>*

He “asserts that draft evaders are ‘reported to be frequently subjected to torture’.” and “that he would not be able to demonstrate that he left Eritrea legally, because he has never lived in Eritrea and has no passport or exit stamp from that country.”<sup>23</sup>

The Danish Immigration Appeals Board however found that “The fact that the applicant risks being called up by the authorities to do his military service to Eritrea cannot in itself lead to a residence permit under section 7 of the Aliens Act, regardless of the applicant’s religious affiliation.”<sup>24</sup>

In its decision, the Committee noted “that credible sources indicate that illegal emigrants, failed asylum seekers and draft evaders risk serious ill-treatment upon repatriation to Eritrea and that the author asserts that he would have to refuse to undertake military service on the basis of his conscience. It considers that the State party did not adequately address the concern that the author’s personal circumstances, including his inability to prove that he left Eritrea legally, might lead to him being designated as a failed asylum seeker and as an individual who has not completed the compulsory military service requirement in Eritrea or as a conscientious objector. Accordingly, the Committee considers that the State party failed to recognize the author’s potential status as an individual subject to a real risk of treatment contrary to the requirements of article 7 [of the International Covenant on Civil and Political Rights – the prohibition of torture and cruel, inhuman or degrading treatment.]”<sup>25</sup> It therefore found that his deportation to Eritrea, if implemented, would constitute a violation of that article, and required the Danish authorities to reconsider the case in the light of this. Although the Committee had observed that the claims of a violation of article 18 of the Covenant (freedom of thought, conscience, and religion) could not be dissociated from the allegations under article 7, it did not consider it necessary to consider whether deportation to Eritrea would have constituted a separate violation of article 18.

#### **1.1.3.1.2 Consideration of state reports**

The Human Rights Committee has continued to raise the issue of conscientious objection to military service in its consideration of the reports of states party under the International Covenant on Civil and Political Rights.

In its October 2013 session, in its concluding observations on **Bolivia**, the Committee stated:

*“The Committee is concerned that there is no alternative civilian service that permits conscientious objectors to exercise their rights in accordance with the provisions of the Covenant (art. 18). The State party should promulgate legal provisions that recognize the right to conscientious objection to military service and establish an alternative to military service that is accessible to all conscientious objectors and is not punitive or discriminatory in terms of its nature, cost or duration.”<sup>26</sup>*

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22 Ibid, para 3.1.

23 Ibid, para 3.2.

24 Ibid, footnote 11.

25 Ibid, para 9.3.

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



At the March 2014 session, in its concluding observations on **Kyrgyzstan**, under the heading "the right to conscientious objection", the Committee *"reiterates its previous concerns (CCPR/CO/69/KGZ, para.18) about the limiting of conscientious objection to military service only to members of registered religious organizations whose teaching prohibits the use of arms and the stipulation of a shorter period of military and alternative service for persons with higher education. The Committee notes the State party's initiative to amend the Law on Universal Conscription of Citizens of the Kyrgyz Republic on Military and Alternative Service (arts. 2, 18 and 26)."* and recommends: *"The State party should ensure that amendments to the Law on Universal Conscription of Citizens of the Kyrgyz Republic, on Military and Alternative Service provide for conscientious objections in a manner consistent with articles 18 and 26 of the Covenant, bearing in mind that article 18 also protects freedom of conscience of non-believers. It should also stipulate periods of military and alternative service on a non-discriminatory basis."*<sup>27</sup>

At the July 2014 session, the concluding observations on **Chile**, available at present only in Spanish, the Committee notes that the state party is currently relying in the first instance on voluntary recruitment, but nevertheless expresses its concern that the relevant law does not recognise conscientious objection to military service, and indicates that the state should bring in a law which does afford such recognition.<sup>28</sup>

The question of conscientious objection to military service also features in the "list of issues" for **Israel**, whose report is to be examined by the Committee on 20<sup>th</sup> October, 2014. The Committee asks: *"How does the State party ensure that the "Committee for Granting Exemptions from Defence Service for Reasons of Conscience" works independently and that persons submitting applications on the grounds of conscientious objection have the right to appeal the Committee's decision? Please also provide information on any step taken to cease repeated imprisonment for refusal to serve in the armed forces, in line with the principle of ne bis in idem."*<sup>29</sup>

### **1.1.3.2 Human Rights Council**

#### **1.1.3.2.1 Resolutions**

For the second year running, the resolution in the Human Rights Council on Eritrea included a reference to conscientious objection.

The resolution called on Eritrea to put an end to the system of indefinite national service by demobilising the national service conscripts who have completed their mandatory 18 months of service, and by effectively ending the practice of engaging them in forced labour after such a period, to provide for conscientious objection to military service, and to end the compulsory practice of all children spending the final year of their schooling in a military camp<sup>30</sup>.

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27 CCPR/C/KGZ/CO/2, 23 April 2014, para 23.

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

29 CCPR/C/ISR/Q/4, 31<sup>st</sup> August 2012, para 23.

30 A/HRC/26, 23<sup>rd</sup> June.



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### 1.1.3.2.2 Universal Periodic Review

Issues related to military service were also to the fore when Eritrea reported under the Universal Periodic Review (UPR) process of the Human Rights Council. In the UPR Working Group no fewer than fourteen states made recommendations in this area: Norway<sup>31</sup>, Australia<sup>32</sup>, the USA<sup>33</sup>, Spain<sup>34</sup>, Italy<sup>35</sup>, Germany<sup>36</sup>, the UK<sup>37</sup>, Austria<sup>38</sup>, Canada<sup>39</sup>, Switzerland<sup>40</sup>, Belgium<sup>41</sup>, Luxembourg<sup>42</sup>, Portugal<sup>43</sup>, and Croatia, which made three separate recommendations<sup>44</sup>.

Taken together, these recommendations called upon Eritrea to abolish military conscription and obligatory militia service; meanwhile to respect the statutory 18 months' duration of National Service and demobilise those who had served longer, to ensure that no person under the age of 18 is recruited, to abolish the requirement that the final year of secondary education is spent in Sawa military camp, and includes military training, to respect the right of conscientious objection to military service, to institute alternative service for conscientious objectors, and immediately to release all imprisoned conscientious objectors. Germany and Canada explicitly classified indefinite military service as a form of forced labour – a severe form according to Germany.

All fifteen were among more than 110 (of 200) recommendations which did not enjoy the support of Eritrea. Specifically, despite all evidence to the contrary, Eritrea denied that children were ever recruited and that any conscientious objectors were imprisoned<sup>45</sup>.

### 1.1.3.3 United Nations High Commissioner for Refugees

In December 2013, the United Nations High Commissioner for Refugees (UNHCR) issued new guidelines on claims to refugee status related to military service. These expand and update the advice given in the UNHCR's "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee", a document which although regularly reissued, most recently in 2011, has remained unchanged since it was first drafted in 1979, and effectively supersede the brief section on conscientious objection in the Guidelines on Religion-based refugee claims, published in 2004.

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31 Document A/HRC/26/13, 7<sup>th</sup> April 2014, para 122.55.

32 Ibid, para 122.56

33 Ibid, para 122.57

34 Ibid, paras 122.58 and 122.149.

35 Ibid, para 122.59

36 Ibid, para 122.60

37 Ibid, para 122.63

38 Ibid, para 122.65

39 Ibid, para 122.66

40 Ibid, para 122.123

41 Ibid, para 122.186

42 Ibid, para 122.187

43 Ibid, para 122.188

44 Ibid, paras 122.61, 122.62 and 122.64

45 Document A/HRC/26/13/Add.1, 17<sup>th</sup> June 2014, Section II, specifically the responses to recommendations nos. 123 and 26 and 64 and 149.



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 survey the most recent international jurisprudence which, which firmly establishes a right of conscientious objection to military service, and are therefore able to give much firmer advice on the situations in which conscientious objectors may qualify for refugee status, advice which sadly is still not heeded in many refugee tribunals.

The guidelines are available online at the UNHCR website. This is however such a significant document that we reproduce it in its entirety in an Annex to this Report.

#### 1.1.4 World Council of Churches

At its Assembly held in Busan, South Korea from 30<sup>th</sup> October to 8<sup>th</sup> November 2013, the World Council of Churches adopted by consensus a "Statement on the Way of Just Peace".<sup>46</sup> The paragraph of recommendations included in the statement reads:

"4. TOGETHER WE RECOMMEND THAT THE WORLD COUNCIL OF CHURCHES

- a. *Undertake*, in cooperation with member churches and specialized ministries, critical analysis of the "Responsibility to Prevent, React and Rebuild" and its relationship to just peace, and its misuse to justify armed interventions;
- b. *Lead and accompany* ecumenical just peace ministries and networks in the practice of violence prevention, non-violence as a way of life, collective advocacy and the advancement of international norms, treaties and law;
- c. *Encourage* its member churches to engage in cooperative interfaith programmes in order to address conflicts in multi-ethnic and multi-religious societies;
- d. *Request* its member churches and partners to develop communication strategies that advocate for justice and peace, proclaim the hope of transformation and speak truth to power;
- e. *Facilitate* a programme of reflection and environmental action in member churches and related networks to build sustainable communities and bring about collective reductions in carbon emissions and energy use; promote the use of alternate, renewable, and clean energy;
- f. *Develop* guidelines within the concept of "economies of life" for the right sharing of resources and the prevention of structural violence, establishing useable indicators and benchmarks; and
- g. *Convene* churches and related organizations to work for human rights protections through international treaty bodies and the United Nations Human Rights Council; to work for the elimination of nuclear and all other Weapons of Mass Destruction, cooperating with the International Campaign to Abolish Nuclear Weapons; and to seek ratification of the Arms Trade Treaty by their respective governments and monitor its implementation.

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<sup>46</sup> <http://www.oikoumene.org/en/resources/documents/assembly/2013-busan/adopted-documents-statements/the-way-of-just-peace>





h. *Reiterate* its existing policy (2009 study) and reaffirm its support for the human right of conscientious objection to military service for religious, moral or ethical reasons, as churches have an obligation to support those who are in prison because they object to military service.”

The reference in recommendation (h) is to the report on the Decade to Overcome Violence and the subsequent Minute from the WCC's Central Committee, reprinted in the EBCO Report for 2009/10. This however represents a very welcome endorsement from the movement as a whole.

Conscientious objection to military service was in fact mentioned in three of the four “statements adopted as part of the report of the Public Issues Committee” (the exception was the declaration on statelessness). In the statement on the politicisation of religion and the rights of religious minorities,<sup>47</sup> an explicit reference was made to the fact that the right of conscientious objection is covered in Article 18 of the Universal Declaration of Human Rights (freedom of thought, conscience, and religion). Concerns about offending the host country had led to considerable reluctance to mention the issue in the statement on peace and reunification of the Korean peninsula.<sup>48</sup> As a compromise, a minute of dissent was attached to the adopted text, reading:

*“The following delegates and entire delegations wished to register their dissent that the statement does not include a concern of special relevance to the Korean peninsula, namely the plight of conscientious objectors to military service:*

*Evangelical Church in Germany*

*Waldensian Church*

*Church of the Brethren*

*Church of the Brethren in Nigeria*

*Eglise du Christ au Congo - Communauté mennonite au Congo*

*Mennonite Church in Germany*

*Mennonite Church in the Netherlands*

*Fiends United Meeting*

*Canadian Yearly Meeting*

*Ms Eun-Young Lee, Korean Methodist Church*

*Ms Alison Jane Preston, Anglican Church of Australia*

*Rev. Sarah Campbell, United Church of Christ*

*Rev. Kelli Parrish Lucas, United Church of Christ”*

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<sup>47</sup> <http://www.oikoumene.org/en/resources/documents/assembly/2013-busan/adopted-documents-statements/politicisation-of-religion-and-rights-of-religious-minorities>

<sup>48</sup> <http://www.oikoumene.org/en/resources/documents/assembly/2013-busan/adopted-documents-statements/peace-and-reunification-of-the-korean-peninsula>



## 1.1.5 Domestic Constitutional Courts

### Kyrgyzstan

The Supreme Court in Kyrgyzstan agreed to suspend proceedings against ten Jehovah's Witnesses who were refusing to perform either military service or the alternative service offered, in order to obtain a ruling on the constitutionality of the Military Service Law.<sup>49</sup> Their complaint was that the Law did not offer a truly civilian alternative service, as guaranteed by article 56.2 of the Constitution, especially in that under article 32.4 of the Law "alternative service includes making monetary contributions by those in alternative service to a special account of the Ministry of Defence..."<sup>50</sup> They also complained that alternative service was supervised by military personnel, and that those who performed it were automatically entered in the military reserves.<sup>51</sup> The Jehovah's Witnesses reveal that three of their members who were convicted in 2012 over their refusal to perform either military service or the existing alternative service had addressed individual communications to the Human Rights Committee in this respect.<sup>52</sup>

The decision of the Constitutional Chamber of the Supreme Court was announced on 19<sup>th</sup> November 2013,<sup>53</sup> The Court was unanimous in declaring that article 32.4 and various other articles<sup>54</sup> were in conflict with the Constitution, and it directed the government to amend the law so as to make available a genuinely civilian alternative service. The Jehovah's Witnesses are confident that pending the legislative amendments no further proceedings will be taken against their members for refusal of alternative service and that the past convictions will be reviewed.<sup>55</sup>

The Government reports<sup>56</sup> that a draft law making the necessary amendments has already been submitted by the Ministry of Defence. However, it has not been possible to discover details of the draft. The Jehovah's Witnesses' complaint does not address any of the other shortcomings in the previous Law - recognition only of conscientious objectors from registered religions which explicitly prohibit the use of arms, discriminatory length of alternative service, and discrimination between citizens with regard to their military service obligations on the grounds of their educational qualifications. The amendments suggested to remedy the aspects of the Law which were found to be unconstitutional will not therefore necessarily address these shortcomings.

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49 Submission of the European Association of Jehovah's Christian Witnesses to the UN Human Rights Committee, April 2013 (UN document reference INT/CCPR/NGO/KGZ/14601), para 60.

50 *Ibid*, para 52, which also gives details of the purposes for which the "special fund" could be used.

51 Human Rights Without Frontiers, *op cit*.

52 INT/CCPR/NGO/KGZ/14601, *op cit*, paras 57, 58.

53 Human Rights Without Frontiers, "Kyrgyzstan: Court rules in favor of conscientious objectors" *Newsletter* "Intolerance and discrimination based on religion or belief", 20<sup>th</sup> January 2014, quoting the official Jehovah's Witnesses website, [www.jw.org](http://www.jw.org)

54 See CCPR/KGZ/Q/2/Add.1, *op cit*, para 164.

55 Human Rights Without Frontiers, *op cit*.

56 CCPR/KGZ/Q/2/Add.1, *op cit*, para 164.



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## Republic of (ie South) Korea

Even though it ruled as recently as 2011 that the military service legislation was in accordance with the constitution, the Constitutional Court in the Republic of Korea has in the last two years had at least six cases referred to it from lower courts which under existing law had no choice but to sentence conscientious objectors to 18 months imprisonment, but felt that this was contrary to the freedom of conscience guarantees in the Constitution. Five international non-governmental organisations – Amnesty International, Friends World Committee for Consultation, the International Commission of Jurists, the International Fellowship of Reconciliation, and War Resisters' International, have produced a joint "amicus brief" to the Court regarding international standards and practice. The text may be accessed through the websites of these organisations.

## 1.2 DEVELOPMENTS WITHIN COUNCIL OF EUROPE STATES

### 1.2.1 Armenia

Following the introduction of the new Law (see EBCO Report 2013), the final 14 imprisoned conscientious objectors were freed on 12<sup>th</sup> November 2013, following the acceptance of their applications to perform alternative civilian service.<sup>57</sup> No new imprisonments have been reported; the alternative service arrangements under the revised Law are acceptable to Jehovah's Witnesses, the vast majority of Armenian conscientious objectors.

This means that, while the imprisonment of conscientious objectors in Europe has not altogether ceased, the numbers concerned are lower than at any time in recent years. Since 1993, almost 500 conscientious objectors had been imprisoned in Armenia, for periods of up to three years; at any one time there had usually been more conscientious objectors in prison in Armenia than in the rest of Europe put together.

### 1.2.2 Azerbaijan

When Nizami District Conscription Office called Karaam Shikhaliyev for medical examinations on 23 August 2013, he immediately attended. He returned to the Conscription Office four times in the next three weeks. Each time, he explained that as a Jehovah's Witness, his conscience did not permit him to go to the military.

On 10<sup>th</sup> October 2013, Shikhaliyev, a Jehovah's Witness from Baku, was seized at Nizami District Conscription Office on 10 October 2013 as he responded to a call-up notice, two days after his 18<sup>th</sup> birthday. Rovshen Babayev, Head of the Conscription Office claimed to Forum 18 on 10 February 2014 that: "He wasn't detained, just sent to a military unit". Officials at Babayev's office had earlier told Shikhaliyev he would be assigned to some kind of civilian alternative service, his fellow Jehovah's Witnesses told Forum 18. Instead, Shikhaliyev was taken against his will from the Conscription

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<sup>57</sup>Corley, F., "Jailed Conscientious objectors freed. But alternative service applications missing?" Forum 18 News Service (forum18.org), 28<sup>th</sup> November 2013.



Office first to Bilajari in the capital Baku, then to Beylegan on Azerbaijan's central southern border with Iran. Finally he was taken further south east to Military Unit No. 704 in Lankaran where he was detained against his will for four months.

"Despite physical abuse, verbal humiliation, and psychological pressure, Shikhaliyev has refused to wear a military uniform, perform military duties, or take the military oath," Jehovah's Witnesses told Forum 18. "He has not wavered in his conscientious religious position."

On 13<sup>th</sup> February, Shikhaliyev was put on trial at Jalilabad Military Court in southern Azerbaijan, charged with fraudulently evading military service.<sup>58</sup> On 16<sup>th</sup> April, Judge Vugar Ahmadov sentenced him to one year in a disciplinary military unit, the court chancellery told Forum 18 on 8 May. He was punished under Criminal Code Article 335.1 ("Evasion of military service by causing harm to health or in another way").

Conditions in disciplinary military units are governed by Articles 138-153 of the Code of Enforcement of Punishments. These specify that those held there are allowed to write letters and make phone calls, and receive periodic visits. They can be required to work in the military unit and can be punished for failing to abide by the rules, most seriously by up to ten days in solitary confinement. However, Jehovah's Witnesses - who reject any activity linked to the military - would find any assigned work within the military unit and military training that might be ordered as unacceptable. In addition, while in the disciplinary military unit, individuals are assumed to be members of the armed forces, which would contradict Jehovah's Witnesses' conscientiously-held beliefs.<sup>59</sup>

On 6 May, Shikhaliyev's lawyer filed an appeal against his conviction to Shirvan Appeal Court. Judge Etibar Jamalov of Shirvan Appeal Court's Military Collegium finally upheld the original sentence on 16 July, the court chancellery told Forum 18 on 6 August. "If he is dissatisfied, he could appeal further to the Supreme Court in Baku," the chancellery official added.<sup>60</sup>

### 1.2.3 Belarus

The EBCO Annual Report for 2013 reported that a draft law on alternative service, which would at last implement the provision which had been included in the 1994 Constitution, was under preparation. Behind timetable, a draft prepared by the Ministry of Labour and Social Security was presented to parliament in December 2013 but before the Labour and Social Affairs Committee of the Parliament could commence its consideration, the draft was returned to the Ministry "for technical amendments", with no date set for its return. This draft would not have guaranteed freedom of conscience, granting the possibility of applying to substitute a civilian alternative service for military service only to those who cited explicitly religious grounds. Applications would have been allowed only within a ten-day window, creating doubts

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58 Corley, F., "Conscientious objector's trial to begin after four months' detention" Forum 18 News Service (forum18.org), 10<sup>th</sup> February 2014.

59 Corley, F., "Azerbaijan: Beating to extract "evidence"; conscientious objector gets one year's military detention" Forum 18 News Service (forum18.org), 8<sup>th</sup> May 2014.

60 Corley, F., "Azerbaijan: NSM secret police detentions extended, conscientious objector's appeal fails" Forum 18 News Service (forum18.org), 7<sup>th</sup> August 2014.



as to whether the process would in practice be accessible to all those affected, and making no allowance for the possibility that conscientious objections may develop over time. And the proposed duration of alternative service was punitive and discriminatory – 30 months as opposed to 18 months of military service.

It is of course to be hoped that withdrawing the draft for amendment would enable the Ministry of Labour and Social Security to address these aspects in which as first put forward it fell short of international standards. Non-governmental organisations in Belarus fear however that yet again the legislative proposal will simply disappear without trace.<sup>61</sup>

## 1.2.4 Cyprus

### Murat Kanatli

On 10<sup>th</sup> October 2013, the Constitutional Court in the northern part of Cyprus delivered its ruling on the case of conscientious objector and EBCO Board member Murat Kanatli, following the hearing on 16<sup>th</sup> May reported in the EBCO Report 2013.

The case had been referred to the Constitutional Court by the Military Court on the grounds that the articles obliging the objector to attend the reservist army services were in conflict with articles safeguarding freedom of thought and expression and gender equality.

Murat Kanatli, an EBCO Board member, had declared his conscientious objection on ideological grounds in 2009 and has since refused each year to participate in the annual compulsory military exercises in the northern part of Cyprus. On 14<sup>th</sup> June 2011 he was summoned to appear in the Military Court on charges relating to his refusal in 2009. After numerous postponements, on 8 December 2011 the Military Court accepted the demand of Murat Kanatli to refer his case to the Constitutional Court.

In its ruling the Constitutional Court cited the decisions of the European Court of Human Rights in *Bayatyan v Armenia*, *Ercep v Turkey* and *Savda v Turkey*, particularly emphasizing *Savda v Turkey* where the objection was based on non-religious grounds, and also the decision of the United Nations Human Rights Committee in *Atasoy and Sarkut v Turkey*. These decisions had all recognized that although the right of conscientious objection is not explicitly referred to in the European Convention on Human Rights and the International Covenant on Civil and Political Rights, "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constituted a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees that are safeguarded in Article 9 of European Convention of Human Rights and Article 18 of the International Covenant on Civil and Political Rights." The Constitutional Court recognized that Article 23 of the Constitution of the self-styled "Turkish Republic of North Cyprus" (the freedom of thought, conscience and religion) is closely based on Article 9 of the European Convention on Human Rights.

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<sup>61</sup>All details from Glace, O., "Belarus: Long awaited alternative service law abandoned?" Forum 18 News Service (forum18.org), 4<sup>th</sup> February 2014.



The Constitutional Court stated that according to the laws and regulations in northern Cyprus one may be exempted from armed service solely on grounds of physical and mental health conditions. The unavailability of alternative service therefore constitutes an interference with the right to freedom of thought, conscience and religion safeguarded in the Article 23 of the Constitution. The role of a decision of the Court that an article of legislation is in conflict with the Constitution is to help resolve the conflict between parties to the case or to prevent the article in question from being applied in that case.

In this case however, the Constitutional Court went on to state that it did not find a conflict with the Constitution. The Court added that the duty is upon the legislator to provide in laws and regulations for alternative service to military service and when doing so to review the article of the Constitution that relates the right and duty to homeland to armed service only. It referred the specific case of Kanatli back to the Military Court.

One judge delivered a minority opinion stating that this case should be dealt in line with rules that are applied when laws are in conflict with the European Convention on Human Rights.

On Tuesday 25<sup>th</sup> February, the case was reopened in the Military Court. In its judgement, the Military Court stated that the right to conscientious objection is not regulated in domestic laws and therefore it could rule only with regard to the constitutional provision on the right and duty to the homeland to perform armed service and the implementing legislation on armed service, and must disregard the decisions of the European Court of Human Rights. The Court went on to state that even if it were to give a judgement in the light of the relevant case law of ECtHR, Kanatli was objecting to serve due to his political beliefs which the Court did not consider to constituting a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees that are safeguarded in Article 9 of ECHR. Furthermore, the Court continued, as alternative service is not provided and because of the existence of the Cyprus conflict the case would fall under the permissible limitations because it considered the regulation to be necessary in a democratic society in the interests of public safety.

It may be observed that both with regard to the nature of protected conscientious objections and the permissible grounds of limitation, the Court's interpretation of the international jurisprudence was highly questionable.

The court found Kanatli guilty and imposed a fine of 500 Turkish liras or ten days imprisonment. Upon refusal to pay the penalty Kanatli was imprisoned.

Charges relating to Kanatli's failure to report for reserve service in 2010 and 2011 (in 2012 he reached the maximum age of liability) are still pending. On 22<sup>nd</sup> October 2013 he made a first appearance in court regarding the charges relating to reserve service in 2010 and 2011; the hearing has been repeatedly postponed, and will now take place on the 16<sup>th</sup> October 2014, following the decision of the Military High Court on the appeal against the decision of 25<sup>th</sup> February, which was to be announced on 9<sup>th</sup> October.

### **Proposed legislative changes**



Meanwhile, the question of the amendment of the conscription law has been considered by the Legal and Political Affairs Committee of the Parliament in Northern Cyprus. Initially, only a reduction in the duration of the compulsory service was on the agenda, but after Kanatli's imprisonment the right to conscientious objection was added.

In May 2014, another ad hoc Committee announced draft amendments of the "Constitution". Currently Article 74 states:

"National service in the armed forces shall be the right and sacred duty of every citizen. Conditions relating to national service shall be regulated by law".

After the proposed amendment it would read:

"National service a duty to the country shall be the right and sacred duty of every citizen. The service in the Armed Forces or in the public sector will be fulfilled or deemed to have been fulfilled as regulated by the relevant law."

The constitutional amendment was due to be put to a referendum in the northern part of the island on 29<sup>th</sup> June 2014, however the Parliamentary Committee withdrew the amendment as there was a consensus between the political parties.

**Haluk Selam Tufanli** declared his conscientious objection on 8<sup>th</sup> December 2011. He appeared in the Military Court for the first time on charges arising from his conscientious objection to reservist call up on 24<sup>th</sup> December 2013. The trial was postponed pending the outcome of the initial Kanatli case, and the decision of the Military High Court. Haluk's case will be heard together with that of Kanatli relating to 2010 and 2011 on 16<sup>th</sup> October 2014.

### **More declared conscientious objectors**

Up to the present are 14 persons who have declared their conscientious objection in the northern part of Cyprus:

Salih Askeroğlu (24 September 1993), Murat Kanatlı (15 May 2009), Haluk Selam Tufanlı (8 December 2011), Faika Deniz Paşa (8 December 2011), Cemre İpçiler (8 December 2011), Nevzat Hami (8 December 2011), Ceren Goynuklu (8 December 2011), Halil Karapaşaoğlu (24 October 2013), Ahmet Karakaşlı (24 December 2013), Teğiye Birey (24 December 2013), Süleyman Tarık Sakallı (15 April 2014), Halil Sayın (15 May 2014), Didem Gürdür (15 May 2014), Reşat Korel (15 May 2014).

### **Republic of Cyprus**

Conscientious objection has been recognised in the Republic of Cyprus (the internationally-recognised state in the south of the island), but not in full conformity with international standards.

Both the old law and the new one of 2011 include the possibility for the conscientious objector to serve alternative military service (unarmed) in military units instead of only alternative social service. The right for alternative social service is removed for the conscientious objector with an exemption on medical grounds, as well as for all those exempt from military service on medical grounds.



Application to gain CO status, with the required supporting documents, is made to the military services and a Special Committee examines this application (after examination of the Physical Condition of the applicant by another Committee). This Special Committee comprises of two professors of higher education with a specialization in philosophy, social or political sciences or psychology, one law officer of the Law Office of the Republic and two higher officers of the Military Force, one of the Conscription Office and one of the Health Department of the Army. The decision of the Special Committee is passed on to the Minister of Defence who has the final say and if his decision is opposite to that of the Special Committee, it has to be justified in writing. The Special Committee may call the applicant for an oral interview, but can also decide without interview.

Alternative social service is performed in posts of the public services sector and consists of serving in services of public utilities or undertaking public duties within the field social care and environmental protection.

In 2013 a number of reservist objectors came to light. One individual has made an application to the military services stating his conscientious objection and requesting not to participate in military reservist call ups but instead to do alternative social service. His case was examined, he was called for an interview and after many months has received an answer that he is accepted as a conscientious objector. However as of the beginning of October 2014, he has not been sent call-up papers for "alternative social reserve service".

### **1.2.5 Greece**

Harassment of conscientious objectors continues.

- On 19 September 2013 the Military Court of Thessaloniki convicted Yiannis Glarnetatzis on an insubordination charge and sentenced him to 12 months imprisonment suspended for 2 years.
- On 8 October 2013 the Naval Court of Piraeus convicted Charalabos Akrivopoulos on a second insubordination charge and sentenced him to 9 months imprisonment suspended for 3 years.
- On 5 November 2013 the Appeal Military Court of Athens convicted Dimitris Hatzivasiliadis on an insubordination charge and sentenced him to 12 months imprisonment without suspension.
- On 14 November 2013 Nikolaos Krontiras was called for trial by the Military Court of Thessaloniki on an insubordination charge. The trial was postponed.
- On 27 February 2014 Haris Ritsios was arrested in Trikala. On 25 June 2014 the Military Court of Athens convicted him on two insubordination charges and sentenced him to 14 months imprisonment suspended for 3 years.
- On 14 March 2014 the Military Court of Athens convicted Michalis Tolis on an insubordination charge and sentenced him to 8 months imprisonment suspended for 1 year.





- On 9 April 2014 Dimitris Hatzivasiliadis was arrested in Athens charged with insubordination.
- On 15 April 2014 Kostas Yiannaros was arrested in Athens charged with insubordination.
- On 13 May 2014 the Military Court of Thessaloniki convicted Dimitris Sotiropoulos on an insubordination charge and sentenced him to 10 months imprisonment suspended for 2 years. Sotiropoulos' appeal will be heard by the Appeal Military Court of Athens on 2<sup>nd</sup>. December.
- On 21 May 2014 there was an attempt to arrest Lazaros Petromelidis in Drapetsona for a 5 month imprisonment sentence imposed on him in 2006 on an insubordination charge. Lazaros Petromelidis finally bought off the sentence.

In addition, several ideological conscientious objectors had their applications for civilian service rejected by the Minister of Defence following negative opinions by the relevant Special Committee of the Ministry of Defence. This unacceptable practice continues and it is a vicious circle. These young persons are then called up for military service, and if they do not enlist, they are repeatedly persecuted, since insubordination is scandalously considered a permanent offence in the Greek legislation. So an endless circle of arrests and penal convictions begins, with suspended imprisonment sentences accompanied with huge administrative penalties of 6000 euros for each insubordination charge.

Last but not least, on 1 March 2014, members of EBCO and Amnesty International were harassed and detained in the General Police Directorate of Attica, after their symbolic peaceful protest in front of the Turkish embassy in Athens against the imprisonment of Turkish Cypriot conscientious objector Murat Kanatli, who was serving 10 days in prison following his refusal, on grounds of conscience, to participate in the annual compulsory military exercises in the northern part of Cyprus.

### **1.2.6 Moldova**

A confidential source was told by members of the Transnistrian Supreme Soviet (Parliament) that in March 2014 the secessionist republic of Transnistria adopted rules for a civilian alternative to military service for conscientious objectors, which would enter into force at the time of the next draft, later in the year.

As described, its features are as follows:

- Civilian service will be in health institutions, housing providers and other non-military settings.
- It will be paid, including social contributions to pension.
- It will be for two years, as against one year for regular military service.
- During the service, the person's place of employment will be held for them to return to.



### 1.2.7 Russian Federation

Our colleagues in the organisation "Citizen, Army, Law" report that the alternative civilian service arrangements in the Russian Federation are now generally functioning smoothly. Approximately 1000 applications are accepted annually; most from Jehovah's Witnesses, but some from non-religious conscientious objectors – pacifists and anarchists.

According to official figures, 83% of applications in 2012 were successful, but it is not clear whether those declared invalid for technical reasons, such as having missed the deadline, have been counted. There are also disturbing reports that applications are frequently "lost" in the course of transfer between different authorities.

One such case was that of Nikita Konev from Kirovsk, Murmansk oblast. Konev "grew up in a family of Jehovah's Witnesses. In 2011, he applied for substitution of the military conscript service by alternative civilian service to the Kirovsk military commissariat who should have transmitted the application to the call up commission. (...) the commission has not received the application and on 22 November 2011 issued decision to call Konev up. Konev contested the commission's decision in court twice. The case has been never opened. "At the same time, the military commissariat complained against Konev evading of military service. Eventually, the criminal case against him was opened in late April on Article 328, part 1 of the Criminal Code (evading of military service). In the conclusion of the case is indicated that the offense started at 04:30 on 26 March 2012, since Konev received the call up notification."<sup>62</sup>

This case, which is now the subject of an application to the European Court of Human Rights, is by no means the only instance where persons following the procedures set out in the Alternative Service Law have found themselves faced with prosecution for attempted evasion of military service.

Another such case involved a young man who had been turned down by the draft commission "on the grounds that as a bee-keeper, he took honey from bees so he was not a pacifist." When he contested this he was twice faced with criminal prosecutions initiated by the local Draft Commissioner. "When he was aged 26, another attempt was made to draft him illegally, as he was legally exempt, having two children by then." He was rescued by the intervention of a counsellor "15 minutes before his head was to be shaved"<sup>63</sup> This illustrates two other features which are reportedly widespread: variable behaviour and arbitrary decisions on the part of draft boards, and illegal conscription of persons who are under the relevant laws not liable for military service.

An ongoing case is that of Evgeniy Plakhutin from the Voronezh region. While his appeal against the negative decision of the draft board was pending, he was charged under Article 328.1 for four instances of failure to appear before the draft board when summoned; two of these summonses, he claims, were illegitimate because they were expressly for the purpose of medical examination, which should not take place while

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62 Soldiers Mothers of St Petersburg, "A pacifist charged with conscription dodging", 12th May 2012.

63 Friends House Moscow, ([www.friendshousemoscow.org](http://www.friendshousemoscow.org)) Newsletter, November 2013.



an application for recognition as a conscientious objector is pending; the other two because they were fresh call-ups while his appeal was pending. At the time of writing, both the appeal against the decision of the draft board and the criminal prosecution are pending.

Meanwhile, particularly in the light of the reporting on developments in Ukraine, there has been a surge in popular support for militarism, which has made life difficult for independent media and anti-militarist NGOs.

This was dramatically exemplified on 28<sup>th</sup> August 2014, when the Russian Ministry of Justice, using new powers enabling it to by-pass the requirements to give notice and to defend its decisions in court, added the NGO "Soldiers' Mothers of St. Petersburg" to its official list of "foreign agents" under the notorious law of November 2012. The decision came after its leader, Ella Polyakova, spoke publicly about the alleged death of Russian soldiers fighting in Ukraine against the Ukrainian forces. Her organization had received a list of some 100 Russian soldiers allegedly killed in Ukraine and a further 300 wounded, and had on 25<sup>th</sup> August, together with "Citizen, Army, Law", submitted a specific request for an investigation into the deaths of nine young men from Dagestan, each allegedly paid 250,000 roubles (approximately €5,800) to go to fight in Ukraine.

Soldiers Mothers were already under investigation under the law on charges that they were currently receiving "foreign funding", but had recently challenged the prosecution's evidence. They are challenging the legality of the Ministry of Justice's intervention.<sup>64</sup>

### 1.2.8 Turkey

As reported in the EBCO Report 2013, (Section 1.2.11), the United Nations Human Rights Committee in October 2012, following its consideration of the initial report of Turkey under the International Covenant on Civil and Political Rights, stated in its Concluding Observations that it "is concerned that conscientious objection to military service has not been recognized by the State party. The Committee regrets that conscientious objectors or persons supporting conscientious objection are still at risk of being sentenced to imprisonment and that, as they maintain their refusal to undertake military service, they are practically deprived of some of their civil and political rights such as freedom of movement and right to vote... (arts. 12, 18 and 25)", and recommended, **"The State party should adopt legislation recognizing and regulating conscientious objection to military service, so as to provide the option of alternative service, without the choice of that option entailing punitive or discriminatory effects and, in the meantime, suspend all proceedings against conscientious objectors and suspend all sentences already imposed."**<sup>65</sup> It also selected that paragraph of the concluding observations as one of the three on which the Committee stipulated, "the State Party should

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64 Human Rights House ([humanrightshouse.org](http://humanrightshouse.org)) "Russian NGO of mothers of soldiers labeled 'foreign agent'", 3<sup>rd</sup> September 2014, and Amnesty International ([amnesty.org](http://amnesty.org)), "Russian NGO branded as 'foreign agent' after reporting on Russian military action in Ukraine" 29<sup>th</sup> August 2014.

65 CCPR/C/TUR/CO/1, 2nd November 2012, Para 23.



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provide, within one year, relevant information on its implementation of the Committee's recommendations"<sup>66</sup>

Turkey did not submit a follow-up report until July 2014, following a reminder from the Committee, and in that report what it had to say about conscientious objection to military service was minimal. It merely quoted Article 72 of the Constitution, instituting a "National Service" which may be performed "either in the armed forces or in public service", and Article 1 of Law 1111, which states "Every male Turkish citizen is obliged to perform military service in accordance with this Law." and adds "At present there is no work regarding introduction of a civilian alternative for military service."<sup>67</sup>

In this it confirms our earlier suspicions that the moves which were being made in this direction have been abandoned.

On 23<sup>rd</sup> October 2012, five days after the conclusion of the Human Rights Committee's examination of Turkey's report "ongoing discussions of legal amendments" to allow for conscientious objection to military service were mentioned by Turkey to the Committee of Ministers of the Council of Europe,<sup>68</sup> with regard to the follow-up of the various European Court of Human Rights judgements<sup>69</sup> concerning conscientious objection to military service.

No legislative moves have however followed; the Bill introduced in 2011 by opposition BDP (Peace and Democracy Party) MP Sebahat Tuncel has disappeared without trace; the official responses by the Ministries of Defence and Justice to a further proposal by Tuncel on 21<sup>st</sup> May 2012 linked the recognition of conscientious objection to the establishment of a professional army, and stated that this was not on the agenda.<sup>70</sup>

Since receiving the Human Rights Committee's Concluding Observations, which said "The State party should adopt legislation recognizing and regulating conscientious objection to military service, so as to provide the option of alternative service, without the choice of that option entailing punitive or discriminatory effects and, in the meantime, suspend all proceedings against conscientious objectors and suspend all sentences already imposed."<sup>71</sup>, Turkey has in fact moved *away* from legislating to recognise conscientious objection. On 11<sup>th</sup> April 2013, the Turkish Parliament adopted the Fourth Judicial Reform package, as part of the programme to align its legislation with the jurisprudence of the European Court of Human Rights. The initial draft had included provisions creating non-military national service options, and removing Article 318 of the Penal Code which created a very broadly-defined offence of "alienating people from military service", thus stifling reporting on and public

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66 Ibid, Para 26.

67 Additional information submitted by the Government of Turkey on the issues specified in paragraphs 10, 13 and 23 of the concluding observations of the Human Rights Committee on the Initial Report of Turkey (UN Document reference INT/CCPR/AFR/TUR/18277/EN), 22<sup>nd</sup> July 2014, page 3.

68 Ucpinar, H. Execution of the Judgment *Ulke v Turkey*: Monitoring report «The right to conscientious objection», IHOP (*Insan Haklari Ortak Platformu* - Human Rights Joint Platform, Istanbul, April 2013).

69 See details in the IFOR submission to the Human Rights Committee regarding the initial report of Turkey.

70 Ibid.

71 See Para 23 of the Concluding Observations CCPR/C/TUR/CO/1, 2<sup>nd</sup> November 2012.



discussion of conscientious objection,<sup>72</sup> but these aspects were missing from the final document. European Union enlargement Commissioner Stefan Füle issued a statement the following day in which while welcoming the package he regretted the lack of progress on the issue of conscientious objection. Füle expressed the hope that the outstanding issues would be dealt with in a forthcoming "Human Rights Action Plan".<sup>73</sup> We are not aware of any further progress with this Plan.

Similarly the "Parliamentary Constitution Conciliation Commission", tasked with drafting a replacement to the 1980 Constitution, discussed the question of conscientious objection to military service at its meeting on 22<sup>nd</sup> November, 2012, but failed to reach consensus. A group of conscientious objectors who had met with Commission members on 9<sup>th</sup> March 2012 reported that the Chairperson's questions had focussed on the implications for national security if no one was prepared to serve in the armed forces.<sup>74</sup>

It seems that in the national debate there is a degree of confusion - which may or may not be deliberate - between the acceptance of conscientious objection and the abolition of obligatory military service (which would of course in practice make the issue less urgent). Most obviously propagandist is the glib argument that to recognise conscientious objection would undermine national security. This deserves to be unpicked.

Prosecutions have been brought under the notorious Article 318 against people carrying banners reading "every Turk is born a baby", as this is seen as mocking the popular slogan "Every Turk is born a soldier". Does the political and military establishment really fear that the population as a whole no longer relates to this slogan - that if a right of conscientious objection were granted young Turks would seek to take advantage of it in such numbers as to create an insuperable shortfall in recruitment? Meanwhile, it could also be argued that the resources diverted towards identifying and pursuing conscientious objectors, who at the end of the day still did not perform military service, represented a threat to national security than greater than the loss of the unwilling manpower.

It is important to realise that most Turkish conscientious objectors have simply not responded to the call up to military service and have subsequently lived semi-clandestinely so as not to be identified and prosecuted as "draft dodgers". By contrast, many of the cases which figure in the jurisprudence have arisen when objectors co-operated with the requirement to report for military service, but then declared their objection.

Various sources confirm that, following the judgements of the European Court of Human Rights in the cases of *Ercep v Turkey*, *Feti Demirtas v Turkey* and *Savda v Turkey* most cases of refusing the call-up to military service are now heard in the civilian courts which in the first instance generally impose fines rather than sentences of imprisonment. Conscientious objectors are however still not spared repeated call-ups and prosecutions. Moreover the Ministry of Justice's statement seems to imply that if objectors exhaust all appeal possibilities and refuse to pay the fines the courts may again revert to imprisonment.

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72 See Para 24 of the Concluding Observations CCPR/C/TUR/CO/1, 2<sup>nd</sup> November 2012.

73 «Turkey's judicial reform falls short on conscientious objection: EU Commissioner», Hurriyet, 12th April, 2013.

74 Upcinar, op cit.



On 5<sup>th</sup> February 2013, the European Association of Jehovah's Christian Witnesses reported to the Committee of Ministers of the Council of Europe that one of their members, Ilker SARIALP, aged 31, of Istanbul, was continuing to receive a fresh call-up to military service three times each year, and each time refused on the grounds of conscientious objection. Between May 2012 and February 2013 he had been indicted three times. One court case against him had been heard and had resulted in a fine of 250TL, which he intended to appeal. A second case was pending at the time of the report.

Moreover, there have recently been technical developments designed to facilitate the interception at random identity checks of those, including conscientious objectors, who have not performed military service. In order to obtain a new passport a man of military service age (20 to 38 years) has always been required to present a "Document of Completion of Military Service" and the issuing officer might indicate whether military service had been completed by writing in the appropriate place "yapmistir" (done) or, if a deferment had been granted to permit study abroad, "yapmamistir" (not done). In recent passports and identity documents, the bar code is electronically linked to the person's entry on the GBTS (*Genel Bilgi Toplama Sistemi* – General Information Gathering System) which - among such other details as convictions, arrest warrants, and tax arrears - indicates the person's military service status. A policeman or border official may read this information with a hand-held device, and if the person is in default can detain him on the spot.<sup>75</sup>

### 1.2.9 Ukraine

As noted in the EBCO Report 2013, Ukraine announced that conscription into the army would cease from the Autumn 2013 call-up, and the army would switch to an all-contract force. However statements by the Ministry of Internal Affairs indicated that they considered the suspension of conscription to apply only to the army and they anticipated continuing to conscript into the forces under their control, including the police. "A particular concern," the 2013 report observed, quoting our colleagues in the Center for Civil Liberties in Kiev, "is the desire of the internal troops and police to retain conscription in order to maintain and enhance their ability to react to political protest. There is a growing number of protests, the majority of them peaceful, but Ministry of Internal Affairs police are increasingly being used to place unreasonable restrictions on the freedom of assembly, and the reliance on conscripts for this purpose is also growing."

These concerns proved sadly vindicated when it was conscripts reporting to the interior ministry who were deployed in the front line to put down the "Maidan" protests of the winter of 2013/14; conscripts suffered disproportionate casualties both from the fighting and from the conditions to which they were exposed with inadequate equipment – over 100 were hospitalised with frostbite. More seasoned troops followed the first wave and were responsible for much of the gratuitous violence.

When a new Ukrainian government took office there were hopes that it would seek to distance itself from its predecessors by completely ending all conscription. But these

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<sup>75</sup> UK Border Agency, Operational Guidance Note: Turkey, May 2013, paras 3.12.12, 3.12.13 and 3.13.2.



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hopes were dashed when it used the annexation of Crimea and the insurrection in the East of the country as an excuse to reinstate universal obligatory military service.

Young Ukrainians are now being conscripted into what is effectively a civil war situation. In such circumstances individuals are especially likely to be presented with a crisis of conscience. The OSCE monitoring mission has reported a number of protests by conscripts and their families against mobilisation for the conflict in the east. In other instances many of those liable for conscription were believed to have already left the country.<sup>76</sup>

We have not yet heard reports of specific cases of young Ukrainians seeking protection to remain outside the country rather than being forcibly embroiled in the conflict – on either side – but there must certainly be those in this position. More are likely to object to being forced to take arms against their fellow-countrymen than to espouse a general pacifist position; these are in fact valid conscientious objections but may not be seen as such by those dealing with such young men, or even by them themselves. Those seeking to reject taking one side or the other will not necessarily receive a friendly welcome from the authorities where they happen to be, and the fact that Ukraine has a law on alternative service will be an obstacle to any who try to make asylum claims, despite the fact that the law in question is inadequate, applying only to members of ten listed minority religious denominations, and that, as members of the United Nations Human Rights Committee have observed, “It is precisely in time of armed conflict (...) that the right to conscientious objection is most in need of protection (...) and most likely to fail to be respected in practice.”<sup>77</sup>

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<sup>76</sup>See “Concerns about mobilisation and conscription in Western Ukraine”, Human Rights Without Frontiers International Newsletter, 16<sup>th</sup> August

<sup>77</sup>Human Rights Committee: Views on Communications Nos. 1853 and 1854/2008, 19<sup>th</sup> June 2012, Annex II (Individual concurring opinion of Committee members Sir Nigel Rodley, Mr. Krister Thelin and Mr. Cornelis Flinterman).



## 2. OVERVIEW: MILITARY SERVICE, CONSCIENTIOUS OBJECTION AND MILITARY EXPENDITURE IN COUNCIL OF EUROPE STATES

### 2.1 CONSCRIPTION

Andorra, Liechtenstein, Monaco, and San Marino maintain a token military for ceremonial purposes only. Iceland has never had a military, although it does maintain a small paramilitary coastguard. In none of these has conscription ever applied, which has also been the case in Ireland and Malta. Otherwise, in 1960, there was conscription in every country of what is now the Council of Europe area. It has subsequently been abolished or suspended in 25 of them. The date on which the last conscript was demobilised in each is as follows:

UK	1963
Luxembourg	June 1969
Belgium	February 1995
Netherlands	1996
France	2001
Spain	December 2001
Slovenia	September 2003
Czech Rep	December 2004
Italy	December 2004
Portugal	December 2004
Slovakia	2004
Hungary	July 2005
Bosnia-Herzegovina	December 2005
Montenegro	July 2006
Romania	December 2006
Bulgaria	2007
Latvia	2007
Macedonia (former Yugoslav Republic of)	2007
Croatia	January 2008
Lithuania	2009
Poland	October 2009
Albania	January 2010
Sweden	July 2010
Serbia	January 2011
Germany	July 2011





This leaves fifteen States still enforcing conscription: Armenia, Austria, Azerbaijan, Belarus, Cyprus, Denmark, Estonia, Finland, Georgia, Greece, Moldova, Norway, the Russian Federation, Switzerland, Turkey and Ukraine.

Conscription is also imposed by the *de facto* authorities in a number of territories which are not internationally recognised: Abkhazia and South Ossetia (Georgia), Nagorno-Karabakh (Azerbaijan), Transdniestria (Moldova), and the northern part of Cyprus.

Kosovo, the other territory within the region whose status is currently unclear, in January 2009 established a “non-military” security force, armed with small arms and light vehicles only, with responsibilities for crisis response, civil protection and explosive ordinance disposal. The personnel of this force number some 2,500, to which, under a law of July 2010, 800 reserves have now been added.<sup>78</sup> Recruitment is voluntary.

## 2.2 RECOGNITION OF CONSCIENTIOUS OBJECTION

With the solitary exception of Turkey (see Section 1.2) all the States in the Council of Europe area which have had conscription, have over the course of the years explicitly recognised conscientious objection to military service or have at least indicated the intention of making alternative service available.

The accompanying table gives the dates of the first explicit reference, in either legislation or a constitutional document, either to conscientious objection to military service or to an alternative service for conscientious objectors. This should not be taken as implying that arrangements in accordance with modern international standards were in place from the date quoted; constitutional provisions in for example the Bulgaria and the Russian Federation were not implemented in legislation for many years; Azerbaijan and Belarus are still in this position. In many cases the initial legislation applied only to very narrowly-defined groups, or merely made an unarmed military service available. The persecution of conscientious objectors often persisted – and in some places still persists – long after a law was in place.

Recognition of conscientious objection to military service is also beginning to reach places which are not internationally-recognised states.

It was reported in the year 2000 that the authorities in the secessionist Georgian republic of Abkhazia were contemplating the introduction of conscientious objection provisions. It is not known if this was carried out, but there have been no reports of the imprisonment of conscientious objectors there since 2002.

The Constitutional Court in the self-styled “Turkish Republic of Northern Cyprus” in 2009 found that there was an obligation on the legislature to draft laws permitting conscientious objection to military service (see Section 1.2 Cyprus). However, nothing has yet been done.

And (as reported in Section 2.1 Moldova) in the “breakaway republic” of Transdniestria, “rules” regarding a civilian alternative service were introduced in 2014.

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<sup>78</sup>International Institute for Strategic Studies (London), *The Military Balance 2014*, p134.



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**First Legislative or Constitutional Recognition of Conscientious Objection to Military Service in States within the Council of Europe area**

- 1916: United Kingdom (Military Service Act, 27<sup>th</sup> Jan.)
- 1917: Denmark (Alternative Service Act, 13<sup>th</sup> Dec.)
- 1920: Sweden (Alternative Service Schemes Act, 21<sup>st</sup> May)
- 1922: Netherlands (Constitutional amendment)  
Norway (Civilian Conscript Workers Act, 24<sup>th</sup> March)
- 1931: Finland (Alternative Service Act, 4<sup>th</sup> June)
- 1949: Germany (In principle in the Grundgesetz "Basic Law" of the Federal Republic of Germany, Art. 4. The first provisions in the German Democratic Republic dated from 1964)
- 1955: Austria (National Service Act)
- 1963: France (Act No. 1255/63, 21<sup>st</sup> December)  
Luxembourg (Act of 23<sup>rd</sup> July, Art. 8)
- 1964: Belgium (Act of 3<sup>rd</sup> June)
- 1972: Italy (Act No. 772/1972)
- 1976: Portugal (Constitution, Article 41)
- 1978: Spain (Constitution)
- 1988: Poland (Constitution, Art. 85)
- 1989: Hungary (Constitution, Art. 70)
- 1990: Croatia (Constitution, Article 47.2)  
Latvia (Law on Substitute Service of the Latvian Soviet Socialist Republic)  
Lithuania (Law on Alternative Service of the Lithuanian Soviet Socialist Republic)
- 1991: Bulgaria (Constitution, Article 59.2)  
Czechoslovakia (Civilian Service Act, No.18/1992 – now the Czech Republic and Slovakia)  
Estonia (Constitution, Article 124)  
Moldova (Alternative Service Act, No. 633/91)
- 1992: Cyprus (National Guard Act, No. 2/1992, 9<sup>th</sup> Jan.)  
Georgia (Military Service Act, Art. 12)  
Serbia and Montenegro (Constitution, Art. 58 – Montenegro gained independence in 2006)  
Slovenia (Constitution)
- 1993: Russian Federation (Constitution, Art. 59.3)
- 1994: Belarus (Constitution, Art. 57)
- 1995: Azerbaijan (Constitution, Art. 76)
- 1996: Bosnia-Herzegovina (parallel Defence Acts in the Federation and in the



Republika Srpska)  
 Romania (Act No. 46/1996, Art. 4)  
 Switzerland (Civilian Service Act)  
 Ukraine (Constitution, Art. 35.3)

1997: Greece (Act No. 2510/97)

1998: Albania (Constitution, Art. 166)

2001: The FYR of Macedonia (Defence Act, Art. 8)

2003: Armenia (Alternative Service Act)

## 2.3 OBLIGATORY MILITARY SERVICE AND ALTERNATIVE SERVICE

No changes in the duration of military service and of alternative civilian service have been reported in the latest 12 months. The relative durations in the countries which retain conscription is as follows. (The figure quoted is for the normal basic military service in the army, before any adjustments to reflect rank, educational qualifications etc.)

	<b>Military service duration</b>	<b>Civilian service duration</b>	<b>Ratio to military service</b>
Denmark	4	4	1
Austria	6	9	1.5
Finland	6	12	2
Estonia	8	8	1
Switzerland	260 days <sup>79</sup>	390 days	1.5
Greece	9	15	1.7
Norway	12	no alternative service required of objectors	
Moldova	12	12	1
Ukraine	12	18	1.5
Russian Federation	12	18	1.5
Georgia	15	24	1.6
Belarus	18	no alternative civilian service	
Azerbaijan	18	no alternative civilian service	
Cyprus	24	33	1.4
Armenia	24	42	1.75
Turkey	24	no alternative civilian service	

<sup>79</sup>In fact many conscripts do not perform the full 260 days, so the discrepancy between the length of military and alternative service is in practice greater.



## 2.4 CONSCRIPTS AND CONTRACT OR PROFESSIONAL SOLDIERS

	<b>Total strength of armed forces</b>	<b>Number of conscripts</b>	<b>% of total</b>
Cyprus <sup>80</sup>	12,000	10,700	89.2
Switzerland	22,650	19,300	85.2
Turkey	510,600	359,500	70.4
Finland	22,200	13,650	61.5
Ukraine	129,950		"just under 50"
Estonia	5,750	2,500	43.5
Armenia	44,800	18,950	42.3
Moldova	5,350	2,200	41.1
Russian Federation	845,000	303,230 <sup>81</sup>	35.9
Greece	144,350	44,550	30.9
Norway	25,850	8,050	31.2
Georgia	20,650	4,050	19.6
Denmark	17,200	2,500	14.5

The number of conscripts in the Austrian, Azerbaijani and Belarusian armed forces is not quoted.

An alternative way of measuring how militarised a society is, is to compare the entire armed forces manpower, conscript, contract and professional, with the population, especially the young male population, which provides the bulk of military recruits.

<sup>80</sup> Republic of Cyprus only: The number of conscripts currently serving in the North is not known.

<sup>81</sup> Number of conscripts for 2013 provided by "Citizen, Army, Law". All other figures are from "The Military Balance 2014".



	<b>Male population reaching 20 in 2014<sup>82</sup></b>	<b>Total armed forces active strength</b>	<b>As %</b>
Greece	52,754	144,350	273.6 (conscripts 84.4)
Armenia	23,470	44,800	190.9 (conscripts 80.7)
Cyprus	8,167	15,500 <sup>83</sup>	189.8
Russian Federation	693,843	845,000	121.3 (conscripts 43.5)
Bulgaria	33,444	31,300	93.6
Belarus	51,855	48,000	92.6
Azerbaijan	76,923	66,950	87.0
Estonia	6,688	5,750	86.0 (conscripts 37.3)
Norway	32,290	24,450	79.9 (conscripts 24.9)
Slovenia	9,818	7,600	77.4
Malta	2,554	1,950	76.4
Turkey	700,079	510,600	72.9 (conscripts 51.4)
Georgia	29,723	20,650	69.5 (conscripts 13.6)
Portugal	62,208	42,600	68.5
Finland	32,599	22,200	68.1 (conscripts 41.9)
Montenegro	3,120	2,080	66.7
Serbia	43,945	28,150	64.1
Spain	217,244	134,900	62.1
Italy	288,188	176,000	61.1
Romania	117,798	71,400	60.6
Croatia	28,334	16,550	58.4
Lithuania	20,425	11,800	57.8
France	396,050	222,200	56.1
Ukraine	246,397	129,950	52.7 (conscripts c.26)
Belgium	59,655	30,700	51.5
Latvia	10,482	5,310	50.7
Slovakia	31,646	15,850	50.1
Switzerland	46,562	22,650	48.7 (conscripts 41.5)
Austria	48,108	22,800	47.4
Czech Republic	49,999	23,650	47.3
Germany	405,468	186,450	46.0
Denmark	37,913	17,200	45.4 (conscripts 3.3)
Poland	221,889	99,300	44.8
Hungary	59,237	26,500	44.7
Albania	31,986	14,250	44.6
United Kingdom	385,989	169,150	44.1
Bosnia-Herzegovina	26,601	10,500	39.5
Netherlands	103,462	37,400	36.1
Ireland	28,564	9,350	32.7
Sweden	54,960	15,300	27.8
Luxembourg	3,263	900	27.6
Moldova	28,213	5,350	19.0 (conscripts 7.8)

82 Source: The CIA World Factbook ([www.cia.gov](http://www.cia.gov)).

83 Including the forces of the self-styled "Turkish Republic of North Cyprus", but not Turkish or other foreign forces.



## 2.5 MILITARY EXPENDITURE

Yet another measure of militarisation is given by military expenditure figures. This table, drawn up on the same basis as that in the previous report, shows the level of military expenditure as reported by the Stockholm International Peace Research Institute (SIPRI) for 2013. The apparent changes from the figures in last year's report should be treated with caution; SIPRI's figures are given in US \$ which are here converted to Euros, so they partly reflect exchange rate fluctuations.

	<b>Military Expenditure 2013, million €</b>	<b>% change from 2012</b>	<b>Euros per capita</b>	<b>As % of GDP</b>
Albania	130	-8.9%	46	1.5%
Armenia	333	-2.3%	98	3.8%
Austria	2520	0.3%	295	0.8%
Azerbaijan	2683	8.2%	249	4.6%
Belarus	753	26.9%	59	1.3%
Belgium	4106	3.8%	365	1.1%
Bosnia-Herzegovina	158	-11.5%	45	1.2%
Bulgaria	654	12.9%	80	1.5%
Croatia	746	0.1%	161	1.7%
Cyprus	355	-3.3%	295	2.1%
Czech Republic	1676	-3.0%	164	1.1%
Denmark	3551	2.8%	600	1.4%
Estonia	374	14.3%	249	1.9%
Finland	2544	-10.7%	522	1.5%
France	47760	4.1%	696	2.2%
Georgia	346	-3.0%	73	2.8%
Germany	38058	7.9%	423	1.4%
Greece	4633	-9.0%	455	2.5%
Hungary	944	16.8%	78	0.8%
Ireland	934	3.5%	188	0.5%
Italy	25473	-3.7%	415	1.7%
Latvia	233	14.9%	90	0.9%
Lithuania	277	-12.9%	87	1.0%
Luxembourg	238	-10.2%	497	0.6%
Malta	46	12.4%	109	0.6%
Montenegro	54	-12.6%	80	1.8%
Netherlands	8056	5.2%	439	1.3%
Norway	5644	4.0%	1107	1.4%
Poland	7221	-0.8%	181	1.8%
Portugal	3732	26.9%	262	1.8%
Rep. Moldova	19	12.0%	5	0.3%
Romania	1966	15.7%	75	1.2%
Russian Federation	68515	-3.0%	462	4.1%
Serbia	718	11.7%	86	2.2%
Slovakia	775	-2.8%	140	1.1%
Slovenia	425	2.4%	201	1.2%
Spain	9957	11.0%	202	0.9%
Sweden	5085	5.3%	511	1.2%
Switzerland	3941	4.9%	453	0.8%
The FYR of Macedonia	99	-3.8%	46	1.2%
Turkey	14887	5.2%	169	2.3%
Ukraine	4164	9.7%	82	2.7%
United Kingdom	45157	-4.6%	685	2.3%



## 2.6 RECRUITMENT AGES

No changes to minimum recruitment ages have been announced in the past 12 months. The data presented in the 2013 EBCO Report regarding minimum voluntary recruitment ages in the Council of Europe area therefore remain valid, and are reproduced below. The numbers concerned are in most cases not known, but in Germany 1,032 seventeen-year-olds were recruited in 2013.

### Minimum voluntary recruitment ages in the Council of Europe area

Albania	19
Armenia	18, but 17 year old cadets at military higher education institutes
Austria	17 ("voluntary" early performance of obligatory military service)
Azerbaijan	17 year olds at cadet military school are classed as "on active service"
Belarus	18 17 year old cadets at the Military Academy
Belgium	on completion of secondary education, regardless of age
Bosnia-Herzegovina	18
Bulgaria	18
Croatia	18
Cyprus	17 ("voluntary" early performance of obligatory military service)
Czech Republic	18
Denmark	18
Estonia	18 (alone in the CoE area has signed but not ratified the OPAC)
Finland	18
France	17
Georgia	18, but possibly boys under 17 at the "Cadets' Military Academy"
Germany	17
Greece	18
Hungary	18
Ireland	18 (raised from 17 by a decision announced in June 2012. Not clear whether this will automatically apply to "apprentices")
Italy	18 but not clear whether action has yet been taken to remove an anomaly regarding officer recruitment competitions.
Latvia	18
Lithuania	18
Luxembourg	18 (raised from 17 in 2007)
Macedonia (former Yugoslav republic)	18
Malta	17.5 nominally, but de facto no recruitment under 18 since 1970
Moldova	18
Montenegro	18
Netherlands	17
Norway	18 but from the year of the 17 <sup>th</sup> birthday in military schools
Poland	17 but amendments to raise this to 18 were proposed in 2009
Portugal	18
Romania	18
Russian Federation	18 but from the age of 16 in military schools
Serbia	18
Slovakia	18
Slovenia	18
Spain	18
Sweden	18
Switzerland	18
Turkey	18, but "under National Defence Service Law 3634, 15-18 year olds may be deployed in civil defence forces in the event of a national emergency"
Ukraine	18 but from the age of 17 in military schools
United Kingdom	16



## 2.7 SERVING MEMBERS OF THE MILITARY

No new developments have been reported regarding serving members of the armed forces who develop conscientious objections. (See section 2.7 of the 2013 EBCO Report.)

However it was reported that in the one country which does have clear legal provisions to deal with requests for release on such grounds, namely Germany, no fewer than 314 contract soldiers (*Berufssoldaten*) applied in 2013 for release as conscientious objectors. If there were similar provisions in other countries, how many might apply?





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### 3. CONSCIENTIOUS OBJECTORS AS REFUGEES

In October 2013, EBCO provided information regarding the military service situation in Turkey in support of the asylum claim of Turkish conscientious objector Yunus Ozdemir before the *Cour Nationale Du Droit d'Asile* (National Asylum Court) in France. On 27<sup>th</sup> February 2014, the Court granted him asylum in France, despite the advice of their own researchers.

While this report was going to print, news came through that Okan Kale, also supported by EBCO, had been granted asylum status in Italy.

However, other Turkish conscientious objectors seeking asylum in various European countries have not been successful, despite EBCO's support; some are still appealing the decisions. And quite apart from refugees who are "pushed back" at Europe's borders, we still hear disturbing reports of attempts to return persons who may not have not identified themselves as conscientious objectors but are seeking to avoid military service to countries such as Eritrea and Egypt where they would face persecution as a result of their attempt to escape.

More encouraging was the outcome of EBCO's support for the asylum application in Greece of M.D., an unaccompanied minor and former child soldier from Guinea, born in 1996. M.D. is a certified victim of torture and suffers from psychological problems (which led him to attempt suicide twice). He was forcibly recruited to the army in 2009 and managed to desert a few months later. He entered Greece on 12/05/2012 and was detained for three months in an underground cell of a police station in Athens under inhumane conditions. He applied for asylum on 03/01/2013 and on 12/08/2013 he was granted humanitarian status. He appealed against the decision on 13/09/2013 asking for refugee status. He was examined on 18/03/2014 and on 19/06/2014 he was granted refugee status. EBCO provided a support letter for him for his first hearing and was also present during his second hearing, providing further documentation.



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## 4. NEW PUBLICATIONS

Two books by Ozgur Heval Cinar have been published by Palgrave Macmillan in the past year. The first, "Conscientious Objection to Military Service in International Human Rights Law", appeared in December 2013. It was followed in July 2014 by "The Right to Conscientious Objection to Military Service and Turkey's Obligations under International Human Rights Law". Derived like the earlier book from his doctoral thesis from the University of Essex, UK, it examines the Turkish context and examines the international legal implications of Turkey's non-recognition of the right to conscientious objection to military service.

Another thesis, by EBCO Board member Volha Damarad, submitted in Russian at the University of Minsk in 2011, has now been translated into English and can be downloaded from the EBCO website. Entitled, "The International Legal Regulation of Alternative Civilian Service", it relates the international standards and jurisprudence to the specific case of Belarus.

Conscientious objectors to military service face a number of serious and negative implications for their refusal to perform military service, when the right of conscientious objection is not recognised in their country. In June 2014 the Quaker United Nations Office (QUNO), Geneva released a report examining the scope of these implications, including include prosecution and imprisonment (sometimes repeated), as well as fines. Authored by Emily Graham, it also looks at those lesser-known implications that make it difficult for conscientious objectors to secure employment, pursue an education, move freely, exercise their right to vote and otherwise participate fully in public and political life.

In July 2014, a second update of the booklet "International Standards on Conscientious Objection to Military Service" by Rachel Brett, which takes into account the most recent developments in international jurisprudence was published on the QUNO website (quno.org). It is available online, and in English only, but a German translation of this and several other important articles and documents appears in *Kriegsdienstverweigerung und Asyl*, published in the same month jointly by PRO ASYL of Frankfurt (proasyl.de) and Connection e.V. of Offenburg (Connection-eV.org).



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## 5. RECOMMENDATIONS

**EBCO recommends to all the European countries:**

- if they have not already done so they abolish all obligatory military service, and meanwhile stop harassing and prosecuting conscientious objectors.**
- that (in accordance with Recommendation CM/Rec(2010)4 of the Committee of Ministers of the Council of Europe) they make it promptly possible on the basis of conscientious objection for all conscripts not to be incorporated in the army and for all serving members of the armed forces to obtain release.**
- that they cease enlistment into the armed forces on any basis of persons aged under 18.**
- that they accept applications for asylum from all persons seeking to escape military service in any country where there is no adequate provision for conscientious objectors.**
- that they reconsider the necessity for the current levels of military expenditure with particular reference to the current economic situation.**



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## ANNEX. UNHCR guidelines on claims to refugee status related to military service

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### 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

UNHCR issues these *Guidelines* pursuant to its mandate, as contained in the Office's Statute, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These *Guidelines* complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* (reissued 2011) and, in particular, are to be read together with UNHCR's *Guidelines on International Protection No. 6: Religion-Based Refugee Claims* and *Guidelines on International Protection No. 8: Child Asylum Claims*. They replace UNHCR's *Position on Certain Types of Draft Evasion* (1991).

The *Guidelines*, the result of broad consultations, provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out mandate refugee status determination.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* and the *Guidelines on International Protection* are available at: <http://www.refworld.org/docid/4f33c8d92.html>.



## I. INTRODUCTION

1. The situation of "deserters and persons avoiding military service" is explicitly addressed in *UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ["*UNHCR Handbook*"].<sup>1</sup> Since the publication of the *UNHCR Handbook* there have been considerable developments both in the practice of States and in the restrictions placed on military service by international law. Given these developments, as well as divergences in jurisprudence, UNHCR issues these *Guidelines* with the aim to facilitate a consistent and principled application of the refugee definition in Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees in such cases. These *Guidelines* examine the position of individuals who seek international protection to avoid recruitment by, and service in, State armed forces, as well as forced recruitment by non-State armed groups.

2. These *Guidelines* address the definition of key terms [Part II], followed by an overview of international legal developments relating to military service [Part III]. Part IV examines the refugee determination criteria as they apply to claims involving military service. Part V considers procedural and evidentiary issues. The *Guidelines* focus on the interpretation of the "inclusion" components of the refugee definition. Exclusion considerations are not addressed, although they may be at issue in such cases, and will need to be properly assessed.<sup>2</sup> Further, issues around maintaining the civilian and humanitarian character of asylum, while often relevant to such claims, are not dealt with in these *Guidelines*.<sup>3</sup>

## II. TERMINOLOGY

3. For the purpose of these *Guidelines*, these terms are defined as follows:

**Alternative service** refers to service in the public interest performed instead of compulsory military service in the State armed forces by individuals who have a conscientious objection to military service ["conscientious objectors"]. Alternative service may take the form of civilian service outside the armed forces or a non-combatant role in the military.<sup>4</sup> Civilian service can involve, for example, working in State-run health institutions, or voluntary work with charitable organisations either at home or abroad. Non-combatant service in the military would include positions such as cooks or administrative clerks.

**Conscientious objection** to military service refers to an objection to such service which "derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives."<sup>5</sup> Such an objection is not confined to **absolute conscientious objectors** [pacifists], that is, those who object to all use of armed force or participation in all wars. It also encompasses those who believe that "the use of force is justified in some circumstances but not in others, and that therefore it is necessary to object in those other cases" [**partial or selective objection** to military service].<sup>6</sup> A conscientious objection may develop over time, and thus volunteers may at some stage also raise claims based on conscientious objection, whether absolute or partial.

**Desertion** involves abandoning one's duty or post without permission, or resisting the call up for military duties.<sup>7</sup> Depending on national laws, even someone of draft age who has completed his or her national service and has been demobilized but is still regarded as being subject to national service may be regarded as a deserter under certain circumstances. Desertion can occur in relation to the police force, gendarmerie or equivalent security services, and is also the term used to apply to deserters from non-State armed groups. Desertion may be for reasons of conscience or for other reasons.

**Draft evasion** occurs when a person does not register for, or does not respond to, a call up or recruitment for compulsory military service. The evasive action may be as a result of the evader fleeing abroad, or may involve, inter alia, returning call up papers to the military authorities. In the latter case, the person may sometimes be described as a draft resister rather than a draft evader, although draft evader is used to cover both scenarios in these *Guidelines*. Draft evasion may also be pre-emptive in

<sup>1</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (reissued, Geneva, 2011), ("*UNHCR Handbook*"), available at: <http://www.refworld.org/docid/4133c8d92.html>, paras. 167-174.

<sup>2</sup> Reference is made instead to UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, ("*UNHCR Exclusion Guidelines*"), available at: <http://www.refworld.org/docid/3f5857664.html>.

<sup>3</sup> See, Executive Committee ("ExCom") Conclusion No. 94 (LII), 2002, on the civilian and humanitarian character of asylum, para. (c)(vii).

<sup>4</sup> See, further, for example, UN Human Rights Council, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, A/HRC/23/22, 3 June 2013, available at: <http://www.refworld.org/docid/51b5c73e4.html>.

<sup>5</sup> See, UN Commission on Human Rights, Resolution 1998/77, "Conscientious Objection to Military Service", E/CN.4/RES/1998/77, 22 April 1998, available at: <http://www.refworld.org/docid/3b0010be10.html>. The Commission was replaced by the UN Human Rights Council in 2006.

<sup>6</sup> See, UN *Conscientious Objection to Military Service*, E/CN.4/Sub.2/1983/30/Rev.1, 1985 (the "*Eide and Mubanga-Chipoya report*"), available at: <http://www.refworld.org/docid/5107cd132.html>, para. 21. See also, paras. 128-135 regarding persecution in the context of conscientious objection to conflicts which violate basic rules of human conduct.

<sup>7</sup> See, European Court of Human Rights, *Fetli Demirtaş v. Turkey*, Application no. 5260/07, 17 January 2012, available at: <http://www.refworld.org/docid/4ff5996d2.html>.



the sense that action may be taken in anticipation of the actual demand to register or report for duty. Draft evasion only arises where there is mandatory enrolment in military service ("the draft"). Draft evasion may be for reasons of conscience or for other reasons.

**Forced recruitment** is the term used in these *Guidelines* to refer to the coerced, compulsory or involuntary recruitment into either a State's armed forces or a non-State armed group.

**Military service** primarily refers to service in a State's armed forces. This may occur in peacetime or during a period of armed conflict, and may be on a voluntary or compulsory basis. Compulsory military service by the State is also known as **conscription** or "**the draft**". Where an individual volunteers to join the State military, it is called **enlistment**.

**Reservists** are individuals who serve in the reserve forces of the State's armed forces. They are not considered to be on active duty, but are required to be available to respond to any call up in an emergency.

4. Where alternatives to compulsory military service are not available, an individual's conscientious objection may be expressed through draft evasion or desertion. However, draft evasion or desertion is not synonymous with conscientious objection as other motivations, such as fear of military service or the conditions of such service may be involved. Conscientious objection, draft evasion and desertion may all take place in peacetime as well as during armed conflict. Moreover, whilst conscientious objection and evasion/desertion tend to arise in relation to conscription, they can also take place where the original decision to join the armed forces was voluntary or the obligation to undertake compulsory military service was initially accepted.<sup>8</sup>

### III. INTERNATIONAL LAW ON MILITARY SERVICE

#### A. The Right of States to Require Military Service

5. States have a right of self-defence under both the UN Charter and customary international law.<sup>9</sup> States are entitled to require citizens to perform military service for military purposes;<sup>10</sup> and this does not in itself violate an individual's rights.<sup>11</sup> This is recognized explicitly in human rights provisions concerned with forced labour, such as Article 8 of the 1966 International Covenant on Civil and Political Rights ["ICCPR"].<sup>12</sup> States may also impose penalties on persons who desert or avoid military service where their desertion or avoidance is not based on valid reasons of conscience, provided such penalties and the associated procedures comply with international standards.<sup>13</sup>

6. The State's right to compel citizens to undertake military service is not, however, absolute. International human rights law, as well as international humanitarian and international criminal law, impose certain restrictions upon States [see Parts III.B. and III.C. below]. In general, for military recruitment and service to be justified it needs to fulfil certain criteria: prescribed by law, implemented in a way that is not arbitrary or discriminatory, the functions and discipline of the recruits must be based on military needs and plans, and be challengeable in a court of law.<sup>14</sup>

7. The position of non-State armed groups is different from that of States, in that only States can require military conscription. International law does not entitle non-State armed groups, whether or not they may be the *de facto* authority over a particular part of the territory, to recruit on a compulsory or forced basis.

<sup>8</sup> See, for example, UN Commission on Human Rights, Resolution 1998/77, preambular para. see note 5 above.

<sup>9</sup> Article 51, UN Charter. See also, International Court of Justice, *Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, 27 June 1986, available at: <http://www.refworld.org/docid/4023a44d2.html>, paras. 187-201.

<sup>10</sup> This does not cover conscription of non-nationals in occupied territories in the context of international armed conflict: see Article 51 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), which states that an "Occupying Power may not compel protected persons to serve in its armed or auxiliary forces." "Protected persons" refers in this context to civilians in the occupied territory who are not nationals of the Occupying Power.

<sup>11</sup> The UN Human Rights Committee ("HRC") has noted this in relation to a complaint of discrimination (Article 26 of the 1966 International Covenant on Civil and Political Rights ("ICCPR")). See, *M.J.G. (name deleted) v. Netherlands*, CCPR/C/32/D/267/1987, 24 March 1988, available at: <http://www.refworld.org/docid/50b8eca22.html>, para. 3.2; see, similarly, the earlier case of *R.T.Z. (name deleted) v. Netherlands*, CCPR/C/31/D/245/1987, 5 November 1987, available at: <http://www.refworld.org/docid/50b8ed122.html>. That human rights law, in particular the ICCPR, applies to members of the military as well as to civilians was explicitly stated by the HRC in *Vuolanne v. Finland*, CCPR/C/35/D/265/1987, 2 May 1989, available at: <http://www.refworld.org/docid/50b8ee372.html>.

<sup>12</sup> Article 8(3)(c)(ii) ICCPR exempts from the prohibition on forced or compulsory labour (found in Article 8(3)(a)), "Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors." In addition, Article 2(2)(a) of the 1930 International Labour Organization ("ILO") Convention No. 29: Forced Labour Convention exempts from its prohibition on forced or compulsory labour (Article 1(1)), "any work or service exacted in virtue of compulsory military service laws for work of a purely military character." The reference to "military service laws" indicates that for the exemption to be valid, it must be set out in law. See also, the decisions of the HRC in *Vanier and Nicholas v. France*, CCPR/C/69/D/690/1996, 1 August 2000, available at: <http://www.refworld.org/docid/50b8ec0c2.html> and *Foin v. France*, CCPR/C/67/D/666/1996, 9 November 1999, where the HRC stated that under Article 8 of the ICCPR States may require service of a military character, available at: <http://www.refworld.org/docid/4a3a3aeb1.html>, para. 10.3.

<sup>13</sup> On procedures, in the European Court of Human Rights, see *Savda c. Turquie*, Application No. 42730/05, 12 June 2012, available at: <http://www.refworld.org/docid/4fe9a9bb2.html>, see also, *Fefi Demirtas c. Turquie*, see note 7 above.

<sup>14</sup> Inter-American Commission on Human Rights ("IACHR"), "*Fourth report on the situation of human rights in Guatemala*", OEA/Ser.L/V/II.83, Doc. 16 rev., 1 June 1993, chap. V. See also, IACHR, *Piché Cuca v. Guatemala*, Report No. 36/93, case 10 975, decision on merits, 6 October 1993, indicating that the conscription process must be challengeable in a court of law, available at: <http://www.refworld.org/docid/5020dd282.html>.



## B. The Right to Conscientious Objection against Compulsory Military Service

8. The right to conscientious objection to State military service is a derivative right, based on an interpretation of the right to freedom of thought, conscience and religion contained in Article 18 of the Universal Declaration of Human Rights and Article 18 of the ICCPR. International jurisprudence on this right is evolving. The UN Human Rights Committee's [HRC] caselaw has shifted from characterizing the right as derived from the right "to manifest" one's religion or belief and thus subject to certain restrictions in Article 18(3),<sup>15</sup> to viewing it as one that "inheres in the right" to freedom of thought, conscience and religion in Article 18(1) itself.<sup>16</sup> This is a significant shift, albeit not without dissenting opinions.<sup>17</sup> The shift suggests that the right to conscientious objection is absolute, and that States may not impose restrictions on the right to freedom of thought, conscience and religion by way of compulsory military service.<sup>18</sup> According to the HRC, the right therefore "entitles the individual to an exemption from compulsory military service if this cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion."<sup>19</sup> Even in its earlier jurisprudence, where the HRC based its decisions on the right to *manifest* one's religion or belief [found in Article 18(1) read together with 18(3) ICCPR], the State had to demonstrate why such a restriction was "necessary", given that many other countries managed to reconcile the interests of the individual with the interests of the State through the provision of alternative service.<sup>20</sup>

9. The right to conscientious objection is also reaffirmed in regional instruments, either explicitly or by interpretation,<sup>21</sup> as well as in various international standard setting documents.<sup>22</sup>

10. The right to conscientious objection applies to absolute, partial, or selective objectors [see II.],<sup>23</sup> volunteers as well as conscripts before and after joining the armed forces; during peace time and during armed conflict.<sup>24</sup> It includes objection to military service based on moral, ethical, humanitarian or similar motives.<sup>25</sup>

11. A conscientious objector's rights under Article 18 ICCPR will be respected where he or she is (i) exempted from the obligation to undertake military service or (ii) appropriate alternative service is available. In assessing the appropriateness of alternative service, it is generally considered that it needs to be compatible with the reasons for the conscientious objection; of a non-combatant or civilian character; in the public interest; and not punitive.<sup>26</sup> For example, civilian service under civilian administration would be necessary in the cases of

<sup>15</sup> Article 18(3) ICCPR provides certain limitations on the right to manifest one's religion or belief, namely "prescribed by law and (...) necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." For further analysis, see UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 April 2004, ("UNHCR Guidelines on Religion-Based Claims"), available at: <http://www.refworld.org/docid/4090f9794.html>, para. 15. Moreover, unlike other rights in the Covenant, restrictions on the grounds of national security are not permitted at all. As noted by the HRC, "... such restrictions must not impair the very essence of the right in question." See HRC, *Yoon and Choi v. Republic of Korea*, CCPR/C/88/D/1321-1322/2004, 23 January 2007, available at: <http://www.refworld.org/docid/48abd57dd.html>, para. 8.3.

<sup>16</sup> See, HCR, *Atasoy and Sarkut v. Turkey*, CCPR/C/104/D/1853-1854/2008, 19 June 2012, available at: <http://www.refworld.org/docid/4ff5b14c2.html>, as well as *Min-Kyu Jeong et al. v. Republic of Korea*, CCPR/C/101/D/1642-1741/2007, 27 April 2011, available at: <http://www.refworld.org/docid/4ff5b332.html>.

<sup>17</sup> See, Individual opinion of Committee member Mr. Gerard L. Neuman, jointly with members Mr. Yuji Iwasawa, Mr. Michael O'Flaherty and Mr. Walter Kaehl (concurring), *Atasoy and Sarkut v. Turkey*, *ibid*.

<sup>18</sup> See, *Yoon and Choi v. Republic of Korea*, para. 8.4., note 15 above and *Eu-min Jung and Others v. Republic of Korea*, CCPR/C/98/D/1593-1603/2007, 30 April 2010, available at: <http://www.refworld.org/docid/4c19e0322.html>, para. 7.4.

<sup>19</sup> *Min-Kyu Jeong et al. v. Republic of Korea*, para. 7.3, see note 16 above.

<sup>20</sup> See, *Yoon and Choi v. Republic of Korea*, para. 8.4, note 15 above and *Eu-min Jung and Others v. Republic of Korea*, para. 7.4, see note 18 above.

<sup>21</sup> The right to conscientious objection is explicitly recognized in two regional treaties: 2000 Charter of Fundamental Rights of the European Union, Article 10(2); 2005 Ibero-American Convention on Young People's Rights, Article 12(3). The right is also derived from the right to freedom of thought, conscience and religion in regional human rights treaties, and has been recognized as such by the European Court of Human Rights (see Grand Chamber judgment in *Bayatyan v. Armenia*, Application No. 23459/03, 7 July 2011, available at: <http://www.refworld.org/docid/4e254eff2.html>, para. 110, followed by *Fett Demirtaş c. Turquie*, note 7 above; *Savda c. Turquie*, see note 13 above; and *Tarhan c. Turquie*, Application No. 9078/06, 17 July 2012, available at: <http://www.refworld.org/docid/51262a732.html>) and by the IACHR (see *Cristóbal Daniel Sahli Vera et al. v. Chile*, Case 12.219, Report no. 43/05, 10 March 2005, available at: <http://www.refworld.org/docid/4ff59edc2.html>; see also the friendly settlement in *Alfredo Diaz Bustos v. Bolivia*, Case 14/04, Report no. 97/05, 27 October 2005, available at: <http://www.refworld.org/docid/4ff59fbc2.html>, para. 19). See also IACHR, Annual Report, 1997, Chapter VII: Recommendation 10, available at: <http://www.refworld.org/docid/50b8bc162.html>; Council of Europe Parliamentary Assembly, Recommendation 1518 (2001) on the exercise of the right of conscientious objection to military service in Council of Europe Member States, 23 May 2001, available at: <http://www.refworld.org/docid/6107c08f2.html>; Council of Europe Committee of Ministers, Recommendation No. R (87) 8, 9 April 1987, available at: <http://www.refworld.org/docid/5069778e2.html>; and Council of Europe Committee of Ministers, Recommendation CM/Rec (2010) 4 on human rights of members of the armed forces, 24 February 2010, available at: <http://www.refworld.org/docid/506979172.html>.

<sup>22</sup> See, UN General Assembly resolution, 33/165, 1978 on Status of persons refusing service in military or police forces used to enforce apartheid, available at: <http://www.refworld.org/docid/3b00f1ae28.html>. See HRC, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, CCPR/C/21/Rev.1/Add.4, 30 July 1993, available at: <http://www.refworld.org/docid/453883b22.html>, at para. 11, as well as the HRC's Concluding Observations on Ukraine, CCPR/CO/73/UKR, 12 November 2001, available at: <http://www.refworld.org/docid/3cbbab1c4.html>, para. 20, and those on Kyrgyzstan, CCPR/CO/69/KGZ, 24 July 2000, available at: <http://www.refworld.org/docid/607572ef2.html>, para. 18. The former UN Commission on Human Rights also affirmed that a right to conscientious objection derives from the right to freedom of thought, conscience and religion (UN Commission on Human Rights Resolution, *Conscientious objection to military service*, E/CN.4/RES/1989/59, 8 March 1989, available at: <http://www.refworld.org/docid/3b00f0b24.html>, reinforced and developed in resolutions E/CN.4/RES/1993/84, 10 March 1993, available at: <http://www.refworld.org/docid/3b00f1228c.html>; E/CN.4/RES/1995/83, 8 March 1995, available at: <http://www.refworld.org/docid/3b00f0c220.html>; E/CN.4/RES/1998/77, see note 5 above, E/CN.4/RES/2000/34, 20 April 2000, available at: <http://www.refworld.org/docid/3b00defa128.html>; E/CN.4/RES/2002/45, 23 April 2002, available at: <http://www.refworld.org/docid/5107c76c2.html>; and E/CN.4/RES/2004/35, 19 April 2004, available at: <http://www.refworld.org/docid/415ba85e4.html>). Its successor, the UN Human Rights Council, has endorsed this position in its 2012 resolution on conscientious objection (A/HRC/RES/20/2, 16 July 2012, available at: <http://www.refworld.org/docid/501661d12.html>) and latest in its 2013 resolution (A/HRC/24/L.23, 23 September 2013, available at: <http://www.refworld.org/docid/526e9e114.html>).

<sup>23</sup> Although the HRC has not discussed partial or selective conscientious objection either in *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, see note 22 above or in its recent decisions on individual complaints, a number of countries do make provision for selective or partial conscientious objectors. See, for example, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, para 47, see note 4 above.

<sup>24</sup> See, Part II on Terminology.

<sup>25</sup> *Ibid*.

<sup>26</sup> UN Commission on Human Rights resolution 1998/77, para. 4, see note 5 above. See also, *Atasoy and Sarkut v. Turkey*, note 16 above, para. 10.4.



individuals who object outright to any association with the military.<sup>27</sup> However, where the objection is specifically to the personal carrying of arms the option of non-combatant service in the military may be appropriate. Many States avoid the difficulty of having to evaluate the sincerity of a claim to conscientious objection by allowing the person a free choice between military and alternative service.<sup>28</sup> In some States recognition of conscientious objection has been granted only to certain religious groups. However, as noted above, this would not be consistent with the scope of the right to freedom of thought, conscience and religion, nor with the prohibition on discrimination.<sup>29</sup>

### C. Prohibition on Underage Recruitment and Participation in Hostilities

12. Explicit safeguards exist to prevent the exposure of children to military service.<sup>30</sup> All recruitment (both compulsory and voluntary) in State armed forces and the participation in hostilities<sup>31</sup> of those under 15 years of age is prohibited under international treaty law.<sup>32</sup> Such recruitment amounts to a war crime.<sup>33</sup> Whether conducted by governments or by non-State armed groups, compulsory recruitment of persons under 18 years of age is prohibited pursuant to the 2000 Optional Protocol to the 1989 Convention on the Rights of the Child ("CRC") on the involvement of children in armed conflict ["Optional Protocol to the CRC"].<sup>34</sup> A similar restriction is found in the 1999 International Labour Organization Convention on Worst Forms of Child Labour.<sup>35</sup> The 2000 Optional Protocol to the CRC requires States to "take all feasible measures" to prevent children under the age of 18 taking a "direct part in hostilities" whether as members of its armed forces or other armed groups and prohibits outright any voluntary recruitment of children under 18 years into non-State armed groups.<sup>36</sup> Whilst voluntary enlistment of children of 16 years and above is permitted for State armed forces, the State is obliged to put in place safeguards to ensure, *inter alia*, that any such recruitment is genuinely voluntary.<sup>37</sup> Despite the different age limits set by international law, the more favourable age limits ought to guide the assessment of refugee claims based on the fact that the child has objected through seeking international protection to that recruitment and/or service. Regional instruments also contain prohibitions on the recruitment and direct participation of children in hostilities.<sup>38</sup>

## IV. SUBSTANTIVE ANALYSIS

### A. Well-founded Fear of Being Persecuted

13. What amounts to a well-founded fear of being persecuted depends on the particular circumstances of the case, including the applicant's background, profile and experiences considered in light of up-to-date country of origin information.<sup>39</sup> It is important to take into account the personal experiences of the applicant, as well as the experiences of others similarly situated, since these may well show that there is a reasonable likelihood that the harm feared by the applicant will materialize sooner or later.<sup>40</sup> The first-tier question to ask is: *What would be the predicament [consequence(s)] for the applicant if returned?* The second-tier question is: *Does that*

<sup>27</sup> See, *Atasoy and Sarkut v. Turkey*, para. 14, see note 16 above. See also, *Min-Kyu Jeong et al v. Republic of Korea*, para.7.3, also note 16 above.

<sup>28</sup> For a general overview of State practice, see, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, see note 4 above. See also, War Resisters' International, *World Survey of Conscription and Conscientious Objection to Military Service*, available at: <http://www.wri-ngo.org/cpi/ria/index.html>. With respect to European countries see also the judgment of the European Court of Human Rights in *Bayatyan v. Armenia*, note 21 above.

<sup>29</sup> See, for example, HRC, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, see note 22 above, stating that "...there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs...", para. 11. With regard to State practice recognizing conscientious objection even when it originates from views outside of those of certain formal religions, see, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, para. 12, see note 4 above. See also, *Brinkhof v. Netherlands*, CCPR/C/48/D/402/1990, 29 July 1993, available at: <http://www.refworld.org/docid/4a3a3ae913.html>.

<sup>30</sup> See, in this regard, UN Security Council, *Resolution 1882 (2009) on children and armed conflict*, S/RES/1882 (2009), 4 August 2009, available at: <http://www.refworld.org/docid/4a7bdb432.html>.

<sup>31</sup> Technically, international humanitarian law distinguishes between non-international armed conflict and international armed conflict in this respect. In non-international armed conflict (Article 4(3)(c), Additional Protocol II to the 1949 Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflict ("Additional Protocol II")) the prohibition relates to use in hostilities. In international armed conflict (Article 77(2), Additional Protocol I to the 1949 Geneva Conventions, relating to the Protection of International Armed Conflict ("Additional Protocol I")), it is limited to taking direct part in hostilities. The Convention on the Rights of the Child ("CRC") adopts the narrower "direct part in hostilities" standard, see Article 38(2), CRC.

<sup>32</sup> Article 77(2), Additional Protocol I; Article 4(3)(c), Additional Protocol II; Article 38(2) CRC.

<sup>33</sup> See, Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the 1998 Statute of the International Criminal Court ("ICC Statute") which lists as war crimes "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities." See also International Criminal Court ("ICC"), *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, available at: <http://www.refworld.org/docid/4169a2db2.html>; Special Court for Sierra Leone ("SCSL"), *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment)*, Case No. SCSL-04-15-T, 2 March 2009, available at: <http://www.refworld.org/docid/49b102762.html>, at para. 184 (finding that the prohibition on such recruitment is customary international law). Further discussion of what constitutes the war crime of underage recruitment can be found in the SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, 18 May 2012, available at: <http://www.refworld.org/docid/50589aa92.html>.

<sup>34</sup> Articles 2 and 4, 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

<sup>35</sup> Article 3(a), 1999 ILO Convention No. 182 on Worst Forms of Child Labour.

<sup>36</sup> Articles 1 and 4, 2000 Optional Protocol to CRC.

<sup>37</sup> Article 3, 2000 Optional Protocol to CRC. See also, *UNHCR Guidelines on International Protection No. 8 Child Asylum Claims under Articles 1A(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, 22 December 2009, (*UNHCR Guidelines on Child Asylum Claims*), available at: <http://www.refworld.org/docid/4b214f6d2.html>, para. 22.

<sup>38</sup> See, Article 22(2), 1990 African Charter on the Rights and Welfare of the Child, and Article 12(3), 2005 Ibero-American Convention on Young People's Rights.

<sup>39</sup> *UNHCR Handbook*, paras. 51-53, see note 1 above.

<sup>40</sup> *UNHCR Handbook*, paras. 42-43, see note 1 above, and *UNHCR Guidelines on Religion-Based Claims*, para. 14, see note 15 above.





*predicament [or consequence(s)] meet the threshold of persecution?* The standard of proof to determine the risk is reasonable likelihood.<sup>41</sup>

14. Persecution will be established if the individual is at risk of a threat to life or freedom,<sup>42</sup> other serious human rights violations, or other serious harm.<sup>43</sup> By way of example, disproportionate or arbitrary punishment for refusing to undertake State military service or engage in acts contrary to international law – such as excessive prison terms or corporal punishment – would be a form of persecution. Other human rights at stake in such claims include non-discrimination and the right to a fair trial right, as well as the prohibitions against torture or inhuman treatment, forced labour and enslavement/servitude.<sup>44</sup>

15. In assessing the risk of persecution, it is important to take into account not only the direct consequences of one's refusal to perform military service [for example, prosecution and punishment], but also any negative indirect consequences. Such indirect consequences may derive from non-military and non-State actors, for example, physical violence, severe discrimination and/or harassment by the community. Other forms of punitive retribution for draft evasion or desertion may also be evident in other situations, such as suspension of rights to own land, enrol in school or university, or access social services.<sup>45</sup> These types of harm may amount to persecution if they are sufficiently serious in and of themselves, or if they would cumulatively result in serious restrictions on the applicant's enjoyment of fundamental human rights, making their life intolerable.

16. Claims relating to military service may arise in various situations. This section outlines five common types of claims, albeit with some overlap.

**(I) Objection to State Military Service for Reasons of Conscience [absolute or partial conscientious objectors]**

17. In assessing what kinds of treatment would amount to persecution in cases where the applicant is a conscientious objector [see V. A. below on issues relating to credibility and genuineness of the applicant's conviction(s)], the key issue is whether the national law on military service adequately provides for conscientious objectors, by either: (i) exempting them from military service, or (ii) providing appropriate alternative service. As mentioned in Part III above, States can legitimately require that citizens perform military or alternative service. However, where this is done in a manner that is inconsistent with international law standards, conscription may amount to persecution.

18. In countries where neither exemption nor alternative service is possible, a careful examination of the consequences for the applicant will be needed. For example, where the individual would be forced to undertake military service or participate in hostilities against their conscience, or risk being subjected to prosecution and disproportionate or arbitrary punishment for refusing to do so, persecution would arise. Moreover, the threat of such prosecution and punishment, which puts pressure on conscientious objectors to change their conviction, in violation of their right to freedom of thought, conscience or belief, would also meet the threshold of persecution.<sup>46</sup>

19. The protection threshold would not be met in countries that do not make provision for alternative service, but where the only consequence is a theoretical risk of military service because in practice conscription is not enforced or can be avoided through the payment of an administrative fee.<sup>47</sup> Similarly, where a draft evader is exempted from military service, or where a deserter is offered an honourable discharge, the issue of persecution would not arise, unless other factors are present.

20. Where alternative service is available, but punitive in nature and implementation, because of the type of service involved or its disproportionate duration, the issue of persecution may nonetheless be at issue. A disparity in the length of alternative service will not, in itself, be sufficient to meet the threshold of persecution. If, for example, the duration of alternative service is based on objective and reasonable criteria, such as the nature of the specific service concerned, or the need for special training in order to accomplish that service, persecution would not arise.<sup>48</sup> However, where alternative service is merely theoretical, for instance, because

<sup>41</sup> See, UNHCR, *Note on the Burden and Standard of Proof*, 16 December 1998, (*Note on the Burden and Standard of Proof*), available at: <http://www.refworld.org/docid/3ae6b3338.html>, para. 10; UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001, (*UNHCR Interpreting Article 1*), available at: <http://www.refworld.org/docid/3b20a3914.html>, paras. 16-17.

<sup>42</sup> Article 33(1), 1951 Convention.

<sup>43</sup> See, UNHCR *Handbook*, para. 51-53, see note 1 above. See also, UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, HCR/GIP/D6/07, 7 April 2006, available at: <http://www.refworld.org/docid/443679fa4.html>, para. 14, and UNHCR *Handbook*, paras. 54-55, see note 1 above.

<sup>44</sup> See, for example, IACHR, *Fourth report on the situation of human rights in Guatemala*, OEA/Ser.L/V/II.83, Doc. 16 rev., 1 June 1993, chap. V.

<sup>45</sup> See, for example, UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, April 2009, available at: <http://www.refworld.org/docid/49da06122.html>, pages 13-14.

<sup>46</sup> See, UN Commission on Human Rights, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention*, E/CN.4/2001/14, 20 December 2000, recommendation No. 2, available at: <http://www.refworld.org/docid/3b00f54d18.html>, paras. 91-94.

<sup>47</sup> Excessive administrative fees designed to deter genuine conscientious objectors from opting for alternative service or which are considered punitive would be considered discriminatory and may on a cumulative basis meet the threshold of persecution.

<sup>48</sup> See the HRC's approach in *Foin v. France*, see note 12 above. See similarly, *Richard Maille v. France*, CCPR/C/69/D/689/1996, 31 July 2000, available at: <http://www.refworld.org/docid/3f588efd3.html>, and *Venier v. France*, see note 12 above.



the relevant legislative provision has never been implemented; the procedure for requesting alternative service is arbitrary and/or unregulated; or the procedure is open to some but not all, further inquiries need to be undertaken. In cases where the applicant has not availed him or herself of the existing procedures it would be important to understand their reasons for not doing so. If found that the reasons relate to a well-founded fear of being persecuted for publicly expressing his or her convictions, this would need to be factored into the overall analysis.

**(ii) Objection to Military Service in Conflict Contrary to the Basic Rules of Human Conduct**

21. Refugee claims relating to military service may also be expressed as an objection to (i) a particular armed conflict or (ii) the means and methods of warfare (the conduct of a party to a conflict). The first objection refers to the unlawful use of force [*jus ad bellum*], while the second refers to the means and methods of warfare as regulated by international humanitarian law [*jus in bello*], as well as human rights and criminal law.<sup>49</sup> Collectively such objections relate to being forced to participate in conflict activities that are considered by the applicant to be contrary to the basic rules of human conduct.<sup>50</sup> Such objections may be expressed as an objection on the basis of one's conscience, and as such can be dealt with as a case of "conscientious objection" [see (i) above]; however, this will not always be the case. Individuals may, for example, object to participating in military activities because they consider this is required to conform to their military code of conduct, or they may refuse to engage in activities which constitute violations of international humanitarian, criminal or human rights law.

22. Recognizing the right to object on such grounds and to be granted refugee status is consistent with the rationale underlying the exclusion clauses in the 1951 Convention. Articles 1F(a) and 1F(c) exclude from protection individuals in respect of whom there are serious reasons for considering that they have committed crimes against peace, war crimes or crimes against humanity or are guilty of acts contrary to the purposes and principles of the United Nations, and who are therefore considered undeserving of international protection as refugees. The obligation on individuals under international humanitarian and criminal law to refrain from certain acts during armed conflict would find reflection in international refugee law in the case of individuals who are at risk of being punished for exercising the restraint expected of them under international law [see paragraph 14]. In this regard, it is important to note the absence of a defence of superior orders which are manifestly unlawful.<sup>51</sup>

*Objection to Participating in an Unlawful Armed Conflict*

23. Where an armed conflict is considered to be unlawful as a matter of international law [in violation of *jus ad bellum*], it is not necessary that the applicant be at risk of incurring individual criminal responsibility if he or she were to participate in the conflict in question, rather the applicant would need to establish that his or her objection is genuine, and that because of his or her objection, there is a risk of persecution. Individual responsibility for a crime of aggression only arises under international law for persons who were in a position of authority in the State in question.<sup>52</sup> Soldiers who enlisted prior to or during the conflict in question may also object as their knowledge of or views concerning the illegality of the use of force evolve.

24. In determining the legality of the conflict in question condemnation by the international community is strong evidence, but not essential for finding that the use of force is in violation of international law. Such pronouncements are not always made, even where objectively an act of aggression has taken place. Thus, a determination of illegality with regard to the use of force needs to be made through the application of the governing rules under international law. The relevant norms are the obligation on States to refrain from the threat or use of force against other States; the right of individual or collective defence; and the authorization of the use of force in line with the UN Security Council's powers to maintain peace and security.<sup>53</sup>

25. If the conflict is objectively assessed not to be an unlawful armed conflict under international law, the refugee claim will ordinarily fail unless other factors are present. Likewise, where the legality of the armed conflict is not yet settled under international law, the application may be assessed pursuant to (i) above as a conscientious objector case.

<sup>49</sup> *Jus ad bellum* refers to the constraints under international law on the use of force, whereas *jus in bello* governs the conduct of the parties to an armed conflict. Traditionally, the latter refers to international humanitarian law but relevant standards are also found in applicable provisions of international human rights law and international criminal law.

<sup>50</sup> See, *UNHCR Handbook*, paras. 170-171, note 1 above. With regard to para. 171: "Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft evasion could, in light of all other requirements of the definition, in itself be regarded as persecution." See also, at a regional level, Council of the European Union, "Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted", OJ/L 304/12, 30 Sept. 2004, available at: <http://www.refworld.org/docid/4157e75e4.html>, Article 9(2)(e) which includes as a form of persecution: "[p]ersecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)."

<sup>51</sup> See, for example, Article 33, ICC Statute, see note 33 above.

<sup>52</sup> See, for example, International Criminal Court, *Elements of Crimes*, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Article 8 bis, available at: <http://www.refworld.org/docid/41f5cd7d2.html>.

<sup>53</sup> See respectively, Articles 2(4), 51 and 42 UN Charter. See also, UN General Assembly, *Non-interference in the internal affairs of States*, A/RES/34/101, 14 December 1979, available at: <http://www.refworld.org/docid/3b00f01740.html>.



### *Objection to the Means and Methods of Warfare (Conduct of the Parties)*

26. Where the applicant's objection is to the methods and means employed in an armed conflict [that is, the conduct of the one or more of the parties to the conflict], it is necessary to make an assessment of the reasonable likelihood of the individual being forced to participate in acts that violate standards prescribed by international law. The relevant standards can be found in international humanitarian law [*jus in bello*], international criminal law, as well as human rights law, as applicable.

27. War crimes and crimes against humanity are serious violations which entail individual responsibility directly under international law [treaty or custom]. Developments in the understanding of the elements of such crimes must be taken into account in determining what kinds of conduct or methods of warfare constitute such crimes.<sup>54</sup> Moreover, when assessing the kinds of acts an individual may be forced to commit in an armed conflict, other violations of international humanitarian law may also be relevant on a cumulative basis. The relevance of international human rights law in international or non-international armed conflict situations is also important to bear in mind.

28. Determining whether there is a reasonable likelihood that the individual would be forced to commit acts or to bear responsibility for such acts which violate the basic rules of human conduct will normally depend on an evaluation of the overall conduct of the conflict in question. Thus, the extent to which breaches of the basic rules of human conduct occur in the conflict will be relevant. However, it is the risk of being compelled to become involved in the act(s), rather than the conflict alone that is at issue, so the individual circumstances of the applicant must thus be examined, bearing in mind the role in which he or she will be engaged.

29. If the applicant is likely to be deployed in a role that excludes exposure to the risk of participating in the act(s) in question – for example, a non-combatant position such as a cook, or logistical or technical support roles only – then a claim of persecution is unlikely to arise without additional factors. Additional factors might include the link between the applicant's logistical or technical support role and the foreseeability of [or contribution to] the commission of crimes in violation of international humanitarian/criminal law. Further, the applicant's reasons for objecting – regardless of the foreseeability or remoteness of the commission of crimes linked to his or her activities – may be sufficient to qualify him or her as a conscientious objector [see (i) above].

30. By contrast, where there is a reasonable likelihood that an individual may not be able to avoid deployment in a combatant role that will expose him or her to the risk of committing illegal acts, his or her fear of being persecuted would be considered well-founded [see paragraph 14]. In some cases the conflict in question may be one that is not generally characterized by violations of international law. However, the individual in question may be a member of a unit whose particular duties mean that it is specifically, or more likely, to be implicated in violations of basic rules of human conduct. In such circumstances there may be a reasonable likelihood that the individual concerned will be forced to commit, for example, war crimes or crimes against humanity. Where options are available to be discharged, reassigned [including to alternative service] or to have an effective remedy against superiors or the military which will be fairly examined and without retribution, the issue of persecution will not arise, unless other factors are present.<sup>55</sup>

### **(iii) Conditions of State Military Service**

31. In cases involving conditions within the State armed forces, a person is clearly not a refugee if his or her only reason for desertion or draft evasion is a simple dislike of State military service or a fear of combat. However, where the conditions of State military service are so harsh as to amount to persecution the need for international protection would arise.<sup>56</sup> This would be the case, for instance, where the terms or conditions of

<sup>54</sup> For an overview, see UNHCR's *Background Note on Exclusion*, 4 September 2003, available at: <http://www.refworld.org/docid/3f5857d24.html>, paras. 30-32. Examples of war crimes in the context of an international armed conflict are willful killing of civilians, soldiers hors de combat or prisoners of war; torture; killing or wounding treacherously individuals belonging to the hostile army; intentionally directing attacks against the civilian population; rape; recruitment of children under the age of fifteen years into the armed forces or using them to participate actively in hostilities; and use of poisonous weapons. In a non-international armed conflict, war crimes include intentionally directing attacks against civilians; killing or wounding treacherously a combatant adversary; rape; recruitment of children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

<sup>55</sup> See, for example, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, see note 4 above, concerning the practice in some States of allowing enlisted soldiers to move to a different non-combatant unit if they develop a conscientious objection to a particular conflict or bearing arms altogether, paras. 26-27. Such an option may not be available though for an individual whose objection to a particular conflict is not based on conscientious objection.

<sup>56</sup> See, for example, *Yasin Sepet, Erdem Bulbul v. Secretary of State for the Home Department*, C/2777; C/2000/2794, United Kingdom: Court of Appeal (England and Wales), 11 May 2001, available at: <http://www.refworld.org/docid/3ff6cb024.html>, para. 61. See UN Working Group on Arbitrary Detention, Opinion No. 24/2003 (Israel), E/CN.4/2005/6/Add.1, 19 November 2004, available at: <http://www.refworld.org/docid/470b77b10.html>. Similarly, HRC, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (Article 14), 23 August 2007, available at: <http://www.refworld.org/docid/478b2b22.html>, stating that, "Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience", para. 55; see also UN Commission on Human Rights, Resolution 98/77, para. 5, see note 5 above. Subsequent to the HRC's ruling on Article 18 and a right to conscientious objection in *Yoon and Choi v. Republic of Korea*, see note 15 above, the UN Working Group on Arbitrary Detention has stated that the imprisonment of a conscientious objector for refusing to take up military service constitutes arbitrary detention as it is a violation of the rights guaranteed in Article 18 ICCPR as well as Article 9 ICCPR: Opinion No. 16/2008 (Turkey), A/HRC/10/21/Add.1, 4 February 2009, available at: <http://www.refworld.org/docid/5062b12e2.html>. See also the European Court of Human Rights that held that the cumulative effect of repeated prosecution and punishment of conscientious objectors for desertion was their "civil death" amounting to degrading treatment in violation of Article 3 of the ECHR. See *Ölke v. Turkey*, Application No. 39437/98, 24 January 2006, available at: <http://www.refworld.org/docid/4964bd752.html> as well as *Savda c. Turquie*, note 13 above and *Tarhan c. Turquie*, note 21 above, and *Feti Demirtaş c. Turquie*, see note 7 above.



military service amount to torture or other cruel or inhuman treatment,<sup>57</sup> violate the right to security<sup>58</sup> and integrity of person,<sup>59</sup> or involve forced or compulsory labour,<sup>60</sup> or forms of slavery or servitude [including sexual slavery].<sup>61</sup>

32. Such cases may in particular involve discrimination on the grounds of ethnicity, or gender. Where the ill-treatment feared is carried out within the State armed forces by military personnel, it is necessary to assess whether such practices are systemic and/or in practice authorized, tolerated or condoned by the military hierarchy. An assessment has to be made regarding the availability of redress against such ill-treatment.

33. Under international law the prohibition of "forced or compulsory labour"<sup>62</sup> does not encompass military or alternative service. Nevertheless, where it can be established that compulsory military service is being used to force conscripts to execute public works, and these works are not of a "purely military character" or not exacted in the case of an emergency, and do not constitute a necessity for national defence or a normal civic obligation, such work constitutes forced labour.<sup>63</sup> According to the International Labour Organization, the condition of a "purely military character" is aimed specifically at preventing the call up of conscripts for public works.<sup>64</sup> In situations of emergency, which would endanger the existence of the State or well-being of the whole or part of the population, conscripts may nevertheless be called upon to undertake non-military work. The duration and extent of compulsory service, as well as the purposes for which it is used, need to be confined to what is strictly required in the given situation.<sup>65</sup> Using a conscript to gain profit through his or her exploitation [e.g. slavery, sexual slavery, practices similar to slavery, and servitude] is prohibited by international law and criminalized in the national legislation of a growing number of States.

34. As with other refugee claims outlined above (i) - (ii), if the applicant has the possibility of discharge, reassignment [including appropriate alternative service] and/or an effective remedy, without retribution, the issue of persecution will not arise, unless other factors are present.

#### (iv) Forced Recruitment and/or Conditions of Service In Non-State Armed Groups

35. As far as forced recruitment in non-State armed groups is concerned, it is recalled that non-State armed groups are not entitled to recruit by coercion or by force.<sup>66</sup> A person who seeks international protection abroad because of feared forced recruitment, or re-recruitment, by non-State armed groups, may be eligible for refugee status provided the other elements of the refugee definition are established; in particular that the State is unable or unwilling to protect the person against such recruitment [see paragraphs 42-44 and 60-61 below]. Likewise, forced recruitment by non-State groups to carry out non-military works could amount to, *inter alia*, forced labour, servitude and/or enslavement and constitute persecution.<sup>67</sup>

36. Where the applicant would be subjected to conditions of service that constitute serious violations of international humanitarian or criminal law,<sup>68</sup> serious human rights violations or other serious harm, persecution would arise.<sup>69</sup>

#### (v) Unlawful Child Recruitment

37. Special protection concerns arise where children are at risk of forced recruitment and service.<sup>70</sup> The same is true for children who may have "volunteered" for military activities with the State's armed forces or non-State armed groups. A child's vulnerability and immaturity make him or her particularly susceptible to coerced recruitment and obedience to the State's armed forces or a non-State armed group; this must be taken into account.

<sup>57</sup> See, Article 7 ICCPR.

<sup>58</sup> See, Article 9 ICCPR.

<sup>59</sup> See for an interpretation, Articles 7, 9 and 17 ICCPR.

<sup>60</sup> See, Article 8(3) ICCPR and Article 1(b) of the [Abolition of Forced Labour Convention, 1957 \(No. 105\)](#).

<sup>61</sup> See, Article 8(1) ICCPR and Article 5 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").

<sup>62</sup> See, Article 8 ICCPR.

<sup>63</sup> 1930 ILO Convention No. 29 concerning Forced or Compulsory Labour. See also, IACHR, "[Fourth report on the situation of human rights in Guatemala](#)", OEA/Ser.L/V/II.83, Doc. 16 rev., 1 June 1993, chap. V.

<sup>64</sup> It has its corollary in Article 1(b) of the Abolition of Forced Labour Convention, 1957 (No. 105), which prohibits the use of forced or compulsory labour "as a method of mobilizing and using labour for purposes of economic development."

<sup>65</sup> ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), [CEACR: Individual Direct Request concerning Forced Labour Convention, 1930 \(No. 29\) Eritrea](#) (ratification: 2000), 2010.

<sup>66</sup> See, para 7 above.

<sup>67</sup> See, Article 8(3) ICCPR, Article 1(b) of the Abolition of Forced Labour Convention (No. 105), 1957; Article 8(1) ICCPR; and Article 6 CEDAW.

<sup>68</sup> See, Article 3 common to the four Geneva Conventions of 1949; Article 8, Rome Statute of the ICC (last amended 2010), 17 July 1998, available at: <http://www.rehworld.org/docid/3aef63a84.html>.

<sup>69</sup> For example, torture or other cruel, inhuman or degrading treatment or punishment (see Article 7, ICCPR), violations of the right to security (see Article 9 ICCPR) and integrity of person (see for an interpretation Article 7, 9 and 17 ICCPR), forced or compulsory labour (see Article 8(3) ICCPR and Article 1(b) of the Abolition of Forced Labour Convention, 1957 (No. 105)) or forms of slavery (including sexual slavery, see Article 8(1) and Article 6 CEDAW).

<sup>70</sup> UNHCR [Guidelines on Child Asylum Claims](#), see note 37 above.



38. As outlined at III.C. above, there are important restrictions on the recruitment and participation in hostilities of children under international human rights law and international humanitarian law, whether related to an international or a non-international armed conflict, and relating to both State armed forces and non-State armed groups.<sup>71</sup> Children need to be protected from such violations; as such, a child evading forced recruitment or prosecution and/or punishment or other forms of retaliation for desertion would generally have a well-founded fear of persecution.

39. There may be cases where children “volunteer” under pressure, or are sent to fight by their parents or communities. Such cases can similarly give rise to refugee status. The key question is the likelihood of risk that the child will be recruited and/or forced to fight, and this needs to be assessed on the basis of up-to-date country of origin information, taking into account the child’s profile and past experiences, as well as the experiences of similarly situated children. Importantly, in refugee claims concerning violations of the restrictions on the recruitment and participation of children in hostilities, there is no additional requirement to consider the issue of conscientious objection.

40. Persecution may also arise from the nature of the treatment the child would be subjected to whilst in the military or armed group. In this respect, it is important to note that in addition to taking an active part in hostilities, children are also used as spies, messengers, porters, servants, slaves [including sex slaves], and/or to lay or clear landmines. Regardless of the function held by the child, they may be exposed to serious or multiple forms of harm, including being put in a position to witness heinous crimes.<sup>72</sup>

41. Persecution may also arise where there is a risk of ill-treatment on return to the country of origin, for example, because of the child’s history of being involved with State armed forces or non-State armed groups, whether as a soldier/combatant/fighter or in another role. They may be considered as an “enemy” by respectively the State or the non-State armed group and as a result be at risk of retaliation, including physical attacks, or being ostracized by the community to such an extent that their life is intolerable. In all such cases, special consideration needs to be given to the particular vulnerabilities and best interest of child applicants.<sup>73</sup>

#### Agents of Persecution

42. There is scope within the refugee definition to recognize both State and non-State agents of persecution. In countries undergoing civil war, generalized violence, situations of insurgency, or State fragmentation, the threat of forced recruitment often emanates from non-State armed groups. This may result from the State’s loss of control over parts of its territory. Alternatively, the State may empower, direct, control or tolerate the activities of non-State armed groups [for example, paramilitary units or private security groups]. The congruity of interests between the State and a non-State armed group involved in forced recruitment may not always be clear. Other non-State actors may also be the perpetrators of persecution in forms other than forced recruitment, for example, through violence and discrimination by family members and neighbours against former child soldiers perceived as having aided the enemy.

43. In all cases involving harm by non-State armed groups and other non-State actors, it is necessary to review the extent to which the State is able and/or willing to provide protection against such harms.

44. Where the refugee claim is based on the risk of being forced to commit acts that violate basic rules of human conduct, it is necessary to examine the extent to which such violations are taking place, as well as the ability and/or willingness of the authorities, in particular the military authorities, to prevent future violations. Isolated breaches *of jus in bello* which are effectively investigated and dealt with by the military authorities will indicate the existence of available and effective State protection. State responses of this nature would involve action being taken against those responsible and measures being put in place to prevent repetition.

45. With respect to ill-treatment by other soldiers, such as serious bullying or hazing, it is necessary to determine whether such acts are condoned by the military authorities and whether effective methods of redress are available through the military system or elsewhere in the State structure.

#### Amnesties

46. When a conflict ends, a State may offer amnesties to persons who evaded military service, in particular to conscientious objectors. Such initiatives may guarantee immunity from prosecution or offer official recognition of conscientious objector status, thereby removing the risk of harm associated with such prosecution or punishment. Nevertheless, the impact of an amnesty on an individual’s fear of persecution requires careful

<sup>71</sup> See generally, UN Committee on the Rights of the Child, CRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, (“CRC General Comment No.6”), CRC/GC/2005/6, 1 September 2005, available at: <http://www.refworld.org/docid/42dd174b4.html>, para. 59.

<sup>72</sup> See, note 69 above; see also *UNHCR Guidelines on Child Asylum Claims*, para. 23, see note 37 above.

<sup>73</sup> *UNHCR Guidelines on Child Asylum Claims*, paras. 4 and 5, see note 37 above, and the CRC General Comment No.6, see note 71 above.



assessment. Amnesties may not cover all deserters and draft evaders. Moreover, it is necessary to examine whether the such protection is effective in practice; whether the individual may still face recruitment into the armed forces; whether he or she may be subjected to other forms of persecution apart from any criminal liability quashed by the amnesty; and/or whether the person is at risk of being targeted by non-State actors – including community groups for being considered a traitor, for example – irrespective of the legislation adopted by the State. In particular, individuals who have witnessed the commission of war crimes or other serious acts, and have deserted as a result, may be able to establish a well-founded fear of persecution under certain circumstances if, for instance, they were required to act as witnesses in criminal proceedings upon return which would expose them to serious harm.

## B. The Convention Grounds

47. As with all claims to refugee status, the well-founded fear of persecution needs to be related to one or more of the grounds specified in the refugee definition in Article 1A(2) of the 1951 Convention; that is, it must be “for reasons of” race, religion, nationality, membership of a particular social group or political opinion. The Convention ground needs only to be a contributing factor to the well-founded fear of persecution; it need not be shown to be the dominant or even the sole cause. Further, one or more of the Convention grounds may be relevant; they are not mutually exclusive and may overlap.

48. The intent or motive of the persecutor can be a relevant factor in establishing the causal link between the fear of persecution and a Convention ground but it is not decisive, not least because it is often difficult to establish.<sup>74</sup> There is no need for the persecutor to have a punitive intent to establish the causal link; the focus is rather on the reasons for the applicant’s predicament and how he or she is likely to experience the harm. Even where an individual is treated in the same way as a majority of the population this does not preclude persecution being for reasons of a Convention ground. Similarly, if the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link. Where the persecutor is a non-State armed actor, the causal link is established either where the persecutor harms the applicant for a Convention-related reason, or the State does not protect him or her for a Convention-related reason.<sup>75</sup>

### Religion

49. The religion ground is not limited to belief systems [“theistic, non-theistic and atheistic”],<sup>76</sup> but covers also notions of identity, or way of life.<sup>77</sup> It dovetails with Article 18 ICCPR and includes broader considerations of thought and conscience, including moral, ethical, humanitarian or similar views. The religion ground is thus particularly relevant in cases of conscientious objection, including those expressed through draft evasion or desertion, as explained at III. B. With respect to claims by conscientious objectors, the *UNHCR Handbook* states that:

Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.<sup>78</sup>

50. The religion ground may also be relevant in cases based on military service other than in situations of conscientious objection. Recruits may be subject to detention, ill-treatment (such as physical beatings or severe psychological pressure) and serious discrimination on account of their religious beliefs, identity or practices. They may also be pressured to renounce their beliefs and convert.

### Political Opinion

51. The political opinion ground is broader than affiliation with a particular political movement or ideology; it concerns “any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged.”<sup>79</sup> Moreover, it covers both the holding of an actual political opinion and its expression, political neutrality as well as cases where a political opinion is imputed to the applicant even if he or she does not hold

<sup>74</sup> *UNHCR Handbook*, para. 66, see note 1 above.

<sup>75</sup> See, *UNHCR, Guidelines on International Protection No. 2: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002, (“*UNHCR Guidelines on Social Group*”), available at: <http://www.refworld.org/docid/3d361234.html>, para. 23.

<sup>76</sup> *UNHCR Guidelines on Religion-Based Claims*, para. 6, see note 15 above.

<sup>77</sup> *Ibid.*, paras. 4 and 8.

<sup>78</sup> *UNHCR Handbook*, para. 172, see note 1 above.

<sup>79</sup> *UNHCR, Guidelines on International Protection No. 1: Guidelines on Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002, (“*UNHCR Guidelines on Gender-Related Persecution*”), available at: <http://www.refworld.org/docid/3d3611c64.html>, para. 32.



that view.<sup>80</sup> The latter can arise in cases where the State, or a non-State armed group, attributes to the individual a particular political view.

52. Cases involving objection to military service may be decided on the basis that there is a nexus with the political opinion ground in the 1951 Convention. Depending on the facts, an objection to military service - especially objections based on a view that the conflict violates basic rules of human conduct (see IV. A. (ii) above) - may be viewed through the prism of actual or imputed political opinion. In relation to the latter, the authorities may interpret the individual's opposition to participating in a conflict or in act(s) as a manifestation of political disagreement with its policies. The act of desertion or evasion may in itself be, or be perceived to be, an expression of political views.

53. The political opinion ground may be relevant in other circumstances. For instance, a refugee claim by a soldier who becomes aware of and objects to criminal activity being conducted or tolerated by military personnel in the context of a conflict, such as the illicit sale of weapons, extortion of civilians or trafficking of drugs or in persons, and who fears persecution as a result of his or her opposition to such activities, may be considered under the political opinion ground. Whether or not the soldier is a whistleblower, attempts to flee military service may be perceived by the authorities as evidence of political opposition. Objection to recruitment by non-State armed groups may also be an expression of political opinion.

54. Political opinion may also be the applicable ground in relation to family members of a conscientious objector, draft evader or deserter who is identified by the State or non-State armed group as having an allegiance to a particular political cause. In such cases, persecution may be linked to imputed political opinion, on the basis that the family member is assumed to hold similar views as those ascribed to the conscientious objector, draft evader or deserter. The relevant ground in such cases may also be "family" as a social group (see below paragraph 56).

### Race or Nationality

55. Race and nationality, in the sense of ethnicity, are often factors in cases connected with military service. The well-founded fear of persecution may be directly based on the applicant's race, for example where conscripts from a particular racial group face harsher conditions than other recruits, or are the only ones actually subject to the draft. Similarly, children may face forced recruitment because they belong to a targeted ethnic group. Cases based on the conditions of military service arising to persecution may also relate to discrimination on the basis of race and/or ethnicity, and could invoke this ground.

### Membership of a Particular Social Group

56. The 1951 Convention does not include a specific list of particular social groups. Rather, "the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."<sup>81</sup> UNHCR defines a "particular social group" as:

A particular social group involves a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>82</sup>

57. The two approaches - "protected characteristics" and "social perception" - to identifying "particular social groups" reflected in this definition are alternative, not cumulative, tests. The "protected characteristics" approach examines whether a group is connected either by an immutable characteristic, or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic "may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status)."<sup>83</sup> The "social perception" approach considers whether a particular social group shares a common characteristic which makes it cognizable or sets the group's members apart from society at large. The latter approach does not require that the common characteristic be easily identifiable by the general public, or visible to the naked eye. An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group.<sup>84</sup> Moreover, irrespective of which approach is adopted, a particular social group can arise even

<sup>80</sup> See UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, available at: <http://www.refworld.org/docid/4c369022.html>, para. 8.

<sup>81</sup> UNHCR *Guidelines on Social Group*, para. 3, see note 75 above.

<sup>82</sup> *Ibid.*, para. 11.

<sup>83</sup> *Ibid.*, para. 6.

<sup>84</sup> *Ibid.*, para. 17.



where this covers a large number of people.<sup>85</sup> Nevertheless, everyone falling within a particular social group is not necessarily a refugee; a well-founded fear of persecution because of membership of that group is required.

58. Under either of these approaches, “conscientious objectors” are a particular social group given that they share a belief which is fundamental to their identity and that they may also be perceived as a particular group by society. Individuals with common past experience, such as child soldiers, may also constitute a particular social group. This may also be the case for draft evaders or deserters, as both types of applicants share a common characteristic which is unchangeable; a history of avoiding or having evaded military service. In some societies deserters may be perceived as a particular social group given the general attitude towards military service as a mark of loyalty to the country and/or due to the differential treatment of such persons (for example, discrimination in access to employment in the public sector) leading them to be set apart or distinguished as a group. The same may be true for draft evaders. Conscripts may form a social group characterized by their youth, forced insertion into the military corps or their inferior status due to lack of experience and low rank.

59. Women are a particular social group, defined by innate and immutable characteristics and frequently treated differently from men.<sup>86</sup> This may be the relevant ground in claims concerning sexual violence against female soldiers or women or girls forced to act as sex slaves; although this does not preclude the application of other grounds. Girls are a sub-set of this social group. Children are also a particular social group, and this will be a relevant ground in cases concerning fear of forced underage recruitment.<sup>87</sup>

### C. Internal Flight or Relocation Alternative

60. Where the feared persecution emanates from, or is condoned, or tolerated by the State and/or State agents, an internal flight or relocation alternative will generally not be available, as the State actors will be presumed to have control and reach throughout the country. In the case of conscientious objectors to State military service, where the State does not provide for exemption or alternative service, and where the fear of persecution is related to these laws and/or practices and their enforcement, a consideration of an internal flight or relocation alternative (IFA) would not be *relevant* as it can be assumed that the objector would face persecution across the country.<sup>88</sup>

61. Determining whether an IFA is available in cases where the risk of persecution emanates from non-State armed groups, it is necessary to evaluate the ability and/or willingness of the State to protect the applicant from the harm feared. The evaluation needs to take into account whether the State protection is effective and of a durable nature, provided by an organized and stable authority exercising full control over the territory and population in question. In the particular context of non-international armed conflict, special consideration would need to be given to the applicant’s profile, and whether he or she was recruited into and/or participated in activities of a non-State armed group considered to be in opposition to the government, and any likely reprisals from the government. It would often be unreasonable to expect former non-State recruits to relocate into government-controlled territory in a situation of an ongoing conflict, especially if the conflict has religious or ethnic dimensions.

## V. PROCEDURAL AND EVIDENTIARY ISSUES

### A. Establishing the Relevant Facts

62. The credibility assessment refers to the process of determining whether, in light of all the information available to the decision maker, the statements of the applicant relating to material elements of the claim can, on balance, be accepted as having been truthfully given for the purpose of determining refugee status eligibility. Where, notwithstanding, an applicant’s genuine efforts to provide evidence pertaining to the material facts, there remains some doubt regarding some of the facts alleged by him or her, the benefit of doubt should be given to the applicant in relation to the assertions for which evidentiary proof is lacking once the decision maker is satisfied with the general credibility of the claim.<sup>89</sup>

63. In claims related to military service, reliable and relevant country of origin information, including the extent to which exemption from military service or alternative service are available, the manner in which conscription is enforced, and the treatment of individuals or groups within the military forces of the country of origin, can

<sup>85</sup> *Ibid.*, paras. 18-19.

<sup>86</sup> UNHCR *Gender-Related Persecution Guidelines*, para. 30, see note 79 above.

<sup>87</sup> UNHCR *Guidelines on Child Asylum Claims*, para. 48 et seq., see note 37 above.

<sup>88</sup> UNHCR *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” within the Context of Article 1A (2) of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, (“UNHCR Internal Flight Guidelines”), available at: <http://www.refworld.org/docid/3f2791a44.html>.

<sup>89</sup> UNHCR *Handbook*, para. 204, see note 1 above.





assist in the evaluation of the truthfulness of the applicant's account and the determination of the forms of treatment and their likelihood he or she may face if returned.<sup>90</sup>

64. Establishing the genuineness and/or the personal significance of an applicant's beliefs, thoughts and/or ethics plays a key role in claims to refugee status based on objection to military service, in particular conscientious objection (see IV. A. (i)-(ii)).<sup>91</sup> The applicant needs to be given the opportunity during the individual interview to explain the personal significance of the reasons behind his or her objection, as well as how these reasons impact on his or her ability to undertake military service. Eliciting information regarding the nature of the reasons espoused, the circumstances in which the applicant has come to adopt them, the manner in which such beliefs conflict with undertaking military service, as well as the importance of the reasons to the applicant's religious or moral/ethical code are appropriate and assist in determining the credibility of the applicant's statements.

65. Where the objection to military service is derived from a formal religion, it may be relevant to elicit information about the individual's religious experiences, such as asking him or her to describe how they adopted the religion, the place and manner of worship, or the rituals engaged in, the significance of the religion to the person, or the values he or she believes the religion espouses, in particular, in relation to the bearing of arms. That said, extensive examination or testing of the tenets or knowledge of the individual's religion may not always be necessary or useful, particularly as such knowledge will vary considerably depending on his or her personal circumstances. A claimant's detailed knowledge of his or her religion does not necessarily correlate with sincerity of belief and vice-versa.

66. Cases involving mistaken beliefs as to a particular religion's views on the bearing of arms occur from time to time. Where mistaken beliefs are at issue, it would need to be established that the applicant, despite the mistaken beliefs, still faces a well-founded fear of persecution for one or more of the Convention grounds.<sup>92</sup>

67. If the claimant is mistaken about the nature of a particular conflict, such as whether the conflict abides by international law, this does not automatically undermine the credibility of the alleged reasons for objecting to military service. The credibility assessment in such situations needs to be conducted in light of the applicant's explanations regarding why involvement in the conflict would be inconsistent with his or her religious or moral beliefs, and the reality of the situation on the ground. Nonetheless, while they may be credible in their objection, where such an objection is based on a false premise, the risk of persecution would not arise unless they face other persecutory consequences for having deserted or evaded military service and a nexus to one of the Convention grounds is established.

68. For those objectors whose reasons for their objection is a matter of thought or conscience (rather than religion), they will not be able to refer to the practices of a religious community or teachings of a religious institution in order to substantiate their assertion. They should, however, be able to articulate the moral or ethical basis for their convictions. This may be based on social or community beliefs or practices, parental beliefs or on philosophical or human rights convictions. Past behaviour and experiences may shed light on their views.

69. In cases involving individuals who volunteered for military service or responded to a call up, and who subsequently desert, it is important to recognize that religious or other beliefs may develop or change over time, as may the circumstances of the military service in question. Thus, adverse judgements as to the credibility of the applicant should not generally be drawn based only on the fact that he or she initially joined the military service voluntarily; the full circumstances surrounding the individual's espoused beliefs and situation need to be carefully examined.

## B. Claims by Children

70. Given their young age, dependency and relative immaturity, special procedural and evidentiary safeguards are required for claims to refugee status by children.<sup>93</sup> In particular, children who spent time as soldiers/combatants/fighters or in a support role to armed groups may be suffering from severe trauma and be intimidated by authority figures. This can affect their ability to present a clearly understandable account of their experiences. Thus, appropriate interviewing techniques are essential during the refugee status determination procedure, as well as the creation of a non-threatening interview environment.

<sup>90</sup> *UNHCR Handbook*, paras. 196 and 203-204, see note 1 above, and *UNHCR Interpreting Article 1*, para. 10, see note 41 above. Note the *World Survey of Conscription and Conscientious Objection to Military Service*, which provides a country-by-country analysis, see note 28 above.

<sup>91</sup> For a general discussion of credibility issues in claims based on freedom of thought, conscience and religion see *UNHCR Guidelines on Religion-based Claims*, paras. 25-29, see note 15 above.

<sup>92</sup> *Ibid.*, para. 30.

<sup>93</sup> For a full discussion of the minimum safeguards required see *UNHCR Guidelines on Child Asylum Claims*, paras. 65-77, see note 37 above. See also ExCom, *Conclusion on Children at Risk*, No. 107 (LVIII), 5 October 2007, available at: <http://www.refworld.org/docid/471897232.html>, para. g(viii). Whether a claimant is a child for the purposes of such safeguards will depend on the age at the date the claim to refugee status is made.



71. In cases concerning children, a greater burden of proof will fall on the decision makers than in other claims to refugee status, especially if the child is unaccompanied.<sup>94</sup> Given their immaturity, children cannot be expected to provide adult-like accounts of their experiences. If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his or her claim, a decision must be made on the basis of all known circumstances.

72. Age assessments may be particularly important in claims to refugee status based on military service where the age of the applicant is in doubt. This is the case not just with claims regarding conscription but also where a child considers him or herself to have "volunteered", given the limits on voluntary service set by international law (see III.B. above). Age assessments, which may be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual, are to be conducted in a safe, child- and gender-sensitive manner with due respect for human dignity.<sup>95</sup> Where the assessment is inconclusive, the applicant must be considered a child. Prior to the assessment, an independent guardian should be appointed to advise the child on the purpose and process of the assessment procedure, which needs to be explained clearly in a language that the child understands. DNA testing should, in normal circumstances, only be done if permitted by law and with the informed consent of the relevant individuals.

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<sup>94</sup> *UNHCR Guidelines on Child Asylum Claims*, para. 73, see note 37 above.

<sup>95</sup> See further, *UNHCR Guidelines on Child Asylum Claims*, paras. 75-76, see note 37 above.