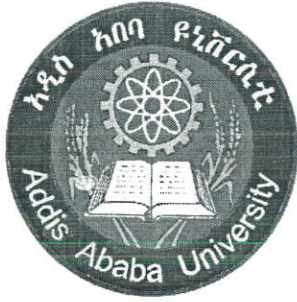


ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
FACULTY OF LAW



The Right to Conscientious Objection under Ethiopian Law

By: Meron Tesfaye

June, 2011

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A Thesis submitted to Addis Ababa University, the School of Graduate Studies, Faculty of Law in Partial Fulfillment of the Requirements for the Degree of Master of Laws (LL.M) in Human Rights Law

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Abstract

Conscientious objection is the refusal to participate in armed services based upon opposition to armed conflict. This opposition may rest upon reasons of religious belief, philosophy, morality or political ideology. Historically, many conscientious objectors have been executed, imprisoned or otherwise penalized when their beliefs leads to actions conflicting with their society's legal system or government.

Nowadays, however, the right to conscientious objection to military service is can be inferred from a number of international human rights instruments. It is considered as an extension of the right to freedom of thought, conscience and religion which is recognized under article 18 of Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR).

This right has got also an implied recognition under the Federal Democratic Republic of Ethiopia (FDRE) Constitution. The problem is that however the Constitution as well as subordinate legislations does not address plenty of issues arising in connection with the right to conscientious objection. They do not provide the grounds of exemption from military service, the scope of objection, the type and the duration of alternative service and the organ that entertain conscientious objection application. They are not clear also weather enlisted and professional soldiers have the right to claim the right to conscientious objection.

Chapter One

1. Introduction

1.1. Background of the Study

Conscientious objection is not a noble idea. Centuries before the birth of Christ the Hebrew midwives refused to cooperate with Pharaoh's decree that all new born males should be killed.¹ Throughout history, different forms of military organizations have caused people to refuse military service for various reasons. One of the most direct forms of resisting armed conflict and military service is conscientious objection based on conscience, religion or political beliefs and convictions.² Hence, conscientious objector is an individual who has claimed the right to refuse to perform military service on the ground of freedom of thought, conscience or religion. The international definition of conscientious objection officially broadened on March 8, 1995 when the United Nations Commissions on Human Rights resolution 1995/83 stated that "persons performing military service should not be excluded from the right to have conscious objections to military service".³ The definition was re-affirmed in 1998, when the United Nations Office of the High Commissioner for Human Rights document called "Conscientious Objection to military service, United Nations Commissions on Human Rights resolution 1998/77" officially recognized that "persons already performing military service may develop conscientious objection."⁴(emphasis added). Consequently, an application for conscientious objection has to be possible at any time – before, during and after military service and also for professional soldiers.

Historically, many conscientious objectors have been executed, imprisoned or otherwise penalized when their beliefs leads to actions conflicting with their society's legal system or government. Nowadays, however, the right to conscientious objection to military service can be inferred from a number of international legal instruments and from legislation of many countries. Accordingly, the right to conscientious objection to military service is considered as legitimate

¹ Defending conscience and Protecting Life <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1360408/> accessed on 7/3/2011

² The Right to Refuse to Kill: The European Bureau for Conscientious Objection Newsletter, especial Edition on Cyprus, Israel, Switzerland and Turkey; p. 28 January 2010.

³ Conscientious Objector; available at: <http://www.scn.org/ip/sdmcc/co.htm> accessed on 9/3/2011

⁴ UN Commission on Human Rights resolution 1998/77, OP2 and OP3

exercise of the right to freedom of thought, conscience and religion as articulated implicitly in article 18 of the International Covenant on Civil and Political Rights and article 18 of Universal Declaration of Human Rights, and explicitly by the Human Rights Committee in its General Comment No.22⁵ on article 18 of the International Covenant on Civil and Political Rights. In its General Comment No. 22 on the right to freedom of thought, conscience and religion (ICCPR, art. 18), the Committee stated that: "The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief".

Here what deserves emphasis is that although ICCPR left the issue of conscientious objectors inexplicit and seems, under article 8 paragraph 3(c) (ii), to encourage member states to recognize the right to conscientious objection, the Committee makes it explicit that the right to conscientious objection derives from the right to freedom of thought, conscience and religion. Article 4, paragraph 3(b) of the European Convention on Human Rights (ECHR) allows a State Party to the ECHR not to recognize the right to conscientious objection to compulsory military service though article 5 of the American Convention on Human Rights (ACHR) appears to be silent on the issue under consideration. The member states of the council of Europe have, however, given a clear political endorsement to recognition of conscientious objectors. Likewise the Inter American Convention on Human Rights also recognizes this right.

Even though the African Charter on Human and Peoples Right seems not clear, still it can be argued that the right to conscientious objection can be inferred from article 8 of the African Charter dealing with freedom of thought, conscience and religion.

Generally, it can be concluded that the issue of conscientious objection to military service in international law shows that the right to conscientious objection to military service is grounded in existing human rights norms guaranteeing the right to freedom of conscience and religion.

When it comes to the exercise of this right it can be said that, it is subject to rules and practices that differ greatly from country to country. In some countries, conscientious objectors are

⁵ U.N.Hum.Rts. Comm., General Comment 22(48)

assigned to an alternative civilian service as a substitute for conscription or military service.⁶ Some conscientious objectors consider themselves pacifist, non-interventionist, non-resistant or anti-militarist.

Regarding the recognition of the right to conscientious objectors under national laws, experience of some countries can readily be examined. To begin with, Finland introduced conscription in 1881, but its enforcement was suspended in 1903 as part of Russification. During the Finnish civil war in 1918, conscription was reintroduced for all able bodied men. In 1992, the option of non-combatant military service was introduced, but service in the military remained compulsory on pain of imprisonment. After the struggle of pacifist Arndt Pekurinen a law was passed providing for a peace time – only alternative to military service, or civilian service.

According to Article 4(3) of the German Constitution on the other hand, “No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.” As per Article 12(a), every adult male is obligated to military service called “Zivildienst” (civilian service), if he declares conscience reason. In Italy as well, up until 2004 conscription was mandatory to all able bodied Italian males. Until 1972, objectors were considered as traitors and tried by military tribunal. Since 1972, however, objectors could choose an alternative civilian service, which was eight months longer than standard military service. By the same token, conscription was mandatory to all able – bodied males, in Belgium till the time it was suspended in 1994. Civilian service was possible since 1963. Objectors could apply for the status of conscience objector and when granted an exemption, they did an alternative service with the civil service or with a socio – cultural organization.

Coming to our legal system, it seems implicit under Article 18(4) (b) of the 1995 Constitution of the Federal Democratic Republic of Ethiopia that giving military service can be compulsory but, individuals can avail themselves of conscience objection and perform other public service which cannot be considered forced or compulsory labor within the meaning of the provision under consideration.

⁶ Ibid

Article 18(4) (b) states that forced or compulsory labor shall not include, in case of conscience objectors, any service exacted in lieu of compulsory military service. Though this provision is an exception, it can be argued that the right to conscientious objection has got implicit recognition. This complements the right to freedom of thought, conscience and religion named under article 27 of the same constitution. Otherwise, it seems that the legislator is convinced article 27 of the Constitution would be devoid of meaning. However, article 18(4) (b) of the Constitution left plenty of questions unanswered. Neither has it made reference to other specific legislation in force. It does not identify clearly whether giving military service is compulsory or not. There is as well, no indication as to the basis on which conscientious exemption from military service can be granted and the process for obtaining such exemption. Stating in different words, the Constitution does not recognize the standard or the criteria to determine a person as conscientious objector and the procedures of granting an exemption. Questions can also be posed relating to the provision, length and condition of alternative service mentioned under article 18(4) (b) of the Constitution and the rights of those who object to alternative service. One can still go further and question whether alternative service provides the same rights and social benefits as military service; whether there can be repeated punishment for failure to perform military service and issues of the lack of an independent decision – making process.

1.2. Research Questions

In light of the problems stated herein above, the following are some of the research questions to be answered by the research.

Is giving military service mandatory under the Ethiopian legal system?

Is the right to conscientious objection recognized in Ethiopia?

What is the basis on which or the criteria to determine conscientious exemption from military service can be granted?

What is the scope of the right to conscientious objection?

What is the process thereof?

How is the alternative service going to be provided, for how long and what would be the condition under which it is to be delivered?

Does the alternative service entail the same rights and social benefits as military service?

Is there a punishment for failure to perform military service?

Which organ should decide on whether a person should be granted an exemption from military service as an independent decision making – process?

Is there any room for enlisted and professional soldiers to subsequently develop conscientious objection to military service under Ethiopian law?

Is the information readily available for individuals who want to invoke their conscience as an excuse not to give military service?

1.3. Objective of the Study

The study has the general objective of examining the nature and scope of the right to conscientious objection under Ethiopian laws. Towards the achievement of this general objective the study has the following specific objectives:

- ❖ To examine international legal instruments having direct and indirect bearing on conscientious objectors
- ❖ To make survey of laws of different countries on conscientious objectors
- ❖ To analyze Ethiopian laws on conscientious objectors

1.4. Methodology

The study will use different methods so as to achieve the general and specific objectives stated herein above. Accordingly, the researcher will review literatures, analyze the experience of some countries and conduct interview with military officials who are engaged in the recruitment of soldiers.

- ❖ Literature review: the literature review component of the study consists of reading and analyzing library and online resources including international and national laws.

- ❖ Comparative study: this component of the methodology helps the researcher to examine the experience of some countries and suggest/recommend the best experience into the Ethiopian legal system.
- ❖ Interview: The interviewee is selected by the good judgment of the researcher so as to get firsthand information on the general and specific objectives of the study, especially, those which cannot be answered by other methods.

1.5. Literature Review

The issue of conscientious objection has been the subject of discussion and comments. There is a considerable amount of literature particularly in the form of articles published in academic journals.

Emily N. Marcus rightly argues that conscientious objection is an emerging human right in the international community. He also asserts that for other recognized human rights in international law to be fully guaranteed, individuals must ensure the right to conscientious objection, preferably through the codification of such a right in international treaty law.

Moreover Matthew Lippman, argued that conscientious objection to aggressive armed conflict, rather than only being conceived of an expression of the individual's right to freedom of conscience, thought and religion, it may be viewed as an affirmation of the fundamental collective human right of all peoples to peace.

Martie-France Major discuss as to the absence of international human right instrument that deal clearly with the scope of the right to conscientious objection. And he addresses some issues surrounding the right to conscientious objection and reasons why so many states are reluctant to recognize the full right of objection.

International human rights organizations like Human Rights Watch and Amnesty International done reports on forced conscription in Ogadan areas of Ethiopia. Amnesty International especially states the absence of selective conscientious objection in Ethiopia.

What makes this research paper different from the above literatures is that it address issues not raised in the above literatures and it specifically pertains to review the Ethiopian laws in light of

the international legal frame work for the right to conscientious objection and the best practice of the states on the right to conscientious objection, which is not addressed in the previous literatures.

1.6. Significance of the study

This research examined and explained the contents of international as well as domestic legal regimes on the right to conscientious objection. In particular it identifies the source and scope of the right to conscientious objections and describe the duration and type of alternative service to military service. Thus it will have significant contribution to different stakeholders. First and for most Ethiopia does not have a detailed legislation on the right to conscientious objection although the Constitution recognized such right implicitly. Then this research will provide basic guidance to the legislature while enacting legislations on the right to conscientious objection. Moreover it will also serve as a guideline for Ministry of Defence when it enforces compulsory military service in Ethiopia. For individual conscientious objectors, it will offer a chance to appreciate the current legal regimes pertaining to the right to conscientious objection. It would also serve as a base for the future research on the right to conscientious objection.

1.7. Scope and Limitation of the Study

The scope of the study is to examine the nature and the scope of the right to conscientious objection to military service in Ethiopia. It is concerned with the analysis of the legal framework for conscientious objection to military service. It does not deal with conscientious objection from the perspective of philosophical, ideological and political grounds. Hence the debate over the conscientious objection to military service is out of the scope of the research.

The research embarks upon a relatively recent issue. There are only few relevant published materials. Reliance is made on electronic sources and even in this case the majority of apparently relevant materials are encrypted-are not freely accessible. This has hindered accommodation of as many diverse views as possible.

Moreover the absence of research on Ethiopian military laws has impeded an in depth investigation of the issue due to information constraints and views on laws.

As per the schedule of the faculty for presenting the draft, the time available for the completion of this study is not more than 3 months. Mean while we are obliged to attend class lecture loads not less than 10 credit hours. As such it was more difficult to come up with a more organized study.

1.8. Structure of the Study

The research paper consists of five chapters. The first chapter deal with introductory matters such as objectives, methodology and literature survey. In the second chapter, the historical background, definition of conscientious objection and international and regional legal framework for conscientious objection are discussed. The third chapter is devoted to the scope of conscientious objection and the experience of some countries. The fourth chapter focuses on analyzing conscientious objection under the Ethiopian legal system. Under the final chapter, which is chapter five, a conclusion is drawn and the way forward is indicated through recommendations.

Chapter Two

2. Historical Development, Definition and International Legal Framework of the Right to Conscientious Objection

2.1. Historical Development of Conscientious Objection

The Government has the power to make peoples fight a war. This is because there is generally accepted principle among countries as to the duty of individual nationals of a country to defend their countries territorial integrity and sovereignty.¹ Hence, conscription is considered as a necessary power of the state in the defense of its territory and political independence. As a result of this power, states have traditionally maintained both the authority to conscript and discretion in the implementation of this power.²

Military service as a fundamental obligation of citizenship dates from early times. Historically, it was often not necessary to serve in military.³ In Roman Empire avoiding military service was not a problem as the legions and other armed forces were largely composed of volunteers.⁴ Military service was regarded as a privilege and all male citizens between the age 17 and 60 served without payment. Some legionaries who converted to Christianity were able to reconcile warfare with their Christianity which is formalized in the just war theory.⁵ This option became more normal after Constantine I who made Christianity an official religion of the Empire. In the eleventh century, there was a further shift of opinion with the Crusades strengthening the idea and acceptability of Holy war.⁶ Objectors to armed conflict became a minority.

Feudalism imposed various forms of military obligation, before and after the crusading movement (which was composed of volunteers).⁷ During this period those who objected to participate in armed conflict were not obliged to go to armed conflict rather they were required to

¹ Encyclopedia of human Rights, 1991 p.240

² Emily N. Marcus, *Conscientious Objection as an Emerging Human Rights*, Vir. Int'l L.J., Vol, 38, 1998, p. 507

³ *Conscientious Objector*, www.newworldencyclopedia.org/entry/Conscientious_objector accessed on 7/4/2011

⁴ Ibid

⁵ Ibid

⁶ Ibid

⁷ *The History of conscientious objection*, <http://nationalpeacemuseum.org/history.html> p.2 accessed on 7/4/2011

pay or to persuade someone else to go in their place.⁸ In medieval time armies were quite small hence the question of unwilling service did not arise until armies became much larger.

As I have tried to mention it in the introductory part, the idea of refusing to kill goes back to the period before the birth of Christ where the Hebrew midwives refused to co-operate with Pharaoh's decree that all new born males should be killed. Conscientious objection to military service has traditionally been closely attached with pacifist religion.⁹ Many religious sects prohibit their followers from engaging in armed conflict. Among pacifist religious sect's members of the Historic Peace Churches such as Quakers, Mennonites, Amish and Church of the Brethren object to armed conflict from the conviction that Christian life is incompatible with military action, because Jesus ordered his followers to love their enemies and to refuse violence.¹⁰ The Seven Day Adventists were also known as non-combatants since the American civil war. Although Jehovah's Witnesses are not pacifists they refuse to participate in Armed conflict alleging that they believe they should be neutral in the worldly conflicts and often cite that the latter portion of Isaiah 2:4 which state that "*....neither shall they learn war anymore.*"

The history of conscientious objection in Europe goes back and is linked with the major religious movements which have left their fingerprint on their history.¹¹ The first European countries to make provisions for conscientious objection were those with protestant tradition.¹² Exemption from compulsory military service was granted in Holland and Britain in 1549 and 1757 respectively. Later on in 1916, however, the British government was forced to military conscription, because it believes voluntary recruitment could not keep pace with the ever-increasing casualties of the First World War. Conscription, with the right of objection, was reintroduced in British from 1939 to 1960.¹³

The protestant countries of continental Northern Europe were the first to incorporate this right into their legislation. For example Norway, Denmark, Sweden, Netherland (provided it in their

⁸ Ibid

⁹ *Conscientious objector Facts, Information...*, <http://www.scn.org/ip/sdmcc/co.htm> . p. 3 accessed on 7/4/2011

¹⁰ Ibid

¹¹ *Conscientious objection: History of Conscientious objection in Europe*, A Peace Pledge Union Project, http://www.ppu.org.uk/learn/infodocs/cos/st_co_eurohistory.html p. 2 Accessed on 3/31/2011

¹² Ibid

¹³ Id p.3

Constitution) and Finland incorporated this right in 1900, 1917, 1920, 1922 and 1931 respectively.¹⁴

In catholic countries of Europe where conscription has never been adopted took half century longer than their protestant counter parts to recognize the right to conscientious objection.¹⁵ France and Luxemburg recognized this right in 1963, Belgium in 1964, Italy in 1972 and Spain in 1976.¹⁶ The difference in time as to recognition of the right to Conscientious objection between catholic and protestant countries of Europe could be explained by the political consequences of different theological perception of the role of the faithful, and therefore of individual citizen. Protestants see themselves as having a direct relationship with God, to whom they are individually and personally responsible, under conscience, for their action. On the other hand in Catholics the church is mediator between God and individual and they take corporate responsibility, by papal decree, concerning moral issues.¹⁷ Hence pope Pius XII proclaimed, in his 1956 Christmas message, that a catholic citizen “cannot invoke his or her own conscience in order to refuse to render the services and perform the duties established by law”.¹⁸ This did not, however, prevent some young catholic from objecting rendering military service.

On the other hand, conscientious objection arising from humanist, socialist, anarchist motive than religion developed in Europe from the early 20th century, particularly on aftermath of the First World War. It found firm stance in 1921 with the establishment of War Resister International. Its founding declaration is “armed conflict is a crime against humanity, we are therefore determined not to support any kind of armed conflict and to work for the abolition of all causes of armed conflict”.

2.2. Definition of the Right to Conscientious Objection

Conscientious objection is an act which aims to safeguard the conscience of the person.¹⁹ According to Walzer;

¹⁴ Ibid

¹⁵ The Right to Conscientious Objection in Europe, <http://www.quaker.org/qcea/coreport/> accessed on 3/31/2011

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Avi Sagi and Ron Shapira, *Civic Disobedience and Conscientious Objection*, 2002, 36 Isr. L. Rev. p. 183

"Conscientious objection is objection to go armed conflict the very word 'conscience' implies a shared moral knowledge, and it is probably fair to argue not only that the individual's understanding of God or the higher law is always acquired within a group but also that his obligation either is at the same time an obligation to the group and to its members----thus conscience can also be described as a form of moral knowledge that we share not with God, but with other men- our fellow citizens..."²⁰

According to this definition, the conscientious objector relies on universal moral principle that have great force than the laws of the state; the objectors believes that he is justified and acts in the name of universal obligation, and not only but a concern for himself or a wish to ensure his own blamelessness. Consequently a conscientious objector relies on principles, which may be generalized, and that apply to all persons who found themselves in a comparable situation.

Rawls and most writers reject the definition of Walzerian. They believe that an act of conscientious objection is one motivated by personal factors, which generally cannot be justified on universal grounds.

An objector refuses to comply with orders which are incompatible with his religion, moral or personal values the purpose of his objection is not to change the order or the law but to preserve his own innocence and moral integrity. Accordingly, the objection is not an act initiated by the individual, but a passive response to the circumstances."²¹

The definition given by Rawls is that conscientious objection to military service is exception to the prima facie duty to obey the law.²² It does not require appealing to the sense of justice of the

²⁰ Michael Walzer, *Obligations: Essays on Disobedience, War and Citizenship*, (Cambridge, Mass., Harvard University Press), 1970 p. 5

²¹ David Heyd, "objection-Political or conscientious(or : Is there a Border between Civic Disobedience and Conscientious Objection)?" in Yishaimenuchin, ed, *Democracy and Obedience* , Jerusalem, Siman Kria, 1990 p. 81-89

²² Hadar Aviram, *Discourse of Disobedience: Law, political Philosophy, and Trials of Conscientious objectors*, 9 J.L. Soc'y 1 2008, p. 10

majority, and does not seek common ground, but entails the premise that one's personal conscience not necessarily political is at odds with the constitutional order.²³

Here the objector does not act in order to bring absolute change in norms or policy, but in order to salvage him and uphold his own values; his action is not necessarily carried out in the public sphere. He does everything possible to evade the norm, which he perceived to be contrary to his personal values. The definition of Rawls is more of inclusive and descriptive of conscientious objection. This is because the motivation of conscientious objector, or their reason could be egocentric in character. Conscientious objectors are attempting to save themselves from a disintegration of their selves, from danger of having to act in ways that are in such deep conflict with everything they believe in- indeed. They take themselves to be that in a sense they cannot service such behavior. Conscientious objectors could also refuse to obey not only out of egocentric reasons but also because of the relevant action could be immoral, or contrary to religion or something of this sort. From legal point of view a conscientious objector is an "individual who claimed the right to refuse to perform military service on the grounds of freedom of thought, conscience or religion."²⁴

2.3. The Right to Conscientious Objection under United Nations Human Rights Instruments

This section deals with standards concerning Conscientious objection which are incorporated in the Charter of United Nations²⁵ and International Bill of Human Rights, comprising the Universal Declaration of Human Rights²⁶ and the International Covenant on Civil and Political Rights (ICCPR)²⁷. It will also deal with the United Nations General Comments and Declarations that have relevance to the right to Conscientious objection.

²³ Id p.15

²⁴ *Conscientious objector Facts, Information...*, <http://www.scn.org/ip/sdmcc/co.htm> p. 3 accessed on 7/4/2011

²⁵ *Charter of United Nation*, Unanimously approved on June 25, 1995, signed June 26, 1945, entered into force Oct.24, 1945,

²⁶ *Universal Declaration of Human Rights*, G.A. Res. 217A, U. N. Doc. A/810(1948)

²⁷ *International Covenant on Civil and political Rights*, Dec. 19, 1966, 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976).

2.3.1. The Right to Conscientious Objection under United Nations Declaration and Charter

The internationalization of human rights is a relatively new phenomenon. It was not as a result of a logical progression in the development and application of natural law or natural rights. Instead it manifested itself in the mid-twentieth century with the birth of United Nations as a response to the inadequacies of a system which relied almost on the municipal law of a sovereign state for the protection of individuals. For instance, it was not in violation of its municipal laws that the Nazi Germany committed terrorism against Jewish rather it is by the authorization of the law. An answer to such experiences was then the emergence of international human rights law which is aimed at ensuring that such violations will not recur in the future.

The first international standard on which the right to conscientious objection to military service can be found is the right to freedom of thought, conscience and religion. In this regard the joint Declaration by United Nations has played a pivotal role in recognizing freedom of religion. At the eve of the establishment of United Nations, United States President Roosevelt set a milestone in the internalization of freedom of religion or belief in his message to seventy-seventh congress on January 6, 1941. He called for 'a world founded upon four essential human freedoms'. Roosevelt identified freedom of religion, which is one of the bases of the right to conscientious objection to military service, among these four freedoms. He offered an immediate vision for defining human rights, including freedom of religion or belief, in the future international instruments.²⁸ Roosevelt's idea was later on incorporated in the joint Declaration by United Nations on January 1, 1942. The signatory governments expressed their Conviction "that complete victory over their enemies is essential to defend life, liberty, independence and religious freedoms, and to preserve human rights and justice in their own lands as well as in other lands."²⁹ This kind of standard setting event in the field of freedom of religion or belief was the indication herald in the development of international standard relating to that freedom in the era following World War II.

²⁸ Bahiyyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection*, Kulwer Law International, Netherlands, 1996 p. 65

²⁹ Id p. 66

The Charter of the United Nations is widely considered the Constitution of the international community and foundation upon which a large body of international human rights law has been built in the post World War II period. This Charter unlike the declaration by the United Nations does not incorporate an explicit reference to freedom of religion or belief. Thus, the Charter's human rights provisions contain at least two obvious sources of defects. Firstly, the expression "*human rights and freedoms*" included in the Charter is neither enumerated nor defined. The wording is very general and vague and there has been no authoritative determination of the full content of the obligation they contain³⁰. Moreover, the Charter does not incorporate a specific mechanism for the supervision of human rights provisions.³¹

However, the preamble and Articles 1, 13, 55, 56, 62, 68, and 76 of Charter contains reference to human rights and fundamental freedoms in general. These Charter's provisions provide a foundation for and an impetus to further improvement in the protection of human rights including freedom of religion or belief and thereby the right to conscientious objection.

2.3.2. The Right to Conscientious Objection under the Universal Declaration of Human Rights

As I have indicated herein above the UN Charter has neither catalogued nor defined the rights to which it referred. Hence, the Economic and Social Council (ECOSOC), which is charged with the promotion of respect for, and observance of, human rights established a Commission on Human Rights and instructed it to submit proposals, recommendations and reports regarding an International Bill of Human Rights.

The Universal Declaration of Human Rights (UDHR) in 1947 worked on by the Commission under the Chairpersonship of Eleanor Roosevelt. The General Assembly of United Nations adopted it in its third session on December 10, 1948. The UDHR which sets out 30 articles the basic rights and freedoms for all peoples, covering civil, political, economic, social and cultural rights. The UDHR is, therefore, the cornerstone of the United Nations activity which catalogued the rights referred by the United Nations Charter. Among civil and political rights covered by this document one can cite liberty and security of a person (article 3), equality before the law

³⁰ Id p. 68

³¹ Id p. 69

(article 7), effective remedies (article 8), due process (article 9 and 10), freedom of thought, conscience and religion (article 18) etc. And economic, social and cultural rights included in the UDHR are right to work and equal pay (article 23), the right to social security (article 22) and the right to education (article 26).

The preamble and article 1, 2, 16, 18, and 26 of the UDHR incorporates provisions that directly concern freedom of religion. While the right to conscientious objection is not explicitly protected within UDHR, 'the right to refuse military service is mostly often characterized as inherent in the concept of freedom of thought, conscience and religion' and this freedom is recognized under UDHR.³² Article 18 of the UDHR specifically pertains to freedom of thought, conscience and religion. It reads as follows:

*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private , to manifest his religion and belief in teaching , practice, worship and observance.*³³

This article consists of two parts. The first part guarantees everyone's right to freedom of thought, conscience and religion. The second part of article 18 gives a two-pronged definition of the right to freedom of thought, conscience and religion that provide a framework of protection for individual conscience- the internal source of the right, the *forum internum*, and the external manifestation of the right, the *forum externum*. The first prong makes reference to "freedom to change his religion or belief" which concerns the internal sphere, *forum internum*, of the right to freedom of thought, conscience and religion. For the *forum internum*, the importance lies in recognizing one's entitlement to develop and harbour a religion or conscientious belief, with a focus on upholding a person's internal, mental, framework that shapes and forms the conscience. The second point mentions "freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance" which is external sphere of that right, the *forum externum*. For the external aspect, the *forum externum*,

³² Supra Note 2 p. 514

³³ Article 18 of UDHR

what is important is the exercise of freedom of religion or conscience.³⁴ It centers on the claim aspect of the right because it entails manifesting or applying one's religion or beliefs.³⁵ Military conscientious objection is a typical example of exercising the forum externum right to freedom of religion or conscience.³⁶ This is because a military conscientious objector is asserting his religion or a conscientious belief, such as against bearing of arms, whereby the requested action by the state, participating in the military, entails a direct conflict with his religion or belief. Hence the right to military conscientious objection is considered as extension of the right to freedom of religion or conscience.

The rights and freedoms incorporated in the UDHR including the right to freedom of thought, conscience and religion are subject to the general limitation allowed by article 29 and 30. Article 29; paragraph 2 permits only those 'limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and general welfare in democratic society'.³⁷ Some states argue that this pertinent provision impose limitation on the freedom of manifestation of freedom of religion and conscience and thereby the right to conscientious objection.³⁸ They base their argument that the word '*necessary for public order and general welfare in a democratic society*' permits states to make conscientious objection during time of armed conflict a threat to general welfare, or mass conscientious objection a disruption to public order.³⁹

2.3.3. The Right to Conscientious Objection under the ICCPR

Article 18 of the ICCPR guarantees the right to freedom of religion or belief, but makes no explicit mention to conscientious objection to military service as being encompassed by the right to freedom of conscience and religion. This leads some states to argue that it is not protected by this pertinent provision⁴⁰. The question then becomes whether there is a base for claiming

³⁴ Leonard M. Hammer, *The International Human Right to Freedom of Conscience: Some Suggestions for its Development and Application*, Dartmouth Publishing Company, England, 2001 p. 84

³⁵ Ibid

³⁶ Id p. 187

³⁷ Article 29 of UDHR

³⁸ *Conscientious objector Facts, Information...*, <http://www.scn.org/ip/sdmcc/co.htm> p. 3 accessed on 7/4/2011

³⁹ Ibid

⁴⁰ Rachel Brett, *International Standards on Conscientious Objection to Military Service*, Quaker United Nations Office, Human Rights and Refuge Publication, 2008, p. 1

exemption to military on the ground that article 18 protected freedom of conscience and religion. Article 18(1) of ICCPR specifies that:

*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*⁴¹

A traditional interpretation of this provision is that the ICCPR does not embrace the right to conscientious objection.⁴² This interpretation is bolstered by the history of the negotiation (travaux préparatoires) of the ICCPR as well as article 8(3) (c) of the ICCPR. During the debate on the adoption of article 18, the Philippines delegate proposed an additional paragraph to the Convention which states that "Persons who conscientiously object to armed conflict as being contrary to their religion shall be exempted from military service."⁴³ Several state delegates encouraged the withdrawal with some countries arguing that ICCPR already protected a right to conscientious objection and any additional amendment would be gratuitous.⁴⁴ Others, on the other hand, object to amendment because of the difficulty of reaching consensus on the definition and the scope of a right to conscientious objection.⁴⁵

Another obstacle was the fact that article 8 paragraphs 3(c) of the Convention provides that forced or compulsory labor⁴⁶ "shall not include any service of a military character and *in countries where conscientious objection is recognized*, any national service required by the law of conscientious objectors." It seems that this article, accept the idea that individual countries have discretion to decide whether or not they will grant a right of conscientious objection because it states that "*where conscientious objection is recognized.*"⁴⁷

⁴¹ Article 18(1) of ICCPR

⁴² Supra Note 2, p. 515

⁴³ Marie-France Major, *Conscientious Objection and International Law: A Human Rights?* 24 Case W. Res. J. INT'L L. 349, 350(1992) p.357

⁴⁴ Matthew Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Rights*, 21 Cal. W. Int'l L.J. 31 1991 p. 44-45

⁴⁵ Id p. 45

⁴⁶ Supra Note 43

⁴⁷ Id 358

The decision of the United Nations Human Rights Committee was also in line with the argument that ICCPR does not recognize the right to conscientious objection on the cases L.T.K v Finland. A Finnish citizen who claimed that Finland had breached article 18 and 19 of ICCPR by refusing to recognize his status as the conscientious objector and by subjecting him to criminal prosecution because of his refusal to perform military service.⁴⁸ The Committee noted that the complainant “was not prosecuted and sentenced because of his beliefs or opinion as such, but because he refused to perform military service.” It then concluded that:

*The Covenant does not provide for the right to conscientious objection, neither article 18 nor article 19 of the covenant, especially taking into account paragraph 3(c) (ii) of article 8, can be construed as to imply that right.*⁴⁹

Hence, the communication was rejected by the Committee on the ground that it was inadmissible.⁵⁰ Therefore, we can understand from the withdrawal of proposed amendment to ICCPR and the Human Rights Committee decision, ICCPR did not at its inception protect the right to conscientious objection.⁵¹

However, nowadays a recent and well – established trend among the international community is to interpret article 18 of the ICCPR as incorporating a right to conscientious objection. The United Nations Human Rights Committee after discussion for several years has come to the same interpretation. In its 1993 General Comment No. 22 on article 18 of the ICCPR (the right to freedom of thought, conscience and religion), the Human Right Committee stated that “the Covenant does not explicitly refer to a right to conscientious objection, but the committee believes that such a right can be derived from article 18, in as much as the obligation to use lethal forces may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief.”⁵²

The Human Rights Committee make it clear that conscientious objection to military service is protected under the right to freedom of thought, conscience and religion and stated so in its

⁴⁸L.T.K. v. Finland, Comm. No. 185/1984, Report of the Human Rights Committee, U.N. GAOR, 14th Sesss.

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Supra Note 44 p. 45

⁵² U.N. Hum. Rts. Comm., General Comment 22(48) (art. 18)

views on individual communications, in its general comments and concluding observations.⁵³ The Committee then rejected the position of states who claimed that article 18 of the ICCPR does not embrace the right to conscientious objection since it does not make explicit reference to the right.

Hence the Committee definitely laid to rest suggestions that conscientious objection is not recognized in the covenant either because it was not included specifically (an argument it had already addressed in its General Comment 22 on article 18 of ICCPR) or because of the reference to conscientious objection which is included in article 8. Article 8, as I tried to indicate, concerns the prohibition of forced labor; its paragraph 3 states that for the purpose of this article, the term forced or compulsory labor does not include “*any service of a military character and, in countries where conscientious objection is recognized any national service required by law of conscientious objectors*”.

The Committee stated “article 8 of the covenant itself neither recognize nor excludes a right of conscientious objection”.⁵⁴ Thus, the right to conscientious objection is to be assessed solely in the light of article 18 of the covenant. In saying so, the Committee makes an important clarification by changing its position it had held in its early case decision (*L.T.K. v Finland* (Case No. 185/1984). While ruling out the case at preliminary stage, the Committee had suggested that the wording of article 8 preclude a requirement on all states to provide for conscientious objection to military service.⁵⁵

Moreover the Human Rights Committee has addressed the issue of conscientious objection in its many of concluding observations on state reports, and in its cases, most significantly in the case of *Yeo-Bum Yoon and Myung- Jin Chori v Republic of Korea*. In this case, the Committee identified conscientious objection to military service as protected form of manifestation of religious beliefs with in article 18(1) of the Covenant and held that the Republic of Korea had violated article 18, by not providing for conscientious objection to military service for these two Jehovah’s Wittiness.⁵⁶

⁵³ Supra Note 40

⁵⁴ Id p. 2

⁵⁵ Ibid

⁵⁶ *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea* (CCPR/C/88/D/1321-1322/2004 of 23 January 2007)

In addition, the UN Commission on Human Rights has passed several resolutions recognizing a right to conscientious objection. In its resolution of 1989, 1993 and 1995, the Commission based the right to conscientious objection upon article 18 of UDHR and article 18 of the ICCPR.⁵⁷ Both of these articles guarantee the right to freedom of thought, conscience and religion. The working group on Arbitrary Detention and the Special Rapporteur on freedom of religion and belief of the UN Human Rights Council has also addressed the issue of conscientious objection⁵⁸.

Coming to the provisions of ICCPR, Article 18(2) of ICCPR specifies that freedom of an individual to have or adopt a religion or belief of his choice may not be restricted⁵⁹, it specifies that freedom of an individual to manifest his religion or belief “may be subjected only to such limitations as they are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental human rights and freedoms of others”⁶⁰. Hence, an individual’s right to adopt a religion or belief of his choice is non – derogable, but his right to manifest that religion or belief is derogable by the domestic laws for the above stated purpose

With regard to the restrictions on the right to manifest one’s religion and conscience the Committee however made clear that such restrictions must not impair the very essence of the right in question.⁶¹ Consequently, these possible limitations cannot excuse making no provision for conscientious objection to military service.⁶²

The Committee’s ultimate conclusion is that the right to conscientious objection can be derived from the rights guaranteed in article 18 of the ICCPR. This line of interpretation is also supported by comments of the United Nations Secretary – General in his report on the states of conscientious objection in international law, that the Committee “expressed the view that a right to conscientious objection could be derived from article 18”.

⁵⁷ See *Conscientious Objection to Military Service*, Hum. Rts. Comm. Res. 1995/83, U.N. ESCOR, 51st Sess., 62d mtg at 1, U.N. Doc. E/CN.4/1995/176; *Conscientious Objection to Military Service*, Hum. Rts. Com. Res. 1993/84, U.N. ESCOR, 49th Sess., 67th mtg. at 1, U.N. Doc. E/CN.4/1993/122; *Conscientious Objection to Military Service*, Hum. Rts. Comm. Res. 1989/59, U.N. ESCOR, 45th Sess., 55th mtg. at 1 U.N. Doc. E/CN.4/1989/59

⁵⁸ Supra Note 40 p. 2

⁵⁹ Id Article 18(2)

⁶⁰ Id Article 18(3)

⁶¹ Supra Note 40 p. 2

⁶² Ibid

The implication of the above paragraphs is that the primary reason to exempt conscientious objector from military service is to protect individual's freedom of religion and conscience. In other words one of the reason for acknowledging conscientious objection is to give due deference to the right to conscience.⁶³ Conscience has been defined as a "moral judgment that prohibits the violation of previously recognized ethical principles"⁶⁴. In the case *Grounda v minster of state for Labour and National Service*, conscientious beliefs have been articulated as "an individual's inward conviction of what is morally right and morally wrong, and it is conviction that is genuinely reached and held after some process of thinking about the subject"⁶⁵. A right of conscience likewise implies the acceptance of conscientious objection.⁶⁶ Without the capacity to satisfy one's convictions, the right to conscience is particularly worthless. The metaphysical satisfaction obtained from merely possessing a strong belief does have independent value.⁶⁷ However, if that is all a right of conscience protects, the right is without substance. Governments have no way of knowing, much less controlling, and individual's mental processes and corresponding feelings.⁶⁸ As such, it should be axiomatic that the freedom of conscience safeguards accompanying manifestation of conduct. The language in article 18 of ICCPR and UDHR specifically preserves the observance and practice of beliefs. Hence the right to conscientious objection is important to protect personal convictions and the right to manifest one's belief.

The preservation of religious freedom is also another additional and closely related reason for the protection of the right to conscientious objection.⁶⁹ Refusal to accept military duty, based on religious principles, is an important decision among the hierarchy of religious beliefs. The right to manifest one's religion as one dimension of freedom of religion is also recognized under international human right instruments. Then if individuals are asked to commit acts which are contrary to the dictates of their conscience/religion then it will be in contrivance with the right to freedom of religion and conscience. Conscription compels affirmative acts in contravention of

⁶³ Russell Wolf, *Conscientious Objection: Time for Recognition As a Fundamental Human Rights*, 6 ASSLS Int'l L.J, 1982 p. 67

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Id p. 82

⁶⁸ Ibid

⁶⁹ Id p. 68

religious proscriptions.⁷⁰ The recognition of conscientious objection seeks to ameliorate this violation of the right to act in conformance with religious precepts.⁷¹

2.3.4. The Right to Conscientious Objection under UN Resolutions and Declarations

It was during the second half of the 20th century that the issue of conscientious objection to military service was discussed in the United Nations. As early as 1950 the secretary General of the United Nations circulated a statement that documented the legislative and administrative provisions of thirty-four countries regarding conscientious objection.⁷² However it was only in 1956 that the issue was given attention by the UN in the Study of Discrimination in the Matters of Religious Rights and Practice.⁷³ The study concluded that:

*As a rule it may be stated that where the principle of conscientious objection to military service is recognized, exemption should be granted in genuine objector in a manner ensuring that no adverse distinction based upon religion or belief may result.*⁷⁴

As of 1960, the Sub- Commission on the Promotion and Protection of Human Rights, examined the issue of the right to conscientious objection and affirmed the right to conscientious objection to military service in the context of freedom and non-discrimination in the matter of religious rights and practices.⁷⁵

In 1965, the General Assembly adopted the Declaration on the Promotion Among Youth of the Ideas of Peace, Mutual Respect and Understanding Between Peoples.⁷⁶ Principle one of the Declaration states:

⁷⁰ Hochstadt, *The Right to Exemption from Military Service of a Conscientious Objector to a Particular War*, 3 HARV. C.R.C.L.L. REV., 1967, p. 20 (, and W.G KELLOG, *The Conscientious objector*, 1970, p. 119

⁷¹ Ibid

⁷² Supra Note 43 p. 371

⁷³ Arcott Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practice*, U.N. Doc. E/CN.4/Sub.2/200/Rev. 1(1960), reprinted in 11 N.Y.U>j. INT'L L.7& PoL. 227(1978). 258-259,

⁷⁴ Id p. 259

⁷⁵ Rachel Taylor and Kasperion Larsen, *Reference to Conscientious Objection in the Documents Submitted to, and resolution of, the UN Commission on Human Rights, 60th session*, Quaker United Nations Office, Geneva, 2004, p.7

⁷⁶ G.A.Res.2037, U.N.GAOR, 20th Sess., Supp. No. 14; at 40, U.N.Doc. A/6014(1965).

*Young people shall be brought up in the spirit of peace, justice, freedom, mutual respect and understanding in order to promote equal rights for all human beings and all nations, economic and social progress, discrimination and maintenance of international peace, and security.*⁷⁷

Although this Declaration did not specifically address the issue of conscientious objection, it establishes the notion that individuals must be brought up in the society that respects peace and personal conscience.⁷⁸ The Commission on Human Rights truly considered and debated the issue of conscientious objection to military service only at its 27th session in 1971.⁷⁹ This was done in the context of the Commission agenda item entitled “the Study of the Question of the education of Young People all over the World for the Development of its respect for the Rights of Man and Fundamental Freedoms”⁸⁰. There was a general agreement as to the duty of the individual citizen to contribute to his country’s response to treaty obligations arising, for example, under the United Nations Charter or other treaties of collective or mutual defence against aggression.⁸¹ Differences of opinion, however, arose concerning the possibility of permitting exceptions to bearing arms for active military service on grounds of conscientious objection, religious belief or moral conviction.⁸²

The next step in the debate over the right to consciously object to military service occurred in General Assembly. The Assembly first recognized restricted right to conscientious objection in a resolution which affirmed the right of all persons to refuse service in military or police forces which are used to enforce apartheid.⁸³ It called member states to grant asylum or safe transfer to another states, in the spirit of the Declaration on Territorial Asylum, to person compelled to live their country of nationality because of a conscientious objection to assisting enforcement of apartheid through service in the military or police force.⁸⁴ It urged member states to consider granting such persons all the rights and benefits accorded to refugees under existing legal

⁷⁷ Id Principle 1

⁷⁸ Supra Note 43 p. 371

⁷⁹ Id p. 372

⁸⁰ Ibid

⁸¹ UN Doc E/4949, E/CN.4/1068, 48 [202]

⁸² Ibid

⁸³ G.A.Res.33/65, U.N.GABOR, 33rd Sesse/Supp.No.45, at 154, U.N.Doc. A/33/45(1978).

⁸⁴ Ibid

instruments and it called upon the appropriate United Nation bodies to provide the necessary assistance to such persons.⁸⁵

Then in 1980, the United Nation Human Right Commission requested the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to prepare a report on the question of conscience objection to military service.⁸⁶ The Sub-Commission appointed two special Rapporturs who after a thorough study of matters made a serious of recommendations to the Commission in 1984.⁸⁷ The report in article 1 state ,inter alia, that states should recognize by law (a), the right of persons who, for reason of profound religious, ethical, moral, humanitarian or similar conviction, refuse to perform armed service and , at a minimum, should extend the right of objection to persons whose conscience forbids them to take part in armed service under any circumstance; and (b), the right to be relived from service in armed forces which the objector considers likely to be used to enforce apartheid, in action amounting to genocide and for illegal occupation of foreign territory; states should recognize the right of persons to be released from service in armed forces which the objector holds in gross violation of human rights; states should recognize the right of persons to be released from the obligation to perform service in armed forces which the objector considers likely to use weapons of mass destruction or other weapons outlawed by international law which cause unnecessary suffering.⁸⁸

This report was followed in 1987 and 1989 with two resolutions by the Commissioner on Human Rights. In resolution 1987/46⁸⁹ and 1989/59⁹⁰ the Commission recognizes the rights of conscientious objection. In its 1987 resolution the Commission appealed states to recognize that conscientious objection to military service should be considered a legitimate exercise of the right to freedom of thought, conscience and religion recognized in the UDHR and ICCPR.⁹¹ The Commission on Human Rights acknowledged however that military conscientious objection

⁸⁵ Ibid

⁸⁶ E.S.C.Ress.40 (XXXVII), 37 U.N. ESCOR SUPP, (No.5) at 243, U.N.Doc. E/1981/25;E/CN.4/1475(1981)

⁸⁷ Asjorn Eide and Chama Mubanga-Chipoya, Conscientious Objection to Military Service, U.N. ESCOR, Sub-Comm. On the Prevention of Discrimination and Protection of Minorities, at 4, U.N.Doc. E/CN.4/Sub.2/1983/30/Rev. 1(1984)

⁸⁸ Ibid

⁸⁹ Human Rights Commission Resolution 1987/46, U.N. ESCOR, HUM. RTS. Comm., 43rd Sess; SUPP. No. 5, at 108-109, U.N.Doc. E/CN.4/1987/60 (1987).

⁹⁰ Human Rights Commission Resolution 1989 /59 Draft Report of the United Nation Commission on Human Rights, U.N.Doc. e/CN.4/1989/1/10/Add.15(1989)

⁹¹ Hum.Res.Com.Ress 1987/46, Supra note 70

derives from reason of conscience and profound convictions based on religious, ethical, moral, or similar motives.⁹² On the other hand in 1989/59 resolution the right to conscientious objection was recognized by the Commission in which the Commission appealed to states to enact legislations aimed at exemption from military service on the bases of genuinely held conscientious objection.⁹³ The main difference between the 1987 and 1989 resolution is that while in 1987 the Commission appealed to member states to recognize the right to conscientious objection, in the latter resolution the Commission for the first time itself recognized the right to conscientious objection to military service. Arguably, the subsequent recognition as opposed to the previous appeal strengthened the normative quality of this Resolution.⁹⁴ The grounds of conscientious objection in 1989 resolution were reason of conscience arising from 'religious or similar motives' and then ethical or moral grounds were not mentioned.

Moreover in resolution 1993/84 the Commission reminded states with a system of compulsory military service of its recommendation that they introduce various forms of alternative service for conscientious objectors and emphasized that such forms of alternative service should be of non-combatant civilian character in the public interest and not of punitive nature.⁹⁵ The grounds for conscientious objection are stated in the preamble which included ethical as well as religious motives although no reference was made to moral motives. By the same token in a resolution 1995/83, the Commission drew attention to "the right of every one to have conscientious objections to military service as legitimate exercise of the right to freedom of thought, conscience and religion, as led down in article 18 of both the UDHR and ICCPR"⁹⁶.

Much progress was made compared to Resolution 1993/84. The first aspect of progress is the reference in the ninth preambular paragraph to General Comment No. 22(48) of the Human Rights Committee on article 18 of the International Covenant on Civil and Political Rights.⁹⁷ General Comment No. 22(48) is of significance because thereby the Committee of Human

⁹² Id Preamble

⁹³ Hum.Res.Com.Res., 1989/59 Supra note 71

⁹⁴ Van Bueren G The international law on the rights of the child. Martinus Nijhoff Publishers, The Hague, 1995, p. 154

⁹⁵ UN Commission on Human Rights, Res 1993/84 [6].

⁹⁶ UN Commission on Human Rights, UN Doc E/CN.4/ 1995/176, Chap. XXVI, adopted without a vote (8 March 1995).

⁹⁷ UN Commission on Human Rights, 51st Session, Summary Record of the 62nd Meeting (15 March 1995) UN Doc E/CN.4/1995/S.62, 4 [13].

Rights clearly recognized that the right to conscientious objection to perform military service can be derived from article 18. The second is that in the penultimate preambular paragraph, humanitarian motives were added to the list of those that formed the basis for conscientious objection.⁹⁸ The third is that in paragraph 2 the words 'compulsory military service', which had been used in previous Resolutions, was amended to read simply 'military service'.⁹⁹ This change is significant, because while it was recognized that persons who were performing their military service on a compulsory basis should not be excluded from the right to conscientious objection, it should be recognized that persons who served in the military on a voluntary basis had the same right.¹⁰⁰ At paragraph 11, the decision was made to change the title of the agenda item, 'The role of youth in the promotion and protection of human rights, including the question of conscientious objection to military service', to a new one, 'The question of conscientious objection to military service'. This change corresponded to the sponsors' belief that 'the Resolution's focus had always been predominantly on conscientious objection rather than the role of youth in the promotion and protection of human rights'.¹⁰¹ The fourth aspect of progress is a reference to article 14 of the Universal Declaration of Human Rights with regard to asylum, which is to serve as a basis for military conscientious objectors facing persecution.¹⁰² The fifth is paragraph 4 which was newly added to urge States not to differentiate in their treatment of military conscientious objectors who maintain different forms of beliefs¹⁰³. The sixth aspect of progress is paragraph 7 where the drafters incorporated an emerging practice among some States that the military conscientious objector's claim is accepted as 'valid without inquiry' by those governments.¹⁰⁴

In resolution 1998/77, the Commission recalling its previous resolutions in which it recognize the right of every one to have conscientious objection to military service as legitimate exercise of the right to freedom of thought, conscience and religion and aware that persons performing

⁹⁸ UN Commission on Human Rights, 51st Session, Summary Record of the 62nd Meeting (15 March 1995) UN Doc E/CN.4/1995/S.62, 4 [14].

⁹⁹ UN Commission on Human Rights, 51st Session, Summary Record of the 62nd Meeting (15 March 1995) UN Doc E/CN.4/1995/S.62, 4 [15].

¹⁰⁰ Ibid

¹⁰¹ UN Commission on Human Rights, 51st Session, Summary Record of the 62nd Meeting (15 March 1995) UN Doc E/CN.4/1995/S.62, 4 [16].

¹⁰² For the last preambular paragraph of Resolution 1995/83,

¹⁰³ Ibid

¹⁰⁴ Ibid

military service may develop conscientious objection drew attention to the right of every one to have conscientious objections to military service as “a legitimate exercise of the right to freedom of thought, conscience and religion”.¹⁰⁵ It called upon states to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held, taking into account of the requirement not to discriminate. In resolution 2000¹⁰⁶, the Commission further entrenched the conclusion that the right to freedom of religion and conscience serve as the basis for military conscientious objection. Resolution 2000/34 is a shorter Resolution, with only three preambular paragraphs and two operating paragraphs so that its objectives must be mainly to recall the contents of Resolution 1998/77 and to encourage States to comply with the Resolution’s purpose.

2.4. Conscientious Objection as Corollary to other Fundamental Rights

As I have stated earlier the emerging trend is towards international recognition of conscientious objection to military service as a fundamental human rights. Although the right to conscientious objection has never been explicitly recognized in international human rights treaty instruments, the Human Rights Commission (now the HR Council) as well as commentators has consistently maintained that it is implicit in the existing human rights treaties. While the emerging consensus is that the right can be derived from the right to freedom of thought, conscience and religion contained in the UDHR and ICCPR, support for internationally recognized human rights to conscientious objection may gain legitimacy from other human rights recognized in the international treaties.¹⁰⁷ It has also been maintained that the right to conscientious objection is corollary of the universally recognized right to life, right to liberty, freedom of expression and the right to peace.

Another right that implicates a right to conscientious objection is the right to life.¹⁰⁸ It is recognized in many international human rights instruments and considered the most fundamental human rights. The right to life as it is recognized in ICCPR may not be derogated even in times of national emergency. State parties to these documents concluded that the right to life is so

¹⁰⁵ UN Commission on Human Rights 54th Session, Summary Record of the 58th Meeting (27 April 1998), UN Doc E/CN.4/1998/SR.58, 11 [54].

¹⁰⁶ E/CN.4/RES/2000/34

¹⁰⁷ Supra note 2 p. 517

¹⁰⁸ Id p. 518

fundamental that neither state sovereignty nor national welfare concerns may preempt it. Although the right to life is so fundamental, it is not absolute right. Life can be taken from an individual so long as the individual is not “arbitrarily deprived of his life.”

The internationally accepted principle that no individual may be arbitrarily deprived of his or her life has been interpreted to include the right to conscientious objection.¹⁰⁹ The logical extension of an inherent right to life is an inherent right “not to take life”.¹¹⁰ Recognizing the primacy of preserving human life, it is blatantly contradictory to compel persons to kill other human beings. The language does not suggest that life is less valuable in some situations, or that individuals must willingly respond to orders to kill in violation of this proscription.¹¹¹ Moreover the violation of the sanctity of life which is the most fundamental of human value is irreversible. Although the right to be free from taking another life is not explicitly protected in international treaties under the general right to life, it may be understood as being subsumed under that general right¹¹². As one scholar has explained, “If international laws and international custom forbid individuals from engaging in arbitrary killing, conscientious objectors should not be punished for refusing to kill”.¹¹³

The right to liberty which is enunciated in numerous human rights documents also lends credence to right to conscientious objection. Article 19 of ICCPR relates particularly with detentions and arrest of individuals. Its significance is primarily in establishing the procedures to protect the right to liberty, rather than establishing an absolute right to liberty, which explains the minimal attention about conscientious objection. That is to mean conscientious objectors should not be deprived their liberty without due reference to the law. However, the right to liberty is not always interpreted narrowly, and was articulated in the aforementioned resolutions by the Commission on Human Rights as a basis for a right to conscientious objection.¹¹⁴

Article 19 of ICCPR also fosters an argument for conscientious objection, especially when assessed in conjunction with article 18. The key phrase is the “right to freedom of expression”.

¹⁰⁹ Supra Not 44 p. 44

¹¹⁰ Supra Not 63 p. 82

¹¹¹ Ibid

¹¹² Supra Note 44 p. 44

¹¹³ Supra Note 2 p. 519

¹¹⁴ Commission on Human Rights Resolution 1989/59, supra Note 14, at preamble; Commission on Human Rights Resolution 1993/84

The same basic analysis that has been presented for recognizing a right to conscientious objection through protections of religion and conscience can be articulated. If individuals only have freedom of expression, a right to freedom of expression loses its impact when it cannot be accompanied with complimentary behavior.¹¹⁵ As one author has explained:

*When objections are based exclusively on the objector's reasoning powers as applied to the facts, speech is sufficient to express these objections since persuasion and rational argument are at the crux of the objection. However, when objections are raised on deep-seated moral grounds going to the essence of a man's...belief, mere speech will not suffice. Complete expression of a deeply felt moral position cannot by its nature, stop with the verbal, for an essential aspect...is that it be acted upon-lived.*¹¹⁶

Thus, it is action, beyond mere vocal expression, that gives meaning to this freedom. Hence the right to freedom of expression helps conscientious objectors to act in accordance with their conscience.

In addition to aforementioned rights, it has been argued that the right to conscientious objection falls within the right to peace. The Declaration on the Preparation of Societies for Life in Peace holds that every nation and each individual has the "inherent right to life, in peace". Moreover, the Declaration on the Right of Peoples to Peace speaks of the obligation of states in the international arena to promote the "right of peoples to peace".¹¹⁷ Some scholars argue that the right to peace is one of fundamental collective human rights.¹¹⁸ Mathew Lipmann argued/contends that the right to conscientious objection originates not only from the individual's right of freedom of conscience, religion and thought, but also "an affirmation of the

¹¹⁵ Supra Note 63 p. 86

¹¹⁶ Hochstadt, The Right to Exemption from Military Service of a Conscientious Objector to a Particular War, 3 Harv. C.R.C.L.L. Rev. 1, 1967, 30-31

¹¹⁷ Declaration on the Rights of people to peace, G.A.Res.39/11, 39 U.N. GAOR, Supp. No51 at 2, U.N.Doc. A/39/51 (1985)

¹¹⁸ Ved Nanda, Nuclear Weapons and the Right to Peace under International Law, 9 BROK. J. INT'L, 283, 299(1983)

fundamental collective human rights of all peoples to peace”.¹¹⁹ He argued that the right to collective peace has effectively denied states the power to conscript unwilling citizens.¹²⁰

2.5. The Right to Conscientious Objection under Customary International Law

Customary international law which functions as primary source of international law has two-pronged part. The first element is state “patterns of practice or behavior” while the second is opinion juris”.

The proportion of states that recognize some form of conscientious objection is so great that the customary human rights law may be satisfied with less unanimity in state practice than is generally required for customary international non-human rights law.¹²¹ Hence the state practice prong of customary international law may be satisfied.

With regard to the second prong, human rights norms embodied in the international treaties and agreements are increasingly viewed by scholars and actors in the international community as customary international law. Many scholars argued that many of norms found in the UDHR and the ICCPR are now part of customary international law.¹²² This line of argument was adopted by the United Nations Human Right Committee in its 1994 General Comment No. 24 to the ICCPR, which stated that states practices to the ICCPR may not make reservations to those provisions that represent customary international law and indicated those rights which fall within the rubric of customary international human rights law.¹²³ The rights to freedom of thought, conscience and religion which implicate a right to conscientious objections are included in the list of customary international human rights law.

The United Nations Secretary-General Committee comments bolster the conclusion that the second prong of customary international human rights law has been satisfied in the case of conscientious objection as emerging from the rights of freedom of conscience, thought and religion:

¹¹⁹ Supra Note 44 p. 58-64

¹²⁰ Id p. 65

¹²¹ Supra Note 2 p. 524

¹²² Ibid

¹²³ Hum. Rts. Comm., General Comment No. 24 (52), U.N. Doc. CCPR/C/21/Rev.

A number of governments considered that the Commission on Human Rights had introduced the concept of conscientious objection to military service, and reported that they had recognized the right to conscientious objection in their legislation and practice. Some states have agreed to introduce and are enacting laws providing for forms of alternative service which are compatible with the reasons for conscientious objection... ..These states have confirmed thus that the right to refuse military service for reasons of conscience is inherent in the concept of freedom of thought, conscience and religion as laid down in article 18 of the Universal Declaration of Human Rights. This freedom is also set forth in the ICCPR (art 18).¹²⁴

Hence domestic recognition of a right to conscientious objection is an indication of the state's belief that they have a legal obligation under international law to provide for a right to conscientious objection based on religion or belief as defined in international human rights documents and treaties. Consequently this belief may satisfy the second prong of the customary human rights law.

2.6. Conscientious Objection in Regional Human Rights Instruments

Article 9 of the European Convention on Human Rights protects the right to freedom of thought, conscience and religion. This freedom may be subject only to such limitations that are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. The European Commission of Human Rights however has declined to find violation of article 9 in regard to conscientious objection.¹²⁵ Although article 9 seems to be the most obvious article to deal with conscientious objection, the Commission has instead addressed conscientious objection through article 4 which talk about forced labour.¹²⁶ The Commission objection cases by interpreting article 4, in effect, to supersede article 9.

¹²⁴ The Question of Conscientious Objection to Military Service: Report of the Secretary-General prepared pursuant to the Commission resolution 1995/83, U.N. ESCOR, 53rd Sess., Provisional Agenda Item 23 at 49, U.N. Doc. E/CN.4/1997/99 p. 48-49

¹²⁵ Christopher Decker and Lucia Fresa, The Status of Conscientious Objection under Article 4 of the European Convention on Human Rights, 33 N.Y.U.J. Int'l. & Pol. 379, 2000-2001

¹²⁶ Ibid

Unlike the Human Right Commission, the Parliamentary Assembly of the Council of Europe adopted its first resolutions 337 and 478 supporting the right of conscientious objection in 1967. This was followed in 1977 with recommendation 816 affirming the right of conscientious objection. In May 2001, the Parliamentary Assembly, in a similar recommendation, noted that “the exercise of the right of conscientious objection to military service has been an ongoing concern of the Council of Europe for over thirty years”.¹²⁷

The Committee of Ministers of the Council of Europe, in 1987, endorsed the right of conscientious objectors to be released from military service and supported the provision of alternative service and invited member States to bring their legislation and practice line with the right to conscientious objection.¹²⁸ The recommendation to member states sets down minimum basic principles for the implementation of this right. For example, relevant due process protections need to be provided to applicants, including the right to be informed in advance of their rights. It also stated that applications can be made during military service and during military training after the initial service. Moreover, “alternative service shall not be of a punitive nature. Its duration shall, in comparison to that of military service, remain within reasonable limits”.¹²⁹ In March 2002, the Committee of Ministers urged a “sustained effort” to implement the 1987 recommendation.¹³⁰

A number of resolutions on the right to conscientious objection as implied in the right to freedom of thought, conscience and religion have been adopted by the European Parliament. Since the first resolution on the issue, adopted in 1983, in which the Parliament noted “that protection of freedom of conscience implies the right to refuse to carry out armed military service and to withdraw from such service on grounds of conscience” (para. 2). The Parliament also pointed out that “no court or commission can penetrate the conscience of an individual and that a declaration

¹²⁷ Parliamentary Assembly of the Council of Europe, Recommendation 1518 (23 May 2001)

¹²⁸ Committee of Ministers of the Council of Europe, Recommendation No. R (87)8 of 9 April 1987 regarding Conscientious Objection to Co Ibid., at para. 10.

¹²⁹ Decision on the reply from the Committee of Ministers adopted at the 785th meeting of the Ministers’ Deputies (26-27 February 2002), doc. 9379, 1 March 2002.

¹³⁰ European Parliament resolution of 7 February 1983 on conscientious objection. See also European Parliament resolution of 13 October 1989 on conscientious objection and alternative civilian service

setting out the individual's motives must therefore suffice in the vast majority of cases to secure the status of conscientious objector"(para. 3)¹³¹

On 7 December 2000, the Charter of Fundamental Rights of the European Union entered into force. Article 10 (2) of the Charter recognizes the right of conscientious objection as being explicitly part of freedom of thought, conscience and religion.¹³² This was the first international human rights instrument to make explicit recognition of the right to conscientious objection.

At the Second Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (the Copenhagen Meeting, 5 June-29 July 1990) the representatives of the participating states noted "that the United Nations Commission on Human Rights has recognized the right of everyone to have conscientious objection to military service"¹³³ and agreed "to consider introducing, various forms of alternative service, which are compatible with the reasons for conscientious objection, such forms of alternative service being in principle of a non-combatant or civilian nature, in the public interest and of a non-punitive nature".¹³⁴ The participating States also agreed to "make available to the public information on this issue".¹³⁵

Article 12 of the American Convention on Human Rights protects the right to freedom of conscience and religion. Moreover, it also states that "[n]o one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs" (art. 12, para.2). The right is subject only to restrictions which are prescribed by law and which are necessary to protect public safety, health, or morals, or the rights or freedom of others. Hence one can argue that the right to conscientious objection is an extension of the right to freedom of thought, conscience and religion.

In its Annual Report for 1997, the Inter-American Commission on Human Rights invited those member States whose legislation still did not exempt conscientious objectors from military

¹³¹ European Parliament resolution of 7 February 1983 on conscientious objection. See also European Parliament resolution of 13 October 1989 on conscientious objection and alternative civilian service.

¹³² Article 10 (2) Charter of Fundamental Rights of the European Union (http://www.europarl.eu.int/charter/default_en.htm), accessed on 20/4/2011

¹³³ Document of the Copenhagen Meeting, Conference on Security and Cooperation in Europe, Second Conference on the Human Dimension of the CSE, Copenhagen, 5 June-29 July 1990 at para. 18. (<http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm>), accessed on 10/4/2011

¹³⁴ Ibid.

¹³⁵ Ibid.

service or alternative service, to review their legal regimes and make modifications consistent with the spirit of the international law of human rights.

Article 8 of the ACHPR provides for the right to freedom of conscience, and that the profession and free practice of religion shall be guaranteed. Then the right to conscientious objection could be also derived from this pertinent provision.



Chapter Three

3. Scope of the Right to Conscientious Objection and the Experience of Some Countries

3.1. Scope of the Right to Conscientious Objection

Although military conscientious objection has been recognize as a human right in many international instruments as extension of the right to freedom of thought, conscience and religion, questions has been raised regarding the scope of such a right. Are states ready to accept an assertion of military objection in the context of freedom of religion and conscience? Must a state now recognize all forms of conscientious objection to military as long as one has linked the objection to a religious or conscientious belief? How broad the right and must the state acknowledged the breadth of those religious military conscientious objection when it derives from a host of belief system external to formalized religions? Is there any room for distinguishing between different forms of objection to make right tolerable for state yet effective for individual?

States that acknowledge a right to conscientious objection differs as to the recognized sources of an individual's opposition to military service. Some states recognize individuals opposition based upon profound moral convictions in addition to religion, whereas other states recognize only religious motivation. Thus, individuals accreting the status of conscientious objector are often divided by states into the categories of religious or ethical objectors. Religious objectors based their opposition to participation in the military upon religious texts and teachings or philosophy of their organized religion.¹ On the other hand ethical objectors rely not upon religious traditions or texts, but upon their own morality and adopted system of ethics.²

A number of states, *inter alia*, Denmark, Germany and Norway recognized the personal nature of a right to conscientious objection, and thus extended such a right to individuals who prove that their opposition to military service is truly based upon profound personal convictions, be it

¹ Matthew Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Rights*, 21 Cal. W. Int'l L.J. 31, 1991, p.31

² Ibid

religious or ethical in origin.³ Hence such kind of states recognize also the right to conscientious objection to individuals who object based upon their deeply held personal beliefs and / or affiliation with a particular religion or religious belief.

Other states grant conscientious objection status only to those individuals with religious motivation. For instance Romania and Ukraine grant the status of conscientious objector only on the grounds of religion.⁴ According to the Romanian and Ukrainian conscientious objection laws, only members of religious denominations who forbid their members to bear arms may claim the right to conscientious objection.⁵ Non-religious conscientious objectors thus have no legal means to claim their right to conscientious objection. Among these states which recognize religious grounds some also narrow the definition of conscientious objection by recognizing only those objectors who are members of certain organized and registered religions that eschew military service, violence, and armed conflict categorically. A system which enables only those individuals who belong to certain religions recognized for their pacifism to assert a right to conscientious objection neglects the fact that human ability can form personal opinions and interpret their espoused religion in an individualized way.⁶

On the other hand, other states limiting a right to conscientious objection to religious objector but take more inclusive approach by extending conscientious objector status to religious objector who interpret the text and tenet of their religion to proscribe military service, even if the religion is not pacifist.⁷ In such a case the definition of religious objector is more closely related to the beliefs of individuals but it refuses to extend this recognition to individuals who come to similar conclusion based upon non-religious grounds.

Limiting the right of conscientious objection to those with religious motivations undermines the very qualities a system of conscientious objection seeks to maintain i.e. freedom of individual to assert his independence in some areas of conflict with the policies and practices of the state

³ The Right to Conscientious Objection in Europe: A Review of the Current Situation <http://www.quaker.org/qcea/coreport/coreport.pdf> accessed on 3/30/2011 p. IV

⁴ Ibid

⁵ Ibid

⁶ Emily N. Marcus, *Conscientious Objection as an Emerging Human Rights*, Virginia Journal of International Law, Vol, 38, 1998, p. 540

⁷ Ibid

based upon his profound personal convictions.⁸ This is because we should see the right from the perspective of freedom of religion, conscience and thought. The rationale for the incorporation of conscience in addition to religion is to protect non-believers and atheists.⁹ There could be persons who are non-believers and also an individual who are not member of pacifist religion but developed a set of beliefs that objection to go to war. Hence it is also necessary to protect these individuals.

The need to extend a right to conscientious objection to all individuals who oppose military based upon their conscience, whether religious in nature or not, has been accepted by United Nations bodies. Although defined as manifestation of religion or beliefs this does not mean that conscientious objection to military service can only be based on a religious belief. The Human Right Committee General Comment 22 simply referred to a situation where “the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest ones religion or belief”.¹⁰ However, the same General Comment gives a broader scope to the terms religion and belief, stating “article 18 protects theistic, non-theistic and atheistic beliefs....article 18 is not limited in its applications to traditional religions or religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.”¹¹ The Committee has specifically addressed this issue in concluding observations on state reports under the Covenant, calling, for example, on a reporting state to “extend the right to conscientious objection against mandatory military service to persons who hold non-religious beliefs grounded in conscience, as well as beliefs grounded in all religions”¹².

Moreover the Commission on Human Rights acknowledged in its 1987 and 1995 resolutions that objection to military service derives from reasons of conscience and profound conviction based on religion, ethical, moral, humanitarian or similar motives. This more inclusive approach to a

⁸ Ibid

⁹ Kevin Boyle and Juliet Sheen, *Freedom of Religion and Belief: A World Report*, Routledge, London and New York, 1997, p. 5

¹⁰ Human Right Committee General Comment 22, Para 11

¹¹ Id Para 2

¹² Human Rights Committee General Comment 22, para 11; also *Brinkhof v Netherlands* (Communication No. 402/1990 of 27 July, 1993). Similarly, UN Commission on Human Rights resolution 1998/77 (adopted without a vote): “Recognizing that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives”.

right of conscientious objection follows from international recognition that such a right is derived from the rights of freedom of thought and conscience in addition to freedom of religion.

Once a state acknowledges a right of objection to military service, it has to delineate the contours of the right. In particular the state must define the circumstance or range of grounds under which the right may be claimed. One issue, which states must address, is whether individuals can base their opposition to military service on profound religious, moral, ethical, humanitarian or similarly convictions or only on religious motivations.

Hence states must be mindful of the position of the Commission on Human Rights that “conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives and the Commission affirmation that whenever a right of objection is recognized there should be no discrimination “between conscientious objectors on the basis of their beliefs”.

Equally, a person may become a conscientious objector after joining the armed forces, whether as a conscript or as a volunteer. Such a situation may arise in the context of a change of religion or belief in general, or in relation to the specific issue of military service. The general freedom to change one’s religion or belief is recognized in Article 18(1) of the Covenant,¹³ and Article 18(2) prohibits “coercion which would impair” the individual’s freedom to have or adopt a religion. The UN Working Group on Arbitrary Detention considers that “repeated incarceration in cases of conscientious objectors is directed towards changing their conviction and opinion, under threat of penalty” and is thus incompatible with Article 18 (2) of the Covenant.¹⁴ The specific application was explicitly acknowledged by the Human Rights Committee, for example, when recommending the adoption of legislation on conscientious objection to military service to a reporting State, “recognizing that conscientious objection can occur at any time, even when a person’s military service has already begun”.¹⁵ Similarly, the UN Commission on Human Rights has stated “that persons performing military service may develop conscientious objections” and affirmed “the importance of the availability of information about the right of conscientious

¹³ The right to change one’s religion or belief was also specified in the Human Rights Committee General Comment 22.

¹⁴ UN Working Group on Arbitrary Detention, Recommendation 2: *Detention of conscientious objectors*, E/CN.4/2001/14, paras. 91-94

¹⁵ Human Rights Committee, Concluding Observations on Chile, March 2007 (CCPR/C/CHL/CO/5), para. 13.

objection to military service, and the means of acquiring conscientious objector status, to all persons affected by military service”.¹⁶

Although the United Nations High Commissioner for Human Rights does not specifically address the issue of conscientious objection for professional soldiers, from the notion that conscientious objection may develop over time, also after having performed a period of military training, we can argue that just like serving conscripts and reservists, the right to conscientious objection should also apply to professional soldiers. There need also to be clear application procedures for professional soldiers who wish to seek discharge from the armed forces because of conscientious objection, and in this case they should be allowed honorable discharge.

One of the other thorniest issues for states concern in relation to scope is whether they should acknowledge the right of belief partial objectors in addition to absolute objectors. Absolute objectors always oppose armed conflict and base their opposition to military service in any conflict upon their personal opposition to the inherent nature of the service and their pacifist that is always wrong to kill.¹⁷

Selective objectors are individuals who believe in the possibility of a just war; they do not object to all armed conflicts of all kinds or the use of violence in all situations. They invoke the right of objection only when they are convinced that armed conflict in which they are asked to serve is unjust in either in its aim or method. Based on standards of international or national law or morality, partial objectors believe that, “armed force may be justified under limited circumstances and objection based on reference to standards of international law may concern the purpose for which armed force is used, or it may concern the means and method used in armed combatant.”¹⁸

Many states allow absolute objectors to attain the status of conscientious objectors, while denying the status of selective objectors. Most states are reluctant to recognize the right of particular objector; for one thing they do not appreciate individual’s critiquing and secondly

¹⁶ UN Commission on Human Rights resolution 1998/77

¹⁷ Alon Harl, *Alternative Nonmilitary Civilian Service: Constitutional Guarantee or Political Expediency*, Lawasia J., 2001, p. 120

¹⁸ Marie-France Major, *Conscientious Objection to Military Service: The European Commission on Human Rights and The Human Rights Committee*, 32 Cal. W. Int’L.J., 2002, p. 6

questioning their involvement in particular military conflict.¹⁹ Thirdly they believe that selective conscientious objection challenges the sovereignty of states that assert exclusive authority in the determination of which armed conflict just and in compliance with international law.²⁰ Moreover, principally the right to military conscientious objection is subject to the factoring of more practical considerations regarding administrative necessity. The cost of administration is expensive so as to ensure for a proper administration of military and allow for a fair method of discerning sincere from insincere objectors.²¹

As noted from the discussion regarding the right to conscientious objection in chapter one, the international as well as regional human right instruments that codify freedom of thought, conscience and religion are beginning to emerge as the basis for the right to conscientious objection. The implication of such a development for a right to selective conscientious objection is that it highlights the selective conscientious objectors assertion of belief.²²

In making a claim, a selective conscientious objector is in essence attempting to manifest a belief or uphold a belief by not carrying out an action, be it due to a particular method of warfare, such as using illegal weapons, or because an action will entail the violation of conscientious belief. Selective conscientious objection as any other assertion allows for analogy to other forum externum beliefs of the right to religion and conscience.²³

In passing various resolutions on the right to military conscientious objection, international organs have never specifically provided for the right to selective conscientious objection.²⁴ The 1983 Committee on Human Rights Report referred to the possibility of selective conscientious objection.²⁵ The report noted that a selective conscientious objector determines that a form or method of military action breaches an international moral that is equated with international law.²⁶

¹⁹ Ibid

²⁰ Ibid

²¹ Leonard M. Hammer, *The International Human Right to Freedom of Conscience: Some Suggestions for its Development and Application*, Dartmouth Publishing Company, England, 2001 p.210

²² Id p. 213

²³ Leonard Hammer, *Selective Conscientious Objection and International Human Rights*, 36 Isr.L.Rev. 2002 p. 164

²⁴ Id p. 165

²⁵ Ibid

²⁶ Ibid

Similarly, there are very few states that recognize the right to selective conscientious objection, *inter alia*, Australia, Denmark and the Netherlands.²⁷

One might argue that the right to selective conscientious objection possibly can derive from Human Rights Committee's provision for military conscientious objection provided in the General Comment 22 to article 18. The idea of objecting to 'lethal force', rather than using language regarding the bearing of arms, centers on the manner of warfare being conducted.²⁸ The term 'lethal' can include selective objection to particular lethal weapons, such as using chemical organs in warfare, even though the same person might not object to handling a gun or participating in the military, in contrast to a pacifist.²⁹

Moreover, even the General Assembly relied on article 18 of UDHR in passing a resolution upholding the rights of individuals to object a military that condones apartheid. The implication is that those individuals did not necessarily dismiss all forms of warfare but were military conscientious objectors due to a particular belief that prevented participation in an army upholding apartheid principles. Similarly, the idea of coercing an individual to violate a belief, which is one of the key bases for military conscientious objection, operates for the selective conscientious objector being forced to perform an act in violation of the conscience.³⁰

As a matter of fact once military conscientious objection is rooted in the right to freedom of religion or belief, there does not seem to be any qualitative difference between a general and selective conscientious objection. From a perspective of freedom of religion or belief, the manifestation of a belief could equally apply to the selective conscientious objector. An objector to involvement with nuclear weapons or with conscientious belief prevents the destruction of the environment should arguably maintain the ability to manifest such belief. Since the importance of conscientious belief is not merely its existence, but also its application to specific instance, the application should also entail instances of selective conscientious objection.³¹

²⁷ Supra Note 21 p. 210

²⁸ Supra Note 23 p. 160

²⁹ Ibid

³⁰ Id p. 167

³¹ Ibid

Moreover, even if we see certain religions, they do not necessarily preach a wholly pacifist doctrine.³² Yet, states uphold their claim to military conscientious objection. For instance, Islam recognizes the eventuality of 'holy war', yet Muslims maintain the ability to assert a military conscientious objection claim.³³ Hence, selective conscientious objection could not only base on freedom of conscience, but also freedom of religion.

Then, restricting military conscientious objection to a total objection to warfare or use of arms is over narrow. Consequently, a narrow treatment of the rights does not adequately consider the variety of conscientious beliefs that the international system currently intended to protect. Hence, respect for individual rights to conscientious objection should be inclusive of selective objectors who base their opposition upon ethics, religion or violations of international law.

3.2. Determining the Sincerity of an Individuals Objection

The next question that states must address is to make the final determination of whether a valid claim for conscientious objection has been presented. Here the issue is whether all claims of objection should be accepted as *bonafide* once they are formulated or whether there should exist some inquiry into their validity.

A number of states are hesitant to recognize formally a broad range of conscientious objectors because it is difficult, if not impossible, to discern whether or not the conviction individuals assert is a truthful representation of his beliefs.³⁴ States are concerned insincere attempts to avoid military service may lead to a floodgate of petitions.³⁵ Although it is true that it is difficult to identify which applicants for conscientious objection status is sincere or otherwise; it is undeniable fact uncertainty is inherent in the nature of conscientious objection as a reason for application of conscientious objection are personal and as such difficult to verify.

Despite those administrative problems, the protection of individual conscience is such a fundamental human right that a real effort to distinguish between truly and otherwise held claims must be made.³⁶ Some argue that accepting claims as *bonafide*, is necessary because it is

³² Supra Note 21 p. 216

³³ Ibid

³⁴ Supra Not 6 p. 543

³⁵ Ibid

³⁶ Ibid

particularly impossible for anyone to penetrate the conscience of an individual, hence a declaration setting out the individual's motive should suffice to obtain conscientious objector status.³⁷ According to Itzak Kullerated, cited in Marie – France Major the proposition that should be made into the validity of a claim of conscientious objection is defended on the basis that if no inquiry is made far too many individuals will invoke a right of objection.³⁸ As to the opinion of the writer, if there are states that recognize the status of conscientious objection by mere declaration, then this is in favor of conscientious objectors. However, since the state needs to scrutinize those who object truly from insincerely based claim and also to protect the interest of states from being remaining having small military, states should not be prohibited from making inquiry.

Presuming that claims are to be reviewed, the other question is whether they should be scrutinized by military panels, by the tribunals composed of military and civilian personnel, or by civilian boards. Deciding what type of procedural system will be established for obtaining conscientious objector status is significant since the rules of procedure and of evidence vary greatly depending on whether one is arguing before a military panel or a civilian board.³⁹

It is questionable to what extent a fair application procedure and independent, impartial decision-making can be guaranteed if the Ministry of Defense is responsible for the application procedure. After all, the military authorities are primarily responsible for attracting sufficient recruits for the armed forces, so it appears questionable as to whether the Ministry of Defense can be responsible for the application procedure for conscientious objection applications.

Although, the UN Commission on Human Rights does not take a clear stance on the issues of whether all objection claims should automatically be accepted as valid without verification,⁴⁰ the Commission has welcomed the fact that some states accept claims of conscientious objection as valid without inquiry and called for independent and impartial decision making bodies where this is not the case.⁴¹

³⁷ Supra Note 18 p. 9

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

⁴¹ UN Commission on Human Rights resolution 1998/77, OP2 and OP3

The Human Rights Committee has expressed concern about “determination by military judicial offices in individual cases of conscientious objection”⁴² and has encouraged “placing the assessment of applications for conscientious objection status under the control of civilian authorities.”⁴³

One of the issues raised in connection with the determining the sincerity of the conscientious objection claim is that should the responsible organ base its decision to say someone is conscientious objector on objective or subjective criteria. As to the writer's opinion the organ should base on subjective criteria. This is because some individuals may want to abuse their religion to escape from military service. In such a case the organ has to see their religious attachment using different methods than accepting them by the mere fact that they belong to pacifist religion.

The other thing that states must address is the time limits for submitting conscientious objection applications. The practice of states in providing legal time limits in place for submitting conscientious objection application is different. Most states limited the time of application to be made before starting military service. For instance in the laws of Austria, Greece, Poland, and Russian Federation the legal time limits for application of conscientious objection is only before call-up for military service.⁴⁴ On the other hand in only few countries, *inter alia*, Germany, Denmark and Norway application for conscientious objection can also be made by serving conscripts and reservists.⁴⁵

Though the practice of the state is different the United Nations Commission on Human Rights Resolution 1998/77 acknowledges that a conscientious objection may develop over time, also after a person may have participated in military training for some time. This implies that the right to be registered as conscientious objector at any time before, during or after conscription, or performance of military service.

⁴² Human Rights Committee, Concluding Observations on Israel, July 2003 (CCPR/CO/78/ISR), para. 24

⁴³ Human Rights Committee, Concluding Observations on Greece, March 2005 (CCPR/CO/83/GRC), para. 15

⁴⁴ *Supra* Note 3 p. XIV

⁴⁵ *Ibid*

3.3. Alternative Service to Military Service

After states grant the conscientious objector status, they must also determine how they will deal with those individuals that obtain the status of conscientious objector. Some of the issues which must be addressed include; whether objectors must perform alternative service; if alternative service is required, what forms of service will be provided for; what should be the length of alternative service – should it be equal to, or longer than, military service; and should the objectors receive the same remuneration as conscripts.

A natural compromise between the demands of the state and the individual is to excuse the conscientious objectors from the opposed military service, yet require an alternative forms of national service.⁴⁶ States that recognize some forms of conscientious objection provide different form of alternative service. Some states insist that individuals serve in a non- combatant position or a support staff position to the military.⁴⁷ While some conscientious objectors are satisfied with these alternatives, these forms of alternative services do not adequately respect the right of other individuals to abstain from participating in military service that they fundamentally oppose.⁴⁸

With regard to the above raised questions, states can obtain guidance from the resolution 1998/77 of the Commission on human rights. The Commission recommended to states any alternative service required of conscientious objector in lieu of compulsory service to be compatible with the reasons for objection, of a civilian character., in the public interest and not of punitive measure.⁴⁹ In addition to civilian alternative service, unarmed military service may be provided for those whose objection is only to personally bearing arms.⁵⁰ The term ‘punitive’ covers not only the duration of alternative service, but also the type of service and the condition under which it is served.

The issue of length of alternative service in comparison to the length of military service has been the subject of a number of cases considered by the Human Rights Committee. The Committee in *Fain v. France* case has now made clear that any difference in the length must be “based on

⁴⁶ Supra Note 6 p. 544

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ UN Commission on Human Rights resolution 1998/77, OP4

⁵⁰ Ibid

reasonable and objective criteria, such as the nature specific service concerned, or the need for a special training in order to accomplish that service.”⁵¹

3.4. The Right to Asylum for Unrecognized Conscientious Objector

The emerging trend in the international community nowadays, as we have seen in the previous chapter, is that to recognize some form of conscientious objection as fundamental human rights. Although the trend is to recognize the right to conscientious objection as implied right in the right to freedom of thought, conscience and religion, some states are still hesitant to recognize this right of individuals. Hence individuals who live in such states avoid calling up for military service by flee in abroad which is called draft evasion.

Draft evasion could possibly occur in three circumstances. Firstly, in countries where the right to conscientious objection is not legally recognized, such as Azerbaijan, Belarus and Turkey draft evasion is the only means by which conscientious objector can avoid performing military service.⁵² Secondly, in countries where only religious grounds for conscientious objection are legally recognized, draft evasion is the only means by which none religious conscientious objectors may avoid military service, for instance, in Romania and Ukraine.⁵³ Thirdly, in countries where only absolute (pacifist) conscientious objection is allowed draft evasion is the only means for selected conscientious objection.

Draft evasion is usually punishable under specific articles of conscription legislation and/or the criminal code by fines and imprisonment. Consequently, one final issue, which states must determine, is whether they will grant asylum to individuals who flee their country of origin because they have not been granted exemption from military service.

The preamble of the 1995 Resolution of the Commission on Human Rights refers to article 14 of UDHR and mentions the notion of granting asylum to military conscientious objectors who are prosecuted for military conscientious objection.⁵⁴ It specifically encourages states to consider granting asylum to individuals who are prosecuted for military conscientious objection. The

⁵¹ Rachel Brett, *International Standards on Conscientious Objection to Military Service*, Quaker United Nations Office, Human Rights and Refugee Publication, 2008, p.6

⁵² Supra Note 3 p. VIII

⁵³ Ibid

⁵⁴ Resolution 1995/83

Commission on Human Rights deemed it relevant issue based on the General Assembly Resolution calling for the right to asylum for military conscientious objectors against a military used to support the policy of apartheid.⁵⁵ In 1978, the United Nations General Assembly passed a declaration entitled Status of Persons Refusing Service in Military or Police Force used to enforce apartheid which recognizes the right to objection to participate in a military used to enforce apartheid, and called upon all UN member states to grant such individuals asylum as refugees.

One of the important sources demonstrating the association between refugee law and conscientious objection is the United Nations Higher Commissioner on Refugees Handbook on Procedures and Criteria for Determining Refugee Status. The Office of the United Nations High Commissioner for Refugees (UNHCR) is in charge of ‘supervising the application of the UN Protocol Relating to the Status of Refugees’.⁵⁶ At the request of member states, the UNHCR prepared the Handbook “for the guidance of governments” in “determining refugee status”.⁵⁷ Hence, the Handbook is one of the central products of the Office of the Higher Commissioner.

The Handbook has been widely circulated and approved by governments and it is often cited as an authoritative statement of the views of the Higher Commissioners Office in construing the definition of refugee.⁵⁸

The terms of the Handbook itself claim it was conceived as practical guide and not a treaty.⁵⁹ The Handbook perhaps due to its non-binding nature, simply states that “it would be open to contracting states, to grant refugee status to persons who object to perform military service for genuine reasons of conscience”.⁶⁰ However, a proper reading of the entire section emphasizes that in certain cases unrecognized conscientious objection should indeed be considered a sufficient ground for asylum.⁶¹ The Handbook notes that a ‘well-founded fear of persecution’, the key determinant for receiving asylum protection, does not arise for an individual who has

⁵⁵ Ibid

⁵⁶ David Enoch, *Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?* 31 Va. J. Int’l L., 1991, p. 445

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Office of the United Nations High Commissioner on Refugees: Handbook on Procedures and Criteria for Determining Refugee Status (1979) HCR/IP/4/Eng/REV.1 preface V

⁶⁰ Id Para 173

⁶¹ Supra Note 56 p. 456

evaded conscription or deserted the military.⁶² Rather, what is essential is that one evading the military would suffer disproportionate punishment because of one's race, religion, nationality, membership in a group or political opinion.⁶³ Such a disproportionate punishment would arise for the military conscientious objector who refuses similar service based on a specific belief.⁶⁴ The Handbook bases such beliefs on religious grounds⁶⁵ and the more recent developing right for secular-based military conscientious objectors.⁶⁶

The religious military conscientious objection can more readily acquire proof from a local minister or fellow congregant so long as the applicant is able to show that his religious conviction are genuine and that such conviction are not taken into account by the authorities of his country which requiring him to perform military service.⁶⁷ However, it is possible that the secular-based military conscientious objection has a higher burden of proof as it is more difficult to prove one's secular belief in the state where the application for refugee status is requested.⁶⁸

The next issue is whether the Handbook has recognized both absolute conscientious objection and selective conscientious objection as a ground for asylum. The Handbook is quite unambiguous on the question of asylum for absolute conscientious objectors, or those who reject all armed conflict. Paragraph 170 of the Handbook states:

*There are ... cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that performance of military service would have required his participation in military action contrary to his conscience, political, religious or moral convictions or to valid reasons of conscience.*⁶⁹

This paragraph contains the increasingly accepted view that a nation's refusal to recognize the absolute conscientious objection of a pacifist constitutes persecution of that individual.⁷⁰ Any

⁶² Handbook Para 167-168

⁶³ Handbook Para 169

⁶⁴ Supra Note 21 p. 219

⁶⁵ Handbook Para 172

⁶⁶ Handbook Para 173

⁶⁷ Supra Note 21 p. 219

⁶⁸ Ibid

⁶⁹ Handbook Para 170

⁷⁰ Supra Note 56 p. 457

alien draft – evader, who can prove his absolute objection to armed conflict in any form, whether that objection is based on religious or secular conviction, should be deemed to have established asylum eligibility.

Although selective conscientious objection could derive from freedom of religion, thought and conscience, there is much less support for recognizing those conscientious objectors who claim the right to pick and choose in which military action to participate. Let us see for example the question of asylum for draft evaders of the United States was faced with during the Vietnam Armed conflict. American draft evaders whose principal objection to military service was their disagreement with United States policy objectives in Vietnam often sought asylum in countries such as Canada, Sweden and the Netherlands.⁷¹ These states were sympathetic to American asylum seekers, but instead of granting asylum under the 1967 UN Protocol, they provided a more limited form of sanctuary in the form of residence permit similar to the ones issued to ordinary aliens.⁷²

In most cases, these residence permits were granted for these draft evaders. These actions caused great political tensions between Sweden, Canada and the United States at that time.⁷³ To ease this tension, both Swedish and Canadian authorities attempted to make it clear that their actions were to be distinguished from grant of refugee status under the UN Protocol, and stressed that their action should not be viewed as unfriendly.⁷⁴

The UNHCR Handbook in tacit recognition of the sensitive political questions involved in granting asylum to selective conscientious objection, it excludes most of these claims, stating that “not every conviction genuine thought it may be, will constitute a sufficient reason for claiming refugee status after dissertation or draft – evasion.”⁷⁵ Specifically, “it is not enough for a person to be in disagreement with his government regarding the political justification for particular military action.”⁷⁶ This provision provides a means of narrowing the right of selective conscientious seeking asylum.

⁷¹ Id p. 459

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Handbook Para 171

⁷⁶ Ibid

However the Handbook does not exclude all claims of selective objectors rather it carves out a specific exception:

*Where, however, the type of military action with which an individual does not wish to be associated, is condemned by international community as contrary to basic rules of human conduct, punishment for desertion or draft – evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.*⁷⁷

If a military is violating humanitarian norms or human rights principles, then a selective military conscientious objector would seem to have the right to seek asylum. This was held true in the Nuremberg Tribunal, at which the major World War II war criminals were tried. These trials stand for the principle in the international law that individual can and will be held criminally liable for atrocities committed during armed conflict, possibly for the armed conflict itself.⁷⁸ The role of the individual in decision making process is irrelevant: following order is no excuse.⁷⁹ This implies that the existence of duty on the part of individuals to abstain from military action when gross violations of human rights are likely to occur. Hence the Handbook recommends that nations cannot decry atrocities and war crimes on the one hand, yet refuse asylum to individuals whose conscience prevented their association with such acts on the other.⁸⁰

The other prime example of the above sort of objection would be soldiers refusing to participate in the South African military due to their potential involvement in upholding the apartheid state. The main indication of condemnation by the international community in this regard is the 1978 General Assembly Resolution 33/165. The resolution recognized the right to asylum for refusing to participate in military or police forces enforcing apartheid.⁸¹

⁷⁷ Ibid

⁷⁸ Antonio Cassese, International Criminal Law, Oxford University, Press 2nd edit, 2008 p. 8

⁷⁹ Ibid

⁸⁰ Musalo, *Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men Who Refuse to Bear Arms for Reasons of Conscience*, 26 San Diego L. Rev., 1989 p. 849

⁸¹ Doc A/33/45 (1978)

3.5. The Right to Conscientious Objection in Some Countries

In this section, the experience of some countries will be explored in light of the scope of the right to conscientious objection that I discussed. The three countries that I have selected are countries with best experience and the better recognition of the right to conscientious objectors. The countries are Denmark, Germany and Norway. These countries almost comply with the minimum standards for the recognition of the right to conscientious objections set out by the UN Human Right committee.

3.5.1. The Right to Conscientious Objection in Denmark

Conscription is enshrined in Article 81 of the 1953 Constitution and is further regulated by the 1980 National Service Law.⁸² The length of military service in the past was between 3 days and 14 months, depending on the branch of the armed forces and the rank attained.⁸³ Most conscripts performed a 9 months' military service.⁸⁴ However from the beginning of January 1, 2006 the length of military service is 4 months.⁸⁵

All men between the ages of 18 and 30 are liable for military service.⁸⁶ The National Service Law does not cover the self-governing territories of the Faroe Islands and Greenland. If a young man moves to mainland Denmark after living in one of those territories for ten years or more, he is not liable for military service.⁸⁷ Like most European countries, the number of available conscripts is much higher than the number considered necessary by the armed forces.⁸⁸ Denmark is, however, the only European country where the actual selection of conscripts takes place by balloting.⁸⁹ Selection takes place by drawing lots during medical examination.⁹⁰ At the "Day of the Armed Forces", attendance at which is compulsory for every young man, conscripts who

⁸² *Professional Soldiers and the Right to Conscientious Objection in the European Union: Information Against War and Reprisal* P. 20 www.wri-irg.org/node/3715, accessed on 30/3/2011

⁸³ Supra Note 3 p. 24

⁸⁴ Ibid

⁸⁵ The Right to Conscientious Objection in Denmark, <http://www.quaker.org/qcea/coreport/DENMARK2008.pdf>, accessed on 30/3/2011

⁸⁶ Supra Note 82

⁸⁷ Coalition to Stop the Use of Child Soldiers: Child Soldiers Global Report 2004.

⁸⁸ Supra Note 82

⁸⁹ Supra Note 3 p. 24

⁹⁰ Ibid



have applied to serve voluntarily are drafted first, whatever lot number they might have.⁹¹ From the remaining conscripts only those with the lowest numbers are drafted, until the necessary level in terms of numbers has been reached.⁹² The lots are not actually drawn by the conscripts themselves, but by the military authorities. Apparently, this is because someone once ate his lot ticket, which meant that the draft had to be suspended that day in order to find out which lot number had been eaten.⁹³

In 2006, 5,727 young men served as conscripts, while 750 served in the rescue service and 349 were conscientious objectors.⁹⁴ It is thus obvious that most of the young men who would not have wished to serve in the armed forces are not called up because of the balloting system.⁹⁵

Denmark was in fact the first European country to introduce a law on conscientious objection. The right to conscientious objection has been legally recognized since 1917.⁹⁶ At present, the right to conscientious objection is regulated by the 1987 Civilian Service Act (588/87), as amended in 1992 and 1998.⁹⁷

With the 2006 reform, the four possibilities of accomplishing the service (military service, development aid, rescue service and civilian service) have become legally co-equal.⁹⁸ So everybody has a free choice as to which service he wants to do, in which the opting for an alternative service has simply to be explained on conscientious grounds.⁹⁹ Service conditions are similar for military and alternative service.¹⁰⁰ The duration of all services is the same, except for the rescue service, which may last up to 6 months.¹⁰¹ However, one difference is that military

⁹¹ Supra Note 82

⁹² Ibid

⁹³ War Resisters' International: Refusing to bear arms – A world survey on conscription and conscientious objection to military service, 1998. Henning Sørensen: National Service Arrangements in Denmark, Paper presented at the 5th Global Conference on National Youth Service in Jerusalem, 11-15 June 2000, www.acys.utas.edu.au/ianys/country/denmark-2000.html, accessed on 28/3/2011

⁹⁴ Supra Note 85

⁹⁵ Ibid

⁹⁶ Country report and updates: Denmark | War Resisters' International, http://www.wri-irg.org/programmes/world_survey/country_report/en/Denmark accessed on 4/27/2011

⁹⁷ Ibid

⁹⁸ Supra Note 85

⁹⁹ Ibid

¹⁰⁰ Conscientious objection to military service - Report of the Secretary-General submitted pursuant to Commission resolution 1998/77, E/CN.4/2000/55, p. 4

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c3c5bb30f21371988025688d006028bd?> accessed on 4/29/2011

¹⁰¹ Supra Note 85

conscripts obtain a monthly salary whereas alternative service conscripts receive an allowance.¹⁰²

With regard to the scope of objection to military service Denmark legally recognized both religious and non-religious grounds for conscientious objection.¹⁰³ Denmark has also recognized both absolute and selective conscientious objection.¹⁰⁴ The legal basis for conscientious objection is laid down in the 2006 National Service Law and the 2006 Civil Service Act.¹⁰⁵ According to Article 1 of the Civilian Service Act, "Conscripts, for whom military service in any form is judged, from available information, to be incompatible with the dictates of their conscience, may be exempted from military service on condition that they are engaged in other national work, which is not, however, serving any military purposes". Hence even the substitute service given to conscientious objector is non-combatant by nature.

Conscripts have also access to information about alternative service.¹⁰⁶ Before being called up, conscripts receive an information leaflet describing the rules of compulsory service.¹⁰⁷ The leaflet includes information on how to apply for alternative service and the length and type of work to be carried out.¹⁰⁸ Information on alternative service is also included with call-up papers.¹⁰⁹

Applications can be made before and during military service.¹¹⁰ Applications that are made by serving conscripts should be more elaborate and should include an explanation as to when and where the applicant's conflict of conscience started.¹¹¹ Approx. 20 per cent of conscientious

¹⁰² Supra Note 3 p. 24

¹⁰³ Supra Note 82

¹⁰⁴ European Bureau for Conscientious Objection, Report to the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, Conscientious Objection in Europe during 2008, www.ebco-beoc.eu/pdf/index/200910/EBCO-2008-report.pdf accessed on 4/29/ 2011 p. 11

¹⁰⁵ Ibid

¹⁰⁶ Supra Note 100 p. 5

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Supra Note 82

¹¹¹ Supra Note 93

objection applications are actually believed to be made by serving conscripts.¹¹² It is not known if there are legal provisions for the right to conscientious objection for professional soldiers.¹¹³

Concerning the application procedure, in Denmark, applications must be made to the Conscientious Objections Administration Board (Ministry of Interior) within four weeks of receipt of call-up papers.¹¹⁴ Applications must be made with a standard form that is available at the Ministry.¹¹⁵ Since 1968 there is no personal interview during the application procedure and applications are not individually examined.¹¹⁶ Consequently, applications are almost automatically granted.

Since 2006, the length of substitute service is the same as military service i.e. 4 months.¹¹⁷ Substitute service is administered by the Ministry of Interior.¹¹⁸ It can be performed in government institutions such as hospitals, social work and cultural institutions, but also with peace and environmental organizations. Substitute service starts with a six days' introduction course, during which conscientious objectors (COs) are informed about their rights and duties.¹¹⁹

In 2006, in the first year after the reform, 349 conscientious objectors accomplished civilian service, whereas 750 went to the rescue service.¹²⁰ Almost all applications are automatically granted.¹²¹ According to the Danish government, applications are rejected if they are considered to be solely based on political grounds.¹²² It simply has to be based on grounds of conscience. Every year, approx. 25 percent COs refuses to perform both military service and substitute service. All of them are believed to be Jehovah's Witnesses.¹²³ Draft evasion and desertion are punishable under the Military Penal Code, but COs are not subjected to its provisions.¹²⁴ Refusal to

¹¹² Supra note 3 p. 24

¹¹³ Ibid

¹¹⁴ Supra Note 82

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ Supra Note 3 p. 25

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Supra Note 85

¹²¹ Ibid

¹²² United Nations Commission on Human Rights, 56th session, Civil and political rights, including the question of conscientious objection to military service, Report of the Secretary-General submitted pursuant to Commission resolution 1998/77 (E/CN/.4/2000/55), 17 December 1999.

¹²³ Supra Note 9 P. 25

¹²⁴ Ibid

perform substitute service is punishable with a fine and a term of imprisonment equivalent to the length of time that someone should have served (Civilian Service Act, Article 6).¹²⁵

In the past, members of the Jehovah's Witness organization have been sentenced to terms of imprisonment under Danish law for failing to appear for military service.¹²⁶ In 1996, the Director of Public Prosecutions circulated notice No. 2/1996 stating that the failure to perform military service for reasons of conscience should be punished by a term of imprisonment corresponding to the length of the remaining term of service.¹²⁷ Since 1996, Jehovah's Witnesses receive a suspended sentence that is replaced by a probationary term of one year with the provision that the committee does not commit an offence.¹²⁸ During this year, they are under the supervision of the Probation Service and are obliged to carry out community service for a maximum of 240 hours.¹²⁹

3.5.2. The Right to Conscientious Objection in Germany

Conscription is enshrined in Article 12(1) of the 1949 Constitution and is further regulated by the 1956 Law on Military Service. The length of military service is 9 months.¹³⁰ All men between the ages of 18 and 23 are liable for military service. Reservist obligations apply up to the age of 45.¹³¹

In recent years, the future of conscription has been discussed extensively in Germany. So far the government has decided to maintain conscription, but the size of the armed forces and the number of conscripts has been reduced significantly.¹³² Consequently, fewer and fewer conscripts are actually called up for service.¹³³ Since 2004, men who are married or who live together with a partner are legally exempt from service.¹³⁴ In addition, the maximum drafting age

¹²⁵ Supra Note 100 p. 5

¹²⁶ Ibid

¹²⁷ Ibid

¹²⁸ Supra Note 93

¹²⁹ Ibid

¹³⁰ The Right to Conscientious Objection in Europe: A Review of the Current Situation, <http://www.quaker.org/qcea/coreport/germany.pdf>, accessed on 4/ 4/2011 P. 1

¹³¹ Ibid

¹³² Supra Note 3 p. 33

¹³³ Ibid

¹³⁴ Ibid

has been reduced from 28 to 23 years.¹³⁵ Men who have not yet been called up by the age of 23 thus get exempted from service.¹³⁶ In previous years this was actual practice already, but in 2004 these grounds for exemption were included in the Law on Military Service.¹³⁷

The armed forces comprise 190,000 troops, including 60,000 conscripts (2004). Every year approx 415,000 young men reach conscription age.¹³⁸ In the next years the armed forces will be further reduced and the government plans to further reduce the number of conscripts to 47,000 by 2010.¹³⁹ Consequently even fewer conscripts will be called up for service in the future. In 2005, 67,000 conscripts will be called up for military service; from 2007 onwards this will be 55,000.¹⁴⁰

The right to conscientious objection is included in Article 4(b) of the 1949 Constitution. Legal provisions are laid down in the 2003 Law on Conscientious Objection, which replaced the previous 1983 Law on Conscientious Objection.¹⁴¹ The new Law on Conscientious Objection entered into force on 1 November 2003.

Both religious and non-religious grounds for conscientious objection are legally recognized.¹⁴² The right to conscientious objection could be made on the ground of absolute (pacifist) and selective conscientious objection.¹⁴³ According to Article 1 of the Law on Conscientious Objection, conscientious objection status is to be granted to those who refuse military service for reasons of conscience as described in the Constitution. Article 4b of the Constitution in fact states that “no one shall be compelled to perform armed war service contrary to his conscience”.

¹³⁵ Child Soldiers Global Report 2005 Germany, <http://www.childsoldiersglobalreport.org/content/germany>, accessed on 4/4/2011

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ War Resisters International, Revision of Germany, <http://www.wri-irg.org/co/rtba/archive/germany.htm>, accessed on 9/4/2011

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Law on Conscientious Objection, http://bundesrecht.juris.de/bundesrecht/kdvg_2003/inhalt.html, accessed on 9/4/2011

¹⁴² Supra Note 3 p. 26

¹⁴³ Ibid

In Germany, information on alternatives to military service is provided during pre-induction examinations.¹⁴⁴ It also provide this information in its Official Gazette (national collection of laws) and in some instances, on the Internet.¹⁴⁵ Information is also disseminated via private organizations.¹⁴⁶

Germany, provide broader latitude by allowing claims to be made prior to conscription, during military service and while in military reserves. There are no time limits for submitting CO applications.¹⁴⁷ Applications can thus be made before, during and after military service, by both serving conscripts and reservists.¹⁴⁸ This is in conformity with the minimum standards suggested by Committee on Human Right.

Applications that are made by serving conscripts are usually decided within two to four weeks.¹⁴⁹ Approx. 2,500 CO applications per year are actually made by serving conscripts and Approx. 1,000 applications per year are made by reservists.¹⁵⁰

Germany ensures that the decision-making process is independent of the military by making civil service-type commissions the fact-finders. Applications must be made to the Federal Office of Civilian Service (Ministry of Youth, Family Affairs, Women and Health).¹⁵¹ Applications must include a reference to Article 4b of the Constitution.¹⁵² No personal interview takes place and applications are not individually examined. Consequently, almost all applications are automatically granted. If the application is rejected, there is a right to appeal to the administrative court.¹⁵³

¹⁴⁴ Rachel Taylor and Kasperion Larsen, *Reference to Conscientious Objection in the Documents Submitted to, and resolution of, the UN Commission on Human Rights*, 60th session, Quaker United Nations Office, Geneva, 2004 P. 12

¹⁴⁵ Ibid

¹⁴⁶ Ibid

¹⁴⁷ Id p. 11

¹⁴⁸ Id p.12

¹⁴⁹ The Right to Conscientious Objection in Europe: A Review of the Current Situation, <http://www.quaker.org/qcea/coreport/germany.pdf>, accessed on 12/ 4/ 2011 P. 2

¹⁵⁰ Informationen zur Kriegsdienstverweigerung', www.zentralstelle-kdv.de, accessed on 12/4/2011

¹⁵¹ Supra Note 141

¹⁵² Ibid

¹⁵³ Ibid

The right to conscientious objection also applies to professional soldiers.¹⁵⁴ Some provisions on conscientious objection for professional soldiers are laid down in a government decree of 21 October 2003.¹⁵⁵ The application procedure for professional soldiers who wish to be discharged from the armed forces because of conscientious objection is comparable with the application procedure for conscripts. Applications must be made to the local military commander and must include a motivation letter in which the applicant explains in more detail how and when his/her problems of conscience started.¹⁵⁶ The application is forwarded to the Federal Office of Civilian Service (Ministry of Youth, Family Affairs, Women and Health), which makes a decision.¹⁵⁷

The Federal Office may ask the opinion of the military commander or the personnel office.¹⁵⁸ If the Federal Office has doubts about the application, it may order the applicant to attend for a personal interview.¹⁵⁹ In practice, this does not seem to happen often. The Federal Office needs to make a decision on the application within 8 weeks.¹⁶⁰

If a professional soldier is recognized as a conscientious objector he needs to be released from the armed forces immediately (2003 Government Decree, Article 3.2).¹⁶¹ The application procedure is the same during wartime or time of emergency or during combat (2003 Decree, Article 3.6).¹⁶² It is believed that every year approx. 80 professional soldiers ask for discharge from the armed forces because of conscientious objection.¹⁶³ There are no detailed figures available about the number of applications granted, but most applications are reportedly being granted.¹⁶⁴

¹⁵⁴ European Bureau for Conscientious Objection Report to the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament: Conscientious Objection in Europe during 2008 www.ebco-beoc.eu/pdf/index/200910/EBCO-2008-report.pdf, accessed on 30/3/2011 p. 10

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ Supra Note 150

¹⁵⁸ Ibid

¹⁵⁹ Ibid

¹⁶⁰ War Resisters International, Revisiting Germany, <http://www.wri-irg.org/node/3993/revisions/4041/view>, accessed on 3/30/2011

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ Germany Service Obligation, www.country-data.com/cgi-bin/query/r-5008.html, accessed on 30/3/2011

¹⁶⁴ Ibid

The military authorities regard a release from the armed forces which is based on conscientious objection as a release on someone's own initiative.¹⁶⁵ This means that a professional soldier who has been recognized as a conscientious objector, needs to pay back the costs of any courses that (s) he has followed in the military and that have a civilian use.¹⁶⁶

The length of substitute service is 9 months, which is the same length as military service.¹⁶⁷ The length of substitute service was actually reduced from 10 months in 2004, meaning that after 40 years, substitute service now has the same duration as military service.¹⁶⁸ Substitute service is administered by the Federal Office of Civilian Service (Ministry of Youth, Family Affairs, Women and Health).¹⁶⁹

Substitute service is mainly performed in social welfare institutions, such as hospitals, nursing and working with handicapped people.¹⁷⁰ The salaries of COs are partially paid for by the employing organization and partly by the government.¹⁷¹ A few placements are made with (non-profit) non-governmental organizations. COs who have completed one year of voluntary work abroad, mostly ecological or social work, do not have to perform substitute service.¹⁷² After completing substitute service, COs have no reservist duties.¹⁷³ During wartime the right to conscientious objection is guaranteed and COs may not be called up for military service.¹⁷⁴

In the previous ten years approx. 150,000 CO applications were made per year.¹⁷⁵ Most applications (approx. 95 per cent) are granted.¹⁷⁶ The number of placements in substitute service is supposed to be similar to the number of conscripts in the armed forces - as laid down in the government agreement.¹⁷⁷ However, in recent years there are actually more COs in substitute

¹⁶⁵ Supra Note 3 p. 34

¹⁶⁶ Ibid

¹⁶⁷ Supra Note 154 p. 7

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Supra Note 3 p. 34

¹⁷¹ Ibid

¹⁷² Ibid

¹⁷³ Ibid

¹⁷⁴ Ibid

¹⁷⁵ Supra Note 150 p. 3

¹⁷⁶ Ibid

¹⁷⁷ The Right to conscientious objection in Germany, [http:// www.zivildienst.de](http://www.zivildienst.de), accessed on 4/5/2011

service than conscripts serving in the armed forces. For example, in 2004 78,343 conscripts performed military service and 82,046 COs were called up for substitute service.¹⁷⁸

This inequality will, in fact, be increasing in the coming years.¹⁷⁹ The Federal Office has stated in 2005, that 90,000 COs will be called up for substitute service. By comparison, in 2005 only 67,000 conscripts will be called up for service in the armed forces.¹⁸⁰ Still, the number of COs by far exceeds the number of available workplaces.¹⁸¹ Consequently, a considerable number of COs is not called up for substitute service and are in practice exempt from service altogether.¹⁸²

Most COs (approx. 80 per cent) perform their substitute service within the health sector¹⁸³. The contribution of COs to the German health sector has often been cited as an obstacle for the abolition of conscription.¹⁸⁴ Charitable organizations regularly stated that the abolition of conscription would have serious consequences for the future of the health sector as it would be financially impossible to replace all COs by regular paid staff.¹⁸⁵

COs who refuse to perform both military and substitute service are usually sentenced to between 62 and 84 days of military arrest, over periods of 7, 14 and 21 days.¹⁸⁶ Afterwards they may be prosecuted under Article 109 of the Military Penal Code for disobeying orders and “refusal to perform national military service”.¹⁸⁷ They are sentenced by district courts, which mean that the sentences can vary.¹⁸⁸

Those who have been granted CO status and state that they cannot perform substitute service for reasons of conscience, but who promise to work in social welfare institutions for a certain amount of time gets exempted from substitute service.¹⁸⁹ Obviously, this option was introduced

¹⁷⁸ Ibid

¹⁷⁹ Supra Note 150 p. 3

¹⁸⁰ Ibid

¹⁸¹ Ibid

¹⁸² Ibid

¹⁸³ Supra Note 3 p. 34

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ Ibid

¹⁸⁷ War Resisters' International: Two total objectors in military arrest, 22 October 2003. www.iisg.nl/archives/en/files/w/10773401full.php, accessed on 28/4/2011

¹⁸⁸ Supra Note 130 P. 4

¹⁸⁹ Ibid

to facilitate Jehovah's Witnesses, who refuse to perform substitute service but comply with it if they are sentenced to do it.¹⁹⁰

3.5.3. The Right to Conscientious Objection in Norway

Conscription is enshrined in Article 109 of the Constitution and is further regulated by the 1953 General Compulsory Service Act (29/1953).¹⁹¹ The length of military service is 12 months.¹⁹² In practice, it is regularly shortened to 8 or 9 months.¹⁹³ All men between the ages of 18 and 44 are liable for military service. In practice, men are seldom called up after the age of 30.¹⁹⁴

A small number of conscripts serve in the National Guards.¹⁹⁵ They serve for 6 months, but have to do an annual two weeks' reservist training up to the age of 44.¹⁹⁶ Conscripts who have performed regular military service also have reservist obligations up to the age of 44, but are in practice seldom called up for reservist training.¹⁹⁷

In recent years, Norway has reviewed its defence policy and decided to keep conscription in place. Apart from the Green Party, there seems to be political consensus to maintain conscription in the future. According to the Ministry of Defence "conscription will remain a pillar of Norwegian defence".¹⁹⁸ The armed forces comprise 19,000 troops, including 11,300 conscripts. Every year, approx. 32,000 young men reach conscription age.¹⁹⁹

The right to conscientious objection has been legally recognized since 1922. Its present legal basis is the 1965 Law on Exemption of Military Service for Reasons of Personal Conviction.²⁰⁰

¹⁹⁰ Ibid

¹⁹¹ Supra Note 3 p. 51

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ Military Service Norway, <http://www.norway.no/temaside/tema.asp?stikkord=94206>, accessed on 29/4/2011

¹⁹⁵ Ibid

¹⁹⁶ Exercise of the Right to Conscientious objection in Europe, <http://assembly.coe.int/Documents/WorkingDocs/doc01/EDOC8809.htm>, accessed on 29/4/2011

¹⁹⁷ Ibid

¹⁹⁸ Norwegian Ministry of Defence: The further modernisation of the Norwegian Armed Forces 2005-2008, 12 March 2004, <http://www.odin.dep.no>, accessed on 15/4/2011

¹⁹⁹ Ibid

²⁰⁰ Ibid

Both religious and non-religious grounds for conscientious objection are legally recognized.²⁰¹ According to Article 1 of the 1965 Law: “If there is any reason to suppose that a conscript is unable to perform military service of any kind without coming into conflict with his serious conviction, he shall be exempted from such service by the competent Ministry or by judgment pronounced pursuant to the provisions of this Act”.²⁰²

Opposition to the use of nuclear weapons has also been included as a legal ground for conscientious objection. According to an amendment made to the 1965 law in 1990, beliefs “related to the use of weapons of mass destruction as they might be expected to be used in the present day defence” may be seen as a legal ground for conscientious objection.²⁰³ Norway is in fact the only European country where opposition to nuclear weapons is recognized as a legal ground for conscientious objection to military service.²⁰⁴

There are no time limits for submitting CO applications. When a serving conscript makes an application, he needs to be discharged from the armed forces within four weeks.²⁰⁵ During these four weeks, he will not have to carry arms.²⁰⁶ It is not clear if there are legal provisions for the right to conscientious objection for professional soldiers. A report published by the Council of Europe in 2001 suggests that the right to conscientious objection does not apply to professional soldiers.²⁰⁷ According to another source, professional soldiers may claim the right to conscientious objection and should, in this case, be released from duty.²⁰⁸ No further information is available about an application procedure for professional soldiers and there are actually no known cases of professional soldiers seeking discharge from the armed forces because of conscientious objection.²⁰⁹

²⁰¹ Documents on Conscientious objection to military service, <http://www.amnesty.org/en/library/asset/POL31/001/1991/en/32560d00-ee4f-11dd-9381-bdd29f83d3a8/pol310011991en.html>, accessed on 15/4/2011

²⁰² Ibid

²⁰³ War Resisters' International: Refusing to bear arms – A world survey on conscription and conscientious objection to military service, 1998. <http://www.wri-irg.org/co/rtba/index.html>, accessed on 20/4/2011

²⁰⁴ Ibid

²⁰⁵ Supra Note 3 p. 51

²⁰⁶ Ibid

²⁰⁷ Exercise of the right of conscientious objection to military service in Council of Europe member states, Report Committee on Legal Affairs and Human Rights, Doc. 8809 (Revised), 4 May 2001.

²⁰⁸ Supra Note 3 p. 51

²⁰⁹ Ibid

Applications have to be made to the Ministry of Justice. Applications can be made by signing a standard form that is available from the Ministry.²¹⁰ Since 2001, no personal interview takes place during the application procedure. Consequently, applications are almost automatically granted.²¹¹

The length of substitute service is 13 months, which is one month longer than military service.²¹² Substitute service is administered by the Ministry of Justice.²¹³ According to Article 10 of the 1965 Law, substitute service "must have a civilian character and must be commanded by civilians, it should have no connection with any military establishment or activity". Substitute service may be performed in government institutions, such as hospitals, but also in non-governmental organizations.²¹⁴ A large number of COs does their substitute service in an educational programme on violence prevention in junior high schools and high schools.²¹⁵ In 2004, 400 COs were employed in this programme, making it in fact the largest employer of COs.²¹⁶

The salary of COs is paid for by the Ministry of Justice.²¹⁷ Employing organizations need to pay a sum of 18.3 Euros per day to the Ministry, which makes it quite attractive for organizations to employ COs.²¹⁸ This money is given to UNICEF, meaning that employers of COs largely pay for Norway's regular contribution to UNICEF.²¹⁹

After completing substitute service, COs have reservist duties in the Civilian Defence Force and may be called up for an annual two weeks' reservist training.²²⁰ The Civilian Defence Force is

²¹⁰ Ibid

²¹¹ Before 2000, the application procedure could be rather strict, as approx. 30 per cent of applications were rejected (War Resisters' International 1998).

²¹² Supra Note 3 P. 51

²¹³ Ibid

²¹⁴ Ibid

²¹⁵ Conscientious Objector, www.britannica.com/EBchecked/topic/.../conscientious-objector, accessed on 5/4/2011

²¹⁶ Ibid

²¹⁷ Ibid

²¹⁸ Norwegian Ministry of Defence: Norwegian Defence Facts and Figures 2003, www.odin.dep.no, accessed on 15/4/2011

²¹⁹ Ibid

²²⁰ Ibid

aimed at supporting civilians during wartime. Its training includes training in first-aid, self-defence and administering logistics, but it does not include training with arms.²²¹

During the last ten years, the number of CO applications has been relatively stable at between 2,000 and 2,500 per year.²²² Since the abolition of personal interviews in 2001, almost all applications are granted.²²³ It is believed that an application is only rejected if the applicant has been convicted for a violent offence. In 2002, three applications were rejected because the applicants had been convicted for a criminal offence in the past.²²⁴

The government has set a maximum on the number of COs that can be employed per year at 1,490.²²⁵ As the number of recognized COs is higher, this means that a considerable number of COs cannot start their substitute service. Consequently, between 500 and 1,000 COs per year are not called up for substitute service and are in practice exempted from serving altogether.²²⁶

Each year, between 100 and 200 conscripts refuse to perform both military and substitute service.²²⁷ They are usually sentenced to “enforced completion of the service”, which means that they are forced to perform a substitute service consisting of regular substitute service duties.²²⁸ This is mainly relevant for Jehovah’s Witnesses. They do not want to apply for substitute service but they will comply with doing substitute service if they are sentenced to perform it. Approximately 150 Jehovah’s Witnesses per year are sentenced to enforced service.²²⁹

Total objectors who do not comply with the sentence of enforced substitute service are usually sentenced to a fine and three months’ imprisonment under Article 35 of the Military Penal Law for “unauthorized absence from military service”.²³⁰ The Military Penal Law envisages a

²²¹ Ibid

²²² Ibid

²²³ Supra Note 3 p. 52

²²⁴ Ibid

²²⁵ Military Recruitment and conscientious objection in Norway, www.cpti.ws/cpti_docs/brett/recruitment_and_co_A4.pdf, accessed on 15/4/2011

²²⁶ Ibid

²²⁷ The Right to Conscientious Objection in Europe: A Review of the Current Situation: Country Report Norway, <http://www.quaker.org/qcea/coreport/norway.pdf>, accessed on 16/4/2011

²²⁸ Ibid

²²⁹ Kampanjen Mot Verneplikt (Campaign against Conscription), www.pluto.no/doogie/ga/huset.kmv, accessed on 18/4/2011

²³⁰ Ibid

renewed call-up after release and a repeated three months' imprisonment. In practice, the second sentence is often pardoned.

Chapter Four

4. The Recognition of Conscientious Objection in Ethiopian Law

As it was discussed in the previous chapters, the right to conscientious objection has been incorporated in a number of international human rights instruments as well as regional instruments. The next part of this paper focuses particularly to the discussion of the same under the current Ethiopian laws. The right to conscientious objection in Ethiopia during Emperor Haile Selassie and Derg regime will be discussed prior to the discussion part on the right to conscientious objection under the current Ethiopian law. The right to conscientious objection before 1931 is not discussed because there is no comprehensive information on conscientious objector before that period.

4.1. Conscientious Objection in Ethiopia from 1931-1991

Modernization of the army took place under the regency of Tafari Mekonnen, who later reigned as Emperor Haile Selassie I.¹ He created an Imperial Bodyguard, the *Kebur Zabagna*, in 1917 from the earlier *Mahal Safari* who had traditionally attended the Ethiopian Emperor; its elite were trained at the French military academy at Saint-Cyr or by Belgian military advisers.² He also created his own military school at Holeta in January 1935.³ During this period there was no compulsory military service.⁴ Hence there the issue of conscientious objectors did not rise during the Emperor time.

During Menghistu's *Derg* regime compulsory military service was introduced in 1983 by Proclamation no. 236. All men and women aged 18 to 30 were liable for a six months' military training and a two years' military service, with the obligation to remain in the reserves until the age of 50.

¹ Ethiopian National Defense Force, <http://ethiopian-national-defense-force.co.tv/> p. 3 accessed on 5/9/2011

² Ibid

³ Ibid

⁴ Ibid

The *Derg* regime has recruited thousands of soldiers by force.⁵ Local communities, such as local militias, factories, offices, farmers associations and urban dwellers associations (*kebele*) were required to provide a quota of recruits.⁶ As more and more conscripts were needed to fight the liberation movements, these local communities tried to present others than members of their own communities for conscription, in order to reach the quota.⁷ As a result, all prisoners, all strangers' refugees, and all unaccompanied children were liable to be press-ganged to be recruited into the armed forces.⁸

Recruits have been sent to the war front with very little military training. Most of them stood no chance against the hardened guerrilla fighters and thousands were killed, wounded or captured.⁹ Professional units behind the line of conscripts at the warfront shot at them if they tried to flee.¹⁰ During civil war which lasted from 1974 to 1990, 300,000 soldiers died and in the final phase of the armed conflict, from January to May 1991, 230,000 were killed in battle.¹¹

The right to conscientious objection was not recognized during the *Derg* regime. People resisting conscription (conscientious objectors) have been arrested and imprisoned.¹² Jehovah Witnesses were victims of imprisonment and death penalty.¹³ Even arrests of relatives of draft evaders in order to make the evaders report for national service, have occurred.¹⁴

In 1991 Menghistu's *Derg* regime was overthrown by the Ethiopian Peoples' Democratic Revolutionary Front (EPDRF), which consisted of several liberation movements, such as the Tigray's People's Liberation Front (TPLF) and the Oromo Liberation Front (OLF). From 1991 onwards new national armed forces have been formed by recruiting new soldiers from all ethnic groups. Enlistment for military service is on a voluntary basis.

⁵Country report and updates: Ethiopia | War Resisters' International, http://www.wri-irg.org/programmes/world_survey/country_report/en/Ethiopia p. 2, accessed on 5/4/2011

⁶ Ibid

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

¹² Interview with Mr. Eferam Abara, One of Preacher of Jehovah Witnesses, 27/4/2011

¹³ Ibid

¹⁴ Ibid

4.2. The Right to Conscientious Objection under FDRE Constitution

Support for the recognition of the human right to conscientious objection in the Constitution is derived from article 18 and 27 of the provisions of the Constitution. The former provision talks about prohibition against inhuman (degrading and cruel) treatment. It prohibits forced labour and mentions its exceptions. Alternative service exacted in lieu of compulsory military service from conscientious objectors is mentioned in article 18 of the Constitution as one of exception of forced labour. The latter provision is devoted to the recognition of the right to freedom of thought, conscience and religion which is a base to create a right to conscientious objection.

4.2.1. The Right to Be Free from Forced or Compulsory Labour

The right to conscientious objection although, not explicitly mentioned in the Constitution, is implicitly incorporated. The first article that could be mentioned in connection with the right to conscientious objection is article 18(4) of the Constitution. This article talks about forced labour and its exceptions including the right to conscientious objection. Before I deal with the right to conscientious objection, let me discussed about the definition of forced labour so as to understand its exception appropriately.

Since there is no definition of forced labour in the Constitution and other subordinate legislations of Ethiopia, to know the definition of forced labour, article 13(2) of the Constitution is a key. It read as follows:

*The fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenant on Human Rights and International Instruments adopted by Ethiopia.*¹⁵

In other words, the interpretation of the provisions of the constitution on forced labour and its exceptions under the Constitution should be in line with the UDHR, ICCPR, ILO Conventions

¹⁵ Constitution of the Federal Democratic Republic of Ethiopia (FDRE), Proclamation No. 1/1995 Articles 13(2)

and other international instruments (adopted and Ratified by the country). So far there are no compressive and detailed laws dealing with forced compulsory labour in Ethiopia. The only law which can help the applicability of the Constitutional provisions by providing broader and deeper principles is that Forced Labour Convention (No. 29)1931 and Abolition of Forced Labour Convention (No. 105)1959 Convention of ILO which are ratified in 2003 and 1999 respectively by Ethiopia.

A compressive and widely accepted definition of forced labour is provided by the International Labour Organization (ILO) Convention No. 29, 193. Forced or compulsory labour is defined as:

*.....all works or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him voluntarily.*¹⁶

From this definition we can understand that an applicant who based his claim on this definition should establish the existence of work “exacted under the menace of penalty” and also performed against the will of the person concerned; that is work for which “he has not offered himself voluntarily”. The first thing we should address in determining the existence of forced labour is whether the person is ordered to work under the threat of penalty. The penalty referred to need not be in the form of sanction, but might also take the form of loss of rights or privileges.¹⁷ The second issue which should require emphasis from this definition is the involuntary nature of employment relationship. A healthy employment relationship should emanate from the consent of both parties. As a result, consent, once given, deprives the work of its compulsory character.¹⁸

Therefore, a victim of forced labour should prove in his application as he does not “offer himself voluntarily” for the work in question. The two conditions should be satisfied cumulatively; not only must the labour performed by the person against his/her free will, but the obligation to carry out must be under the menace of penalty which are “unjust” or “oppressive”.¹⁹

In addition to this general definition of forced labour, ILO has identified five categories of forced labour by its No. 105, 1957 Convention. This was done to give them special emphasis for they

¹⁶ International Labour Organization, Forced Labour Convention No. 29, 1930, article 2(1)

¹⁷ Richard Clayton, The Law of Human Rights, Oxford University Press, 2002 p. 220

¹⁸ Ibid

¹⁹ Fransisco Forrest, International Human Rights and Practice Oxford University, 2004. p. 1018

frequently practiced forced labour at that time.²⁰ The Convention called each member of the ILO which ratifies this Convention including Ethiopia to undertake to suppress and not to make use of any form of forced labour.²¹ It includes works used:

A. As a means of political coercion or education or a punishment for holding or expressing political views or views ideological opposed to the established political, social and economic system.

B. As a method of mobilizing and using labour for the purpose of economic development.

C. As a means of labour discipline.

D. As a punishment for having participated in strikes.

*E. As a means of racial, social or religious discrimination.*²²

ILO's definition of forced labour of 1930, however, is not applicable to all kinds of work whose nature contradicts with the general definition. Article 2(2) of the same Convention identifies certain activities which are not included in the definition of compulsory or forced labour in article 2(1) and consequently are not banned or required by this Convention. All of them are permitted though they are in contradiction with the general definition by their nature. Among these areas of work which are excluded from the definition are works or service exacted in lieu of compulsory military service laws for work of a purely military character, any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country and any work or service exacted in cases of emergency.²³

The area of work or service described under article 2(2) are not justifiable exception to the prohibition against forced labour or restrictions on the exercise of the right protected by article 2(1). They are excluded entirely from forced labour in the first instance and hence they are not intended to limit the exercise of the right, but to delimit or define the very content of the right.

²⁰ Wilfered C. Jenks, Human Rights and International Labour Standards, Wesleyan University Press, 1960, p. 32

²¹ Supra Note 16

²² Ibid

²³ Article 2(2), Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 U.N.T.S. 55,

They are part of general definition of forced labour to indicate what the term forced or compulsory labour does/ does not include. As a result, article 2(2) serve as an aid to the construction and interpretation of article 2(1).

Article 18 of the FDRE Constitution is the reflection of the provisions of article 8 of ICCPR. The Constitution provides that no one shall be compelled to work without her/his consent. Article 18(3) also lays down the principle of the prohibition of forced labour in a direct and explicit manner. The Constitution, in addition to the general prohibition of forced labour which is provided in article 18(3), prohibits two forms of forced labour specifically slavery or servitude and forced labour arising from human trafficking. Article 18(2) states that no one shall be held in slavery and servitude and trafficking in human beings for whatever purposes is totally prohibited. Hence exceptional situations that are provided in article 18(4) of the Constitutions do not apply to these forms of labour. This can be inferred from the wording of article 18(4) which states that “for the purpose of sub-Article 3 of this Article the phrase forced or compulsory labour” shall not include works stated in article 18(4). Since article 18(4) refers only to article 18(3) the exclusion should not be applicable to those forms of forced or compulsory labour arising from slavery and human rights.

Article 18(4) of the Constitution lists works or service out of the domain of forced or compulsory labour. These are any work or service normally required of a person who is under detention in consequence of lawful order, or of a person during conditional release from such detention; any service extracted in cases of emergency of calamity threatening the life or wellbeing of the community; any economic and social development activity voluntarily performed by a community within its locality and finally in the cases of conscientious objectors any service exacted in lieu of compulsory military service.²⁴

It has been customary in most civilizations for states to utilize, directly or indirectly, the labour of convicted offenders. Article 18(4) of the FDRE Constitution provides forced labour as punitive measure to be imposed on prisoners or persons under conditional release when it is provided in law. The FDRE Criminal Code in accordance with article 18(4) made compulsory labour one type of punishment. Article 103(1) of the Criminal Code provides that where the

²⁴ Article 18(4) of the FDRE Constitution

crime is minor importance and is punishable with simple imprisonment for the term not exceeding sixth months, the court may sentence him to compulsory labour without any restriction of personal liberty subjected to supervision on the condition that if the criminal is healthy and is not a danger to society which shall be stated in the judgment. The court may also impose compulsory labour as substitution for simple imprisonment when the execution of simple imprisonment is not possible or the carrying out of such sentence is not conducive to the reform or rehabilitation of the criminal.²⁵

Most rights are not without limitation and are to be exercised in accordance with different conditions laid down in the law. The same is true for the exaction of forced labour from prisoners, which are excluded from the scope of forced or compulsory labour, and which are to be implemented in conformity with the conditions and safeguards regulating the right to impose such labour. The Constitution does not provide conditions and safeguards regulating the right to impose forced labour on prisoners. On the other hand the proposal made in 1957 by the ILO to supplement the implementation of the Forced Labour Convention of 1930, prescribes restriction to be imposed having recourse to exaction of labour from a prisoners. It provides four conditions to be fulfilled before recourse to extraction of labour from prisoner. The first condition is that the person concerned had been convicted as the result of regular, fair and reasonable expeditious legal proceeding before an independent tribunal in the course of which he had been informed in advance of charges against him and had full opportunity for calling evidence and defending himself against the changes and had appropriate facilities for appeal.²⁶ The second condition is that the person concerned had been convicted of an offence for which work or service might be exacted as penalty under the law of the state.²⁷ The third condition is that the offence consisted of an overt act or an omission to perform a specific legal duty or a series of such acts or omission and is not deducted from presumed or expressed opinions or alleged association of the concerned.²⁸ The fourth condition is that the offence of which the person concerned had been convicted was an offence at the time of the commission.²⁹ Since Ethiopia is a party to the 1930

²⁵ The Criminal Code of the FDRE, 2004, article 107

²⁶ Supra Note 20. P. 42

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

Convention and is also a member of ILO, these safeguards should be implemented in the country.

The second situation where compulsory labour is to be exacted is during a sudden and unexpected happening endangering the existence of the whole society in a specific area or throughout the nation.³⁰ The Paris Minimum Standards of Human Right Norm in a state of emergency provides that “emergency” means an exceptional situation of crises of public danger, actual or imminent, which affects the whole population or the population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.³¹

The 1930 Forced Labour Convention also provides illustration of cases of emergency under article 2(2) (d). It states that:

“emergency is to say, the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic, disease, invasion by animal, insect or vegetable pest, and in general any circumstance that would endanger the existence of well-being of the whole or part of the population.”

Hence according to article 18(4) of the Constitution services which are compulsory by their nature are to be exacted from citizens when events occur that endanger the society.

The third exception to forced labour is any economic and social development activity voluntarily performed by the community within its locality.³² Here the situation refers to those individuals who do not give their consent while the majority of the community agrees to perform works to bring economic and social development within that local community. Then these individuals may be obliged to involve in activities without giving their consent.

³⁰ Article 18(4)(c)

³¹ Forced Labour and Its Exceptions, American Int'l L.J. .Vol. 79, 1985 page 1073

³² Article 18 (4) (d) of FDRE Constitution

The final exception provided in the Constitution is any service exacted upon conscientious objection in lieu of compulsory military service.³³ Hence from the reading of article 18(4) (b) of the Constitution we can understand that compulsory military service is mandatory obligation imposed on citizens. Nowadays, however the fact is that there is no conscription in practice in Ethiopia i.e. it is not enforced.³⁴ Hence the issue of conscientious objection is not as such arise in time of recruitment for military force rather it is a big issue for those who are serving in military (enlisted persons) and professional soldiers. Moreover, the Constitution gives legitimacy to the effect that when situations which entail compulsory military service (conscription) appear and then the issue of conscientious objection could arise in such situation.

Although article 18(4) (b) talks about works performed by conscientious objectors in lieu of compulsory military service as exception to forced labour, we can understand from the same provision that the right to conscientious objection is recognized under the Constitution. This right is also an absolute right under the FDRE Constitution. This is because it is provided under article 93 of the constitution as non-derogable right. However till now there are no subordinate laws which enable the country to implement the Constitutional general provision.

Conscientious objection from the view point of military service raises a conflict of interest which is most difficult to resolve. National security represents the most compelling collective interest of any society on the one hand and the full respect of freedom of religion and conscience on the other side. Moreover, unconditional exception would continue to pursue their private interests while their fellow citizens were conscripted into military service.³⁵ This may subsequently result in inequality among citizens of the same nation. To reconcile conflict which emanates from those interests provisions are normally included for alternative service in countries where conscientious objection is recognized. The Constitution also tries to resolve the above mentioned problem by providing alternative service for those who object compulsory military service. Here the issue is what kind of alternative services should conscientious objectors perform and for how long. The Constitution as well as subordinate laws do not address such issues. Then in such situation it would be mandatory to resort to the Human Right Commission

³³ Article 18(4) (C) of FDRE Constitution

³⁴ Interview with one of Legal Consultant of Ministry of Defense whom he does not want to mention his name, 23/4/2011

³⁵ Donald A. Giannella, Religious Liberty, 1967, Vol. 80. No 7 p. 1413

Resolution 1998/77 so as to interpret the provisions of the right to conscientious objection of the constitution in line with international human right instruments including ICCPR which Ethiopia is party.

The UN Human Right Commission recommend states any alternative service required of conscientious objectors *in lieu* of compulsory military service must be compatible with the reasons for the objection, of a civilian character, in the public interest and not of a punitive nature. With regard to the length of military service the Commission recommended that states should provide alternative service for the objector which should be at least as long as the military service, but not excessively long so that it becomes in effect a punishment. States should to the extent possible, seek to give the alternative service including social service or work for peace, development and international understanding. That is, such forms of alternative service should be in principle of a non-combatant or civilian character, in the public interest and not of a punitive nature.

4.2.2. The Right to Freedom of Religion or Belief

The first and foremost legal basis of the right to conscientious objection to military service undoubtedly must be the right to freedom of thought, conscience and religion. The word ‘conscientious’ objection itself implies the relationship between two concepts. The right to freedom of religion or belief upon which the right to conscientious objection derives is recognized under FDRE constitution. The Constitution comprises of 106 articles of which the preamble and articles 10, 11, 13(2), 27, 29 and 31 are devoted to the recognition of rights under freedom of religion or belief. Paragraph 2 of the preamble of the Constitution stipulates the need for respect of individuals and people’s fundamental freedoms and rights. It is article 27(1) of the Constitution which incorporates specifically freedom of thought, conscience and religion. It is stated in the following terms.

Everyone has the right to freedom of thought, conscience and religion. This right shall include the freedom to hold or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others, and in public or

*private, to manifest his religion or belief in worship, observance, practice and teaching.*³⁶

Article 27(1) of the Constitution is directly translated from article 18(1) of the ICCPR. It recognizes three elements of freedom of religion, thought and conscience. These are freedom of belief, freedom of choice and freedom of exercise.

Article 27(1) of the Constitution starts by proclaiming that “Everyone has the right to freedom of thought, conscience and religion”. This implies that the belief of an individual is respected as being his/her own domain of right. Due to the combination of thought and conscience with religion, it can be argued that the Constitution protects atheists and other non-believers as well.³⁷ This has a positive implication for the right to conscientious objection. It will broaden the ground of conscientious objection by incorporating both religious and non-religiously held beliefs. This is because conscientious’ objection is most likely to be deduced from an internal conviction of an ethical nature which may be inspired by religious or humanitarian ideals. Yet, this conviction may also be inspired by the ethics of the community to which an individual belongs. Today, this notion of community and the environment surrounding individuals is not limited to the domestic or local community but also extends to the international community. The ethics of international community have been greatly influenced by the rise of human rights in the twentieth century. Among others, the UN promoted the protection of human rights and the building of an international community. These achievements of the United Nations could influence the building of an individual’s internal conviction.

Hence due to the fact that the Constitution impliedly recognized theistic, non-theistic and atheistic beliefs, it could be argued that the Constitution extend the right of conscientious objection against mandatory military service to persons who hold non-religious beliefs grounded in conscience, as well as beliefs grounded in all religions”.

Moreover, the phrase ‘..... freedom to hold or to adopt a religion or belief of his choice...’ under article 27(1) of the Constitution further guarantee freedom of belief. According to article 27(3) of the constitution, the right to freedom of belief of an individual shall not be “subject to coercion

³⁶ Article 27(1) of the FDRE Constitution

³⁷ S. Liskofsky, The UN Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Prospective, In Religion and the State, ed. J.E Wood (St. Paul Minniwes Publishing Co., 1985) P. 456

or other means which would restrict or prevent his freedom”³⁸. Belief is something related with the inner part of individuals, being limited with the inner part, it affects no one unless such belief is manifested. That is why it becomes absolute right in the Constitution.

Hence the freedom of belief does not need protection by law since it is inherent in the nature of human beings. And recognition of freedom of religion in laws is to allow believers the right to manifest their religion or belief. Therefore the recognition of freedom of belief as the first and foremost element of freedom of religion is nothing but reaffirming such inherent nature of human beings.

The Constitution also expressly incorporates the second element of freedom of thought, religion and conscience i.e. freedom of choice.³⁹ According to article 27(1), one’s freedom “to hold or to adopt a religion or belief of his choice” is guaranteed. Generally, freedom of choice involves two freedoms i.e. freedom of maintaining one’s previous religion or belief and freedom to change the previous religion or belief. Article 13(2) of the Constitution has significant contribution in answering questions whether the “right of maintaining” and the “right of change” ones religion or belief are incorporated under article 27(2).

Article 13(2) of the Constitution requires chapter three of the Constitution to be interpreted in a manner conforming to international instruments. This, in another word, it means that the interpretation of the provisions on freedom of religion or belief under the Constitution should be in line with those under UDHR, ICCPR and other international instruments adopted by Ethiopia. As a result, the view of Human Rights Committee on the interpretation of the phrase “to hold or to adopt a religion or beliefs” is relevant.

According to the interpretation of the Human Rights Committee, the phrase is comprised of two elements.⁴⁰ The first one is, “the right to retain one’s religion or belief”.⁴¹ And secondly, the phrase implies “the freedom to choose a religion or belief”.⁴² The Committee continues to interpret the implication of the second element and says “the freedom to choose a religion or

³⁸ Article 27 (3) of the FDRE Constitution

³⁹ Id article 27(1) of the FDRE Constitution

⁴⁰ Bahiyyin G. Tahzib, *Freedom of Religion or Belief: Effective International Legal Protection*, the Hague, Martionous Nijhoft Publisher 1996 p. 86

⁴¹ Ibid

⁴² Ibid

belief” includes “the right to replace one’s current religion/ belief with another or adopt atheistic views”.⁴³ Consequently, the phrase “to hold or to adopt a religion/belief” in article 27(1), should be interpreted to encompass the following freedoms under freedom of choice: freedom of maintaining the previous religion/belief, freedom of converting to another religion/belief and the right to disbelief or adopting atheistic views.

The inclusion of both freedoms to maintain and change one’s previously held religion/belief in the Constitution has its own implication on the right to conscientious objection especially for enlisted soldiers and professional soldiers. Because it gives implication that conscientious objection to military service could develop any time before, during or after performance of military service.

It has been mentioned earlier that the question of the recognition and the appropriate scope of conscientious objection primarily arise in countries with conscription.⁴⁴ Theoretically, there may be an inference that ‘by enlisting in the armed forces the adult volunteer soldier must be taken to have consented to certain aspects of military life.’⁴⁵ He has accepted that the military discipline system will apply to him’.⁴⁶ Therefore there may be a strong presumption that it is illogical for volunteer soldiers to claim conscientious objector status. However, the issue of conscientious objection arises not only for conscripted soldiers but for volunteer soldiers as well. This is because so long as the Constitution recognized the right to change one’s previous belief and religion there is no reason that professional soldiers and voluntary soldiers would be prohibited from being exempted from military service since they have the right to change their belief and religion. The application of the right to conscientious objection to persons who voluntarily serve in the armed forces is based on the view that an individual’s deeply held convictions can evolve and that individuals voluntarily serving in armed forces may over time develop a conscientious objection to bearing arms. As I tried to show in the previous chapter some States, including Germany, Norway and Denmark, have recognized that those persons who voluntarily serve in

⁴³ Ibid

⁴⁴ Lippman M, Civil resistance: The dictates of conscience and international law versus the American judiciary. Fla J Int Law 6, 1990, p. 31, 36

⁴⁵ Hitomi Takemura, International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders, Springer-Verlag Berlin Heidelberg Publisher 2009 p. 10

⁴⁶ Rowe P, The impact of human rights law on armed forces. Cambridge University Press, Cambridge, Cambridge, 2006,p. 9

the armed forces may apply for conscientious objector status. Ethiopia should also accept the experience of such states.

The right of conscientious objection for professional soldiers is associated with the issue of the time limits for applying for conscientious objector status. A strict time limit for making application for conscientious objector status prior to induction into the armed forces would preclude conscientious objector status for virtually all persons serving as volunteers in professional armed forces. Therefore in principle no time limits should be applicable for formulating a request for conscientious objector status. Resolutions by the UN Commission on Human Rights adhere to this position. Resolution 1998/77 of the Commission on Human Rights stipulates that “persons performing military service may develop conscientious objection”.

The third element of freedom of religion/belief is that freedom of exercise of religion or belief.⁴⁷ States have not considered it difficult to allow their citizens the freedom to think.⁴⁸ The difficulty starts when we come to the right to express one’s conviction.⁴⁹ Freedom to act in accordance with one’s belief is the backbone of freedom of religion. As to freedom of belief, it is out there in nature of human beings, without the need to regulate it through laws. Since, it is tied to human being nature of freedom of thinking.

Article 27(1) of the Constitution guarantees freedom of religious practice to all citizens as well as non-citizens. This can be inferred from the term “everyone” which entails that the right to freedom of religion or belief is not confined to Ethiopian nationals alone.

The manifestation of ‘religion and beliefs’ as stated in article 27(1), is referring to the forum externum. The manifestation relates to an application of specific principles deriving from the beliefs.

What is important for manifestation is that the conscientious decision emanating from the forum internum leads to definitive action or inaction in the forum externum. The internal belief provides specific direction for external action according to the belief’s underlining directives. Additionally, the action or manifestation of the forum externum relates to a crucial aspect of the

⁴⁷ Article 27(1) of the FDRE Constitution

⁴⁸ Supra Note 18 p. 392

⁴⁹ Ibid

belief being asserted. Prevention of the desired action or inaction will therefore not only impede its performance, but also generate an unyielding predicament that can serve to thwart the belief itself. This internal dilemma is in essence comparable to a violation of a religious belief. Hence the right to military conscientious objection as reliant on pacifist beliefs because the action relates to specific directives of the belief, such that denying the claim to military objection infringes a basic principle of the belief.

According to article 27(1), four means of manifestation of religion are stated i.e. freedom of worship, observance, practice and teaching. Article 27(1) expressly incorporates freedom of religious or belief of worships as one of the element of manifestation of freedom of religion or belief. As a result, believers have the right to worship depending on their belief. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest.⁵⁰

Freedom of religious observance is another method of manifestation of freedom of religion or belief. In almost all faiths the followers are expected not only to worship but also to observe the laws and edicts of their religion/belief.

Such laws and edicts differ according to the religion or belief one follows. For instance Jehovah's Witnesses in Ethiopia are the only religious group which believes that they are required not to rendered military service in the world by the Bible. According to an interview with MR Sentayehu Misker⁵¹, the order not to render military service is not without Biblical support. He mentioned to me the following Proverbs from the Bible.

"For though we walk in the flesh, we don't wage war according to the flesh; for the weapons of our warfare are not of the flesh, but mighty before God to throwing down of strongholds." Accordingly he says Jehovah's witnesses, although we live like human beings, we do not go to armed conflict like human beings. This is because he said that the person behind perpetrating armed conflict is devil and we are not going to fight one another. Devil wants us to fight one

⁵⁰ General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): CCPR/C/21/Rev.1/Add.4, General Comment No. 22. (General Comments), Para p. 4

⁵¹ One of Coordinator of Jehovah Witnesses Church located in Shero Meda, 26/4/2011

another. Hence we disobey devil by not going to armed conflict and by fighting him by the spirit of God. Our weapons to fight devil are spirit of God which are mentioned in Eph 6: 10-18.⁵² This is because God says “put on the whole armor of God, that you may be able to stand against the wiles of the devil.”⁵³ Moreover Eph 6:12 states that, “For our wrestling is not against flesh and blood, but against the principalities, against the powers, against the world’s rulers of the darkness of this age, and against the spiritual hosts of wickedness in the heavenly places.” And then the first weapon of us is that to “put on the whole armor of God so that to be able to withstand in the evil day, and, having done all, to stand”⁵⁴. The second weapon of us is to stand having the utility belt of truth buckled around our waist, and having put on the breastplate of righteousness.⁵⁵ The third weapon is to fit our feet with the preparation of the gospel of peace.⁵⁶ The fourth weapon which is above all is to take up the shield of faith, with our which will be able to quench all the fiery darts of the evil one.⁵⁷ The fifth weapon is taking the helmet of salvation, and the sword of the spirit, which is the word of God.⁵⁸ The final weapon is praying at all times in the spirit, and being watchful to this end in all perservance and requests for all the saints.⁵⁹

The other base for Jehovah Witnesses to refuse to go to armed conflict is Matt 26:52 and John 13:34 which talks about the fact that individuals should not quarrel each other rather they should love each other just like God love them. So if we are going to armed conflict we are violating this commandment since there is no love by fighting and killing one another.

Moreover, Mark 12:17 require as rendering to Caesar things that belong to Caesar and to God the things that are God’s. God require us loving one another and if Caesar’s laws require us to go to armed conflict that would be the point that we refuse to obey the secular law. We only obey the rules of Caesar so long as it does not contradict to laws of God and require rendering things belong to God to Caesar. We are therefore ambassadors on behalf of Christ, as though God were entreating by us. Hence we will not interfere in the affairs of the world. So we will not fight one another since we are required by God to observe the commandment of him.

⁵² Ibid

⁵³ Eph 6:10 of The Bible

⁵⁴ Eph 6:13

⁵⁵ Eph 6:14

⁵⁶ Eph 6:15

⁵⁷ Eph 6:16

⁵⁸ Eph 6:17

⁵⁹ Eph 6:18

Coming to the Ethiopian Constitution, it allows the followers to act in accordance with the doctrine of their religion or belief under article 27(1). However, it does not mean that every act of believers based on their conviction is allowed. That is why the constitution imposes restriction on such right of individuals.

Teaching the doctrine of religion/belief is important for believers so that they could keep the laws and edicts of their faith. Having this in mind freedom of religion is comprised of both freedom of religious teaching and freedom of religious observance.

The right of parents or legal guardians to bring up their children by “ensuring their religious and moral education in conformity with their own conviction” is incorporated under article 27(4) of the Constitution. In the same manner, such right of parents is incorporated under article 26(3) of UDHR. Based on article 13(2) of constitution, it is possible to interpret what article 27(4) implies. Hence, the right of parents or legal guardians under article 27(4) can be interpreted to encompass “the prior right to choose the kind of education i.e. that shall be given to their children.

The last but not the least point under article 27(1) of the constitution is that it guarantees the freedom of worship, observance, practice and teaching to be manifested both privately and publicly. The implementation of the right to freedom of thought, conscience and religion is dependent up on other human rights.

The limitations provided for the right to freedom of thought, conscience and religion are only those ‘limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and general welfare in democratic society’. Some argue that this pertinent provision impose limitation on the freedom of manifestation of freedom of religion and conscience and thereby the right to conscientious objection. They base their argument that the word ‘*necessary for public order and general welfare in a democratic society*’ permits states to make conscientious objection during time of armed conflict a threat to general welfare, or mass conscientious objection a disruption to public order. With regard to the restrictions on the right to manifest one’s religion and conscience the Human Rights Committee however made clear that such restrictions must not impair the very essence of the right in question. Consequently, these

possible limitations cannot excuse making no provision for conscientious objection to military service. Hence from this we can conclude that there is no limitation for the right to conscientious objection so long as the objection is based on genuinely held conviction.

4.3. Major International Human Rights Instruments Ratified by Ethiopia

Ethiopia is a party to the treaty being considered important internationally for recognition of the right to conscientious objection. It has ratified ICCPR on 11th June 1993. However, this needs to be analyzed in legal terms given the hierarchy of laws in the Ethiopian system. The present Ethiopian Constitution,⁶⁰ which came into force in 1995, answers this question.⁶¹ Two of its many provisions, articles 9(4) and 13(2), are relevant for the present query. They read as follows.

Article 9(4): - All international agreements ratified by Ethiopia are an integral part of the law of the land.

Article 13(2): - The fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.

Article 9 (4) is a constitutional provision providing for the incorporation into Ethiopian laws of international agreements to which the nation is a party. It simply, but quite powerfully, declares that they become laws of the land upon ratification. The ICCPR, which recognized freedom of thought, conscience and religion upon which the right to conscientious objection is derived, was acceded to by the Ethiopian government and therefore become integral parts of the domestic laws of Ethiopia. The Amharic⁶² version of the constitution, which is the governing version, makes it clear that what was intended is both treaties acceded to and ratified.

⁶⁰ 1995, *The Federal Democratic Republic of Ethiopia (FDRE) Constitution*, Proclamation No. 1

⁶¹ Despite what is stated in the preceding footnote, the status of the Convention in Ethiopian law is to be determined in regards to the constitution, since the constitution categorically rules for the status of international agreement irrespective of when they are concluded

⁶² Amharic is one of the many languages in the nation and it is also chosen to serve as the official language of the Federal Government. Thus, laws are written primarily in Amharic but a non-binding English translation is rendered

when it comes to international human rights covenants, Article 13(2) of the Constitution binds anyone applying the constitutional human rights provisions, to interpret them '*in a manner conforming to*' existing international human rights instrument to which Ethiopia is a party. But, one might rightly argue that resorting to the international sphere is allowed only when the constitutional sphere is found to be ambiguous. It is only then that interpretation is justified.

Article 13 (2) aims at making international conventions on human rights the standards for the interpretation of the constitution's chapter dealing with human rights and fundamental freedoms. In other words, the standards of protection of the human rights including the right to freedom of thought, conscience and religion as well as the right to conscientious objection guaranteed in the constitution have to be tested against the international standards set by UDHR and the various conventions and covenants ratified by Ethiopia. As one of the human rights convention ratified by Ethiopia, ICCPR therefore is not only part and parcel of the domestic laws of Ethiopia with a place high up in the hierarchy, but also authoritative guidelines for the interpretation of the rights of conscientious objectors guaranteed by the constitution.

In conclusion it can safely be asserted that the Constitution has very well incorporated both the ICCPR and UDHR in a solid way. It has integrated them into the domestic laws of Ethiopia; it has elevated them to the status of interpretive guidelines; and it has embodied some of their parts in the text of the Constitution itself.

Although the Constitution recognized the right to conscientious objection, so far there are no other subordinate laws which enable the country to implement its constitutional general provision and for this reason, to know the spirit of this provision the ICCPR, UDHR and the Human Right Committee General Comment No 22 have a significant contribution. This is because as indicated earlier article 13(2) of the Constitution dictates that the provisions of Chapter Three of the Constitution to be interpreted in conformity with human rights instruments adopted by Ethiopia in particular with ICCPR and UDHR which recognize the right to freedom of thought, conscience and religion which intern includes the right to conscientious objection. consequently chapter one and chapter two of the paper under which I have discussed about the

in the *Federal Negarit Gazeta*. See Article 2(4) of the Proclamation to Provide for the Establishment of the *Federal Negarit Gazeta*, Proclamation No. 3/1995

right to conscientious objection under international human rights laws have relevance in clarifying the constitutional provisions of the right to conscientious objection.

4.4. A Proclamation on the Defence Forces of the Federal Democratic Republic of Ethiopia

Ethiopia has issued a Proclamation for the Establishment of Defence Force. This proclamation states criteria for recruitment of soldiers. The Ministry of Defence recruits persons fit and willing for military services.⁶³ The Internal Regulation of the Armed Forces, issued by the Defence Council puts attaining the age of 18 as a prerequisite for joining the army.⁶⁴ This is to mean that there is no conscription in practice in Ethiopia.⁶⁵ This is because nowadays only volunteers are forming the military force. Thus one may say that the problem of conscientious objection in practice is less significant. This is not however true. Although the Defence Proclamation states that military service is voluntary the Constitution legitimizes conscription impliedly. Then if there will be a law which enforces conscription then the issue of conscientious objection will arise again. Moreover the issue of conscientious objection even nowadays arises in connection with those enlisted persons and professional soldiers after joining the army.

The Defence Proclamation states that any military person is required to sign contract of employment.⁶⁶ Every member of the Defence Forces' shall be employed for a seven-year term of service.⁶⁷ This is to mean each members of the Defence Force are obliged to serve for the term of seven years. Where the member is willing to serve for additional time and the Ministry so agrees, the period of service may be extended. The service however could not be extended beyond the age of 45 years.⁶⁸

Article 11 of the Proclamation states the ground of termination of military services. The first ground is expiry of contract of employment.⁶⁹ This is to mean that the military persons could terminate after serving the military force for seven years. The second ground is the death of the

⁶³ Article 4(1), Defence Forces Proclamation, Proclamation No. 27/1996

⁶⁴ Captain Harinet Yohannes, Head of Public Relations, Ministry of Defence, 23/4/2011

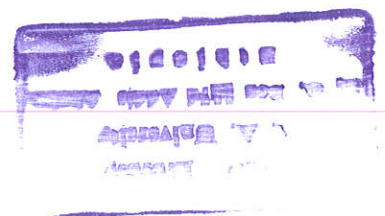
⁶⁵ Ibid

⁶⁶ Article 5 of Defence Force Proclamation

⁶⁷ Id Article 9(1)

⁶⁸ Ibid

⁶⁹ Id Article 11(1)



members of defence force.⁷⁰ The third ground is resignation of the members of defence force where the Ministry of Defence accepts the resignation.⁷¹ Here one may inquire what possible reasons that the ministry would accept to resign. According to the current experience of the Ministry of Defence, the grounds that the Ministry accepts are cases like family problems but it would not accept the development of conscientious objection as a ground of resignation.⁷² However, the writer's opinion is that the grounds for the resignation of members of the defence force should cover conscientious objection to military service so as to enforce article 18(4), 27(1) and 27(3) of the Constitution. The fourth ground of termination of military service is when members of the military, owing to serious illness or, mental or physical handicap suffered becomes unfit for further military service and a medical board testifies this fact.⁷³ Fifthly, when members of the defence force are criminally convicted and the offence he/she is convicted disqualifies him/her from giving military service.⁷⁴ Sixthly if there is structural change in the ministry and it becomes impossible to retain him.⁷⁵ The term of service of members of the defence force will also be terminated if his/her service is undesirable because of incompetence in performance of the regular military duties, failure in leadership or misconduct.⁷⁶

From the above mentioned grounds we can understand that there is no specific provision which allows enlisted soldiers to terminate their service on the ground of conscientious objection. This is in contradiction with the constitution provisions which allows the right to conscientious objection and freedom to change one's religion or belief. Like any other individuals, enlisted soldiers as well as professional soldiers have the right to change one's previously held religion or belief. Hence the proclamation should provide as a ground of termination of service to enlisted and professional soldiers when they develop conscientious objection to military service specifically so as to comply with the recommendation of Human Right Commission which state that persons performing military service may develop conscientious objection to military service. It also recommends states to provide information about the right to conscientious objection to

⁷⁰ Id Article 11(2)

⁷¹ Id Article 11(3)

⁷² Interview with one of the Legal Consultant of the Ministry of Defence, whom he does not want to mention his name, 23/4/2011

⁷³ Article 11(4) of Defence Force Proclamation

⁷⁴ Id Article 11(5)

⁷⁵ Id Article 11(6)

⁷⁶ Id Article 11(7)

military service and the means of acquiring conscientious objector status, to all persons affected by military service. When we see the Defense Proclamation in light of the Human Right Committee recommendation it does not fulfill what is recommended by the Committee.

The Defence Proclamation provides for the situation where the Ministry could defer discharge from military service. The ministry would postpone discharge from military service of members of defence force even beyond terms of service where national security is endangered or in time of armed conflict. This in other words means that enlisted and professional soldiers will not be exempted from performing military service even on the ground of conscientious objection when the security of the state is endangered. This can be inferred from the wording of the provision of the Proclamation. It says “any member of the defence force shall be obliged to remain in service” in cases where there exists threat of national security or war. This is however, contrary to the constitution and UN Human Right Commission Resolution 1998/77 which reaffirms conscientious objection could develop over time by persons who have participated in military training. Moreover from article 27(1) of the Constitution we can understand that persons performing military service could develop conscientious objection over time since ‘everyone’ has the right to change one’s previously held religion and belief. As to the writer’s opinion members of the defence forces who developed conscientious objection over time should not be obliged to serve in military service even where the time they develop their internal conviction not to go to war is in time of war or there exist national endanger. This is because, for one thing, obliging them to serve in military will be coercion which is prohibited under article 27(3) of the constitution because it would impair the individual’s freedom to hold or adopt a religion or belief. Obliging member of the defence force who develop conscientious objection to render military service is directed against the right to change their conviction and opinion and is thus incompatible with article 27(3) of the Constitution.

4.5. The Criminal Code of the Federal Democratic Republic of Ethiopia

The new Criminal Code of Ethiopia which comes in to force on 9th of May 2005 devoted Title III to military crimes and crimes against the defence and the police force. It talks among other

things about refusal to perform military service and failure to comply with a calling-up order. Article 284 states that

- (1) Whoever, with intent to evade recruitment or military service which he is legally bound to perform, fails to obey an enlistment or mobilization order duly served by personal summons, by placard or by public announcement, is punishable with simple imprisonment.*
- (2) Where the crime is committed in times of emergency, general mobilization or war, the punishment shall be rigorous imprisonment not exceeding ten years.*

From the above provision we can understand that failure to obey an enlistment or mobilization order with the intention to evade recruitment or military service is punishable with simple imprisonment. The punishment is severe in time of emergency or war; it is rigorous imprisonment not exceeding ten years.⁷⁷ Then the word to “evade recruitment” or “military service” refers to a situation where call up military service is compulsory. The Criminal Code then authorizes compulsory call up military service. It tells us impliedly that compulsory military service exists in Ethiopia. It provides punishment for those who object to an “enlistment” and “mobilization order”. The word enlistment refers to a situation where individuals who are not members of military force will be called up for recruitment. On the other hand, the word failure to obey mobilization order refers to a situation where members of the defence force object to go to war fronts in accordance with call up. Hence we can conclude that whosoever whether or not those individuals or members of defence force, who fails enlistment and mobilization order respectively are criminally liable. Hence although we can conclude that military service is not compulsory, the military can conduct call-ups when necessary and compliance is compulsory.

According to interview with one of the Legal Consultant of the Ministry of Defence, the provisions of the Criminal Code are applicable only in case of time of war or threat that endangers the national security. He told me that the provisions of the Criminal Code are intended to be applied in cases where there exists shortage of manpower. Since nowadays there are many volunteer individuals to render military service, the law which is applicable is the Defence proclamation No 1996. Until, now there is no call up service in Ethiopia.

⁷⁷ Article 284(2), FDRE Criminal Code

However, War Resister International states that before the escalation of conflict in Somalia in 2006 Ethiopian forces attempted to attract civilians in Ogaden province voluntarily to the Ethiopian military, when this failed forces stationed in the region began conscripting civilians in Ogaden province voluntarily to the Ethiopian military.⁷⁸

According to reports from early December 2006, Ethiopian forces stationed in many parts of Ethiopian province Ogaden are reported to have started conscripting civilians into the army and its affiliated militias. The campaign to conscript civilians into the army came after a failed attempt to get civilians voluntarily for the Ethiopian military. The failed plan was meant to enlist, for the army, up to one hundred civilian members from each district throughout Ogaden.⁷⁹ It is reported that the military leaders are said to be dead set on getting the numbers they require for their conscription plans.⁸⁰

Human Rights Watch also stated that the government has initiated campaigns of forced recruitment:

Although the use and recruitment of local militia is a longstanding practice, in 2007 the Ethiopian authorities engaged in a systematic campaign of forced recruitment of local civilians into pro-government militias, ordering village elders to recruit specific quotas for the militias, or provide money and weapons instead. In some villages, the authorities have detained or killed elders or seized property to force civilians to comply with orders to join the militia. Civilians forced to join the militia are often sent into battle without any military training. The forced recruits are generally lightly armed (at times, they are told to find their own weapons) and simply told to go find and fight the ONLF. As a result, the forced

⁷⁸ War Resisters' International, Somalia and Ethiopia: Forced recruitment and conscription for war, 1 January 2007, <http://www.wri-irg.org/node/1001>, accessed 4/21/2011

⁷⁹ Country of Origin Research and Information, Country Report Ethiopia, Commissioned by the United Nations High Commissioner for Refugees Status Determination and Protection Information Section, Division of International Protection, 2010 <http://www.unhcr.org/refworld/pdfid/4b9e03f92.pdf> accessed on 5/20/2011

⁸⁰ Ibid

*recruits suffer disproportionate casualties against the more experience and better trained ONLF fighters.*⁸¹

Hence so long as there is call up military service issue of conscientious objection will arise in practice. Consequently I asked the Legal Consultant of the Ministry of Defence what will be response of the Ministry in the situation where a person refuses/objects to go to armed conflict on the ground of religion or belief. He told me that the provision of the constitution which recognize the right to conscientious objection would be applied in the above situation.

As to the scope of the objection whether the Ministry accepts both religious and non-religiously held beliefs the Consultant answered that Ministry will accept both grounds so long as the recruitment Committee which is organized from individuals who belong to the Defence Force , police and kebele determine the sincerity of the claim. Here the inquiry Committee is not independent as to the writer's opinion and hence it should be independent organ.

Alternative service will be provided to conscientious objectors in line with the Constitution.⁸² And the type of service the ministry of defence would provide for those conscientious objectors are such as giving logistic service to military, to take care of those wounded, to buries those who are dead, if they are doctors to give treatment to wounded and sick, and giving bullet.⁸³ As to the writers opinion such kind of alternative services are not civilian character in accordance with the recommendation of the Human Right Committee.

The duration of alternative service that conscientious objectors would be required to perform is the same as the duration of military conscripts.⁸⁴ After the end of armed conflict, they would be relived from giving alternative service.⁸⁵ For instance the end of armed conflict, experience shows that soldiers were relieved from military service after the end of armed conflict.⁸⁶ And then in the future if the Ethiopia enforced conscription in line with the Criminal Code, those who

⁸¹ Human Rights Watch, Collective Punishment: War Crimes and Crimes against Humanity in the Ogaden area of Ethiopia's Somali Regional State, Forced Recruitment of Pro Government Militias, June 2008, http://www.hrw.org/reports/2008/ethiopia0608/14.htm#_Toc200167150, accessed on 5/20/2011

⁸² One of Legal Consultant of Ministry of Defence whom he does not want to mention his name, 23/4/2011

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Ibid

object to go to armed conflict will be relieved from rendering alternative service just like soldiers as there is no reason to keep them to stay in work.⁸⁷

Concerning the social benefits that conscientious objectors are entitled, he told me that their wages will be given to their family members if they have job before they give the alternative military service just like soldiers since they are engaged in giving alternative service.⁸⁸

Coming to enlisted and professional soldiers there does not exist any room for conscientious objection in Ethiopia.⁸⁹ Those individuals once they sign contract of employment they are obliged to perform their agreement.⁹⁰ If they fail to oblige the mobilization order they would be criminally liable. They will be criminally liable according to article 284 of Criminal Code.⁹¹

However if the members of the Defence Force with the intent to evade military, for whatever reason including religious or non- religious grounds , quit his unit, post or military duties and leave without the proper authority he will be criminally liable for the crime of desertion (article 288). The punishment for desertion under the Ethiopian law is rigorous imprisonment not exceeding five years. However if the crime is committed in time of emergency, general mobilization or war, the punishment is rigorous imprisonment from five years to twenty-five years, or, in the gravest cases, with life imprisonment or death.⁹² One can infer that the right time to make conscientious objection to military service in Ethiopia is before engaging in military service.

In 2005, Amnesty International expressed its concern that two pilots who had sought asylum in Djibouti as they had not wanted to fire on opposition demonstrators, had been forcibly returned to Ethiopia and might be sentenced to death for desertion.⁹³ Hence in Ethiopia there is no selective objection to military service what is recognized is absolute conscientious objection. As a matter of fact once military conscientious objection is rooted in the right to freedom of religion

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Ibid

⁹² Article 288 of the FDRE Criminal Code

⁹³ Amnesty International, Ethiopia; Further information on fear of forcible return, 22 July 2005, <http://www.amnesty.org/en/library/asset/AFR25/011/2005/en/24329d91-d4c7-11dd-8a23-d58a49c0d652/afr250112005en.html>, accessed on 5/23/2011

or belief, there does not seem to be any qualitative difference between absolute and selective conscientious objection. From a human rights perspective of freedom of religion or belief, the manifestation of a belief could equally apply to the selective conscientious objector. Hence the right of selective conscientious objectors should also be recognized so as to enforce the constitutional provisions of the right to freedom of religion and belief.

From the above paragraphs we can understand that the provisions of the Criminal Code are not in conformity with article 27(1) and 27(3) of the Constitution. The general freedom to change one's religion or belief is recognized in Article 27(1) of the Constitution and Article 27(3) prohibits "coercion which would impair" the individual's freedom to have or adopt a religion. Hence, incarceration of enlisted soldiers and professional soldiers in cases of conscientious objectors is a violation of the freedom to change their conviction and opinion, under threat of penalty and is thus incompatible with Article 27 (3) of the Constitution. The right to develop conscious objection was explicitly acknowledged by the Human Rights Committee. The Committee recommends that conscientious objection can occur at any time, even when a person's military service has already begun. Similarly, the UN Commission on Human Rights has stated "that persons performing military service may develop conscientious objections" and affirmed "the importance of the availability of information about the right of conscientious objection to military service, and the means of acquiring conscientious objector status, to all persons affected by military service."

Chapter Five

Conclusions and Recommendations

Conscientious objection is the right to refuse to participate in the military based upon an opposition to armed conflict. Conscientious objectors base this opposition on their religion or conscientious beliefs, which reflect an individual's inward conviction of what is morally right or morally wrong. This is a conviction genuinely reached and held after some process of thinking about the subject.

Under the principle of international law, conscription is considered as necessary power of the state in the defense of its territory and political independence. Hence states have traditionally maintained both the authority to conscript and discretion in the implementation of this power. As a corollary to this power the existence of a right to conscientious objection has historically remained within the exclusive sphere of the state and beyond the scope of international inquiry.

Nowadays, however states are no longer viewed as discrete and autonomous entities in the modern international system: the increasing interdependency of the state governments often restricts states in the domestic sphere by their obligation to other states. Because states are increasingly interdependent, they are restricted in the domestic sphere by their obligations towards other states. These obligations include an increasing number of agreements recognizing the existence of international human rights. States have responsibility to individuals they govern not only as subjects, but also as human beings.

As a result of this a series of fundamental human rights received global protection under international law. The right of conscientious objection however is not expressly preserved. Nevertheless, a right to conscientious objection has recently emerged in the international community as a human right. This right derives (its authority) from human rights formally recognized in the international treaties, particularly the right to freedom of thought, conscience and religion.

Nowadays conscientious objection has been viewed as an international human right, rather than simply a privilege granted voluntarily by certain domestic governments and this has undermined what has been traditionally the state's exclusive control over its internal policies.

The United Nations human rights law has been the best source of the right to conscientious objection to military service as an international human right. The UN produced a number of resolutions on the right to conscientious objection.

Article 8 of the ICCPR has constituted interpretative impediment for the Human Rights Committee even though the travaux préparatoires do not support the construction deterring the Committee from recognizing the right to conscientious objection. However the situation is gradually changing. Most significantly, the Committee now does not hesitate to urge States to recognize the right to conscientious objection at domestic level. The Human Rights Committee has changed its attitude towards and interpretation of the right to conscientious objection to military service.

It is true that at the time of the drafting of the International Covenant on Civil and Political Rights, there was no consensus on the right to conscientious objection under international law. However, the mere fact that the drafters of the Covenant do not seem to have contemplated the Covenant as giving rise to a generalised right to assert an objection to the performance of military service does not preclude the establishment of such a right for all time.

The Human Rights Committee, made it clear that conscientious objection to military service is protected under the right to freedom of thought, conscience and religion, and has stated so in its Views on individual communications, in General Comments and Concluding Observations. In addition, the former UN Commission on Human Rights adopted a series of resolutions on conscientious objection to military service.

In resolution 1987/46, 1989/59, 1995/83, 1998/77, 2000/34, the Commission on Human Rights specifically declared that the right to conscientious objection to military service constituted a legitimate exercise of the right to freedom of thought, conscience and religion.

Therefore, at the very least international law recognizes that treaty provisions such as article 18 of the Covenant have a norm creating function informing the development of binding rules of

customary international law. One can see that this development in United Nations human rights law has great importance for the future development of international law on the issue of the right to conscientious objection as an international human right.

Although the right to conscientious objection is recognized as an extension of the right to freedom of thought, conscience and religion, the scope of such right is not clearly provided under international treaty instruments. However, concerning the scope of the right to conscientious objection states can get guidelines from different UN resolutions on the right to conscientious objection.

The range of grounds based on which states grant the right to conscientious objection to military service is different. However, the need to extend a right to conscientious objection to all individuals who oppose military based upon their conscience, whether religious in nature or not, has been accepted by UN bodies. The Human Right Committee's General Comment 22 simply referred to a situation where "the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest ones religion or belief". The same General Comment gives a broad scope to the terms religion and belief, stating "article 18 protects theistic, non-theistic and atheistic beliefs....article 18 is not limited in its applications to traditional religions or religions and believes with institutional characteristics or practices analogous to those of traditional religions."

Moreover the Commission on Human Rights acknowledged in its 1987 and 1995 resolutions that objection to military service derives from reasons of conscience and profound conviction based on religion, ethical, moral, humanitarian or similar motives. This more inclusive approach to a right of conscientious objection follows from international recognition that such a right is derived from the rights of freedom of thought and conscience in addition to freedom of religion.

Hence states must be mindful of the position of the Commission on Human Rights that "conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives and the Commissions affirmation that whenever a right of objection is recognized there should be no discrimination "between conscientious objectors on the basis of their beliefs".

The second important issue in relation to the right to conscientious objection is whether states should acknowledged partial objectors in addition to absolute objectors. In passing various resolutions on the right to military conscientious objection, international organs have never specifically provided for the right to selective conscientious objection. One might, however, argue that the right to selective conscientious objection can possibly be derived from the Human Rights Committee's opinion on military conscientious objection provided in the General Comment 22 to article 18. The idea of objecting to 'lethal force', rather than using language regarding the bearing of arms, centers on the manner of warfare being conducted. The term 'lethal' can include selective objection to particular lethal weapons, such as using chemical organs in warfare, even though the same person might not object to handling a gun or participating in the military, in contrast to a pacifist.

The third issue related with the right to conscientious objection is the time for submitting an application as to conscientious objection. The UN Human Rights Resolution 199877 affirmed that the right to be registered as conscientious objector at any time before, during or after conscription, or performance of military service. From the notion that conscientious objection may develop over time, after conscription or performed military training, we can argue that just like serving conscripts and reservists, the right to conscientious objection could also apply to professional soldiers.

The organ that scrutinized the claim of conscientious objector status needs to be fair and independent decision maker. If it is composed of only by military personals the independence of the organ will be compromised.

The system of alternative service to military service that states provide for conscientious objector has to be compatible with reasons for conscientious objection, of non-combatant or civilian character in the public interest and not punitive in nature.

States has to grant asylum to conscientious objectors who are compelled to leave their country of origin because they fear persecution owing to their refusal to perform military service when there is no provision or no adequate provision for conscientious objection to military service.

In Ethiopia, there is no compulsory military service in practice. Military service is on voluntary base. However, from article 18(4) of FDRE Constitution we can infer that compulsory military service is mandatory obligation imposed on citizens. Nowadays, however the fact is that there is no conscription in practice in Ethiopia i.e. it is not enforced. Hence the issue of conscientious objection is not as such raised in times of recruitment for military force rather it is big issue for those who are serving in military (enlisted persons) and professional soldiers. Moreover, the Constitution gives legitimacy to the effect that when situations which entail compulsory military service (conscription) appear and then the issue of conscientious objection arises, in a situation where the Ministry of defence may enforce the Constitution.

The FDRE Criminal Code punishes those who object to call-up military service. Although there is no compulsory military service nowadays, but the military could conduct call-ups when necessary and compliance is compulsory and still the issue of conscientious objection will arise.

Article 18(4) (b) states that works performed by conscientious objectors in lieu of compulsory military service are exception to forced labour. From the same provision we can infer that the right to conscientious objection is recognized under the Constitution. However, there are no subordinate legislations which define the source of objection to military service, the scope of the objection, the type and the length of alternative service to be provided.

There is no room for enlisted and professional soldiers to develop conscientious objection while serving the military. This is in violation of the right to freedom to change ones previously held religion and belief recognized in the Constitution and international human right instruments acceded by Ethiopia.

The provisions of the Constitution as well as international instruments ratified by Ethiopia have pivotal role in clarifying issues arising in connection with the right to conscientious objection.

Although there is no conscription in Ethiopia in practice, legislative guarantees are needed that, if it is reinstated in the context of Constitution, the right of conscientious objection will be fully recognized and that the measures adopted for the treatment of those who claim such a right are completely in accordance with the best practices which have been identified.

As shown in this paper there is no detail legislation on the right to conscientious objection. Hence in the future the laws that are to be legislated should comply with minimum standards that have been laid down by the Human Right Committee and best practice. In particular, the writer of this paper recommends the Ethiopian Government to enact legislation which accommodates the following principles:

1. The right to conscientious objection should be legally recognized and should apply to all reasons of conscientious objection against the use of violence. Both religious and non-religious grounds for conscientious objection should be recognized, by law and practice.
2. The right to be registered as a conscientious objector at any time, before, during and after military service should be recognized. No time limits for submitting conscientious objection application should apply.
3. The application procedure for assessing conscientious objection application needs to be fair, and not discriminatory. All conscripts should have the right to receive information on conscientious objection and the means of obtaining it. Potential recruits should be clearly informed of their rights and procedure to follow. The mechanisms and information about, whereby serving members of the military can obtain release as conscientious objectors should be readily available to those who might be affected. Similarly, information should be available to reservists whether originally conscripts or volunteers.
4. The institutions or tribunals, which decide on conscious objector status, should be impartial. The genuineness of the objection should be determined by neutral institution in a fair trial.
5. Substitute service should be genuinely civilian, be performed outside the armed forces and not be punitive by its nature and duration. Substitute service should not be organized by the ministry of defence, to ensure that substitute service is not connected with the military authorities any way.
6. As a matter of fact once military conscientious objection is rooted in the right to freedom of religion or belief, there should not be any qualitative difference between absolute and selective conscientious objection.
7. The right to conscientious objection should also apply to professional soldiers. There need to be a clear application procedure for professional soldiers who wish to seek

discharge from the armed forces because of conscientious objection, and in this case they should be allowed honorable discharge.

8. Particular attention needs to be paid to the freedom to change one's religion or belief. Not only can this be crucial in the case of serving members of the military; it also means that evidence of a person's past behavior should not in itself be used to invalidate a claim of conscientious objector status.
9. Conversely, no one should be forced to change his or her views or beliefs. This means that even when an application for conscientious objector status has been turned down the applicant should not be forced unwillingly into the armed forces, and should not be subject to repeated calls.
10. Finally, the importance of ensuring that the rights of conscientious objectors should be safeguarded with at least as much force in time of armed conflict as in time of peace. As the core of conscientious objection is the refusal to set out willingly to take other lives it is likely that any objections will be stronger, not weaker, in time of armed conflict. It is also not unreasonable to suppose that the experience of actual combat might crystallize a conscientious objection in a serving member of the military; the fact that an application is made during a time of conflict is by no means an indication that it is spurious. It is therefore legislation affecting the right to conscientious objection should be applicable in time of peace as well as war.

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Declaration

I, the undersigned, declare that this thesis is my original work, has not been presented for a degree in any other University and that all sources of materials used have been aptly acknowledged.

Name Meron Tesfaye

Signature 

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June, 2011