

OHCHR call for inputs on the topic of conscientious objection

Submission on behalf of the Centre for Law and Social Justice,
University of Newcastle, Australia

Authors: Amy Maguire* and Zar Chavla*

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Introduction

The University of Newcastle Law School's Centre for Law and Social Justice ("the Centre") is grateful for the opportunity to submit this input for the Office of the High Commissioner for Human Rights' ("OHCHR") report on conscientious objection to military service at the 50th session of the Human Rights Council ("HRC").

The Centre is particularly concerned with the issue of conscientious objection in Ukraine in the context of its ongoing conflict with Russia. In this submission, we identify where Ukraine's recent national mobilisation, ban on men aged 18-60 from leaving the country, and failure to provide for conscientious objection risks violations of international humanitarian norms. We provide specific contemporary examples of Ukrainian citizens unable to legally avoid conscription and consider the flow-on effects of this for vulnerable groups of people.

The Centre urges the OHCHR to call on Ukraine to bring its law and practice into line with humanitarian and human rights obligations by adequately attending to the right to conscientious objection. This right is no more important than during a time of war.

Legal background

International law

As is well covered, the right to conscientious objection to military service is based on Article 18 of the *International Covenant on Civil and Political Rights*, which guarantees the right to freedom of thought, conscience and religion or belief. The Human Rights Committee, in its general comment No.22 (1993), stated that a right to conscientious objection could be derived from Article 18, on the basis that an obligation to use lethal force might seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.

* Associate Professor in international law and human rights, University of Newcastle Law School, Australia and co-Director, Centre for Law and Social Justice. Address for correspondence: Amy.Maguire@newcastle.edu.au

* Research assistant, Centre for Law and Social Justice, University of Newcastle Law School.

Further, the seminal case of *Bayatyan v Armenia* (application no. 23459/03)¹ saw the European Court of Human Rights hold that Article 9 of the *European Convention on Human Rights* creates a right to conscientious objection in European law. The Court stated that:

*...opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other belief, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion, and importance to attract the guarantees of Article 9.*²

While *Bayatyan* involved the religious rights of Jehovah's Witnesses, the provision that was cited in support of the judgment clearly provides that "a person's conscience or his deeply and genuinely held... other belief" is grounds for conscientious objection.

Ukrainian law and practice

Article 35 of the Constitution of Ukraine confirms the right of all people to freedom of religion. It also expresses this right in the context of military service:

...In the event that the performance of military duty is contrary to the religious beliefs of a citizen, the performance of this duty shall be replaced by alternative (non-military) service.

However, Article 2 of the *Ukrainian Act on Alternative Civil Service* states the right conferred by Article 35 of the Constitution may only be asserted by individuals who are Adventists, Baptists, Jehovah's Witnesses, or members of the Pentecostal Movement. To avoid military service, an individual with one of these affiliations must submit an application for exemption, along with an official letter from the relevant religious organisation, within six months of receiving call-up papers.

In 2015, the High Specialised Court of Ukraine for Civil and Criminal Cases upheld the acquittal of Vitaliy Shalaiko, a Jehovah's Witness, who was accused of evading military service during mobilisation because he requested alternative service when summoned for conscription. The Court affirmed that the lower courts in Ukraine were correct in referring to the relevant provisions of the European Convention on Human Rights and the judgements of the European Court of Human Rights to justify Shalaiko's acquittal.

By upholding the applicability of the *Bayatyan* decision, the Ukrainian court in *Shalaiko* effectively confirmed that the implied right to conscientious objection from Article 9 of the European Convention on Human Rights applies in Ukraine.³ Both cases explicitly confirmed the right to conscientious objection of Jehovah's Witnesses, however these judgments stand

¹ <https://www.refworld.org/cases,ECHR,4e254eff2.html>.

² *Bayatyan v. Armenia*, Grand Chamber judgement of 7 July 2011, p 110.

³ <https://www.jw.org/en/news/legal/by-region/ukraine/human-rights-conscientious-objectors/>

for the broader conclusion that conscientious objection is the right of all whose conscience or deeply and genuinely held beliefs conflict with a requirement of military service.

Issues arising in the current conflict

Conscientious objectors

On Thursday 24 February 2022, Ukrainian President Volodymyr Zelensky ordered the mobilisation of the Armed Forces of Ukraine, including conscription measures and the banning of nearly all male citizens aged 18-60 years old from leaving Ukraine.⁴ Limited exceptions to this rule may apply in a given case, for example for men who have three or more children⁵ or those with serious medical conditions.

Media reports have canvassed a range of perspectives from Ukrainian men affected by the departure ban:

- “We will stay here till Russians go home because it’s important to us to stay in our homes.” – [REDACTED], 24 years old.⁶
- “Now is no time for feelings. If it is necessary to go to war, then that’s what it is. We are proud to do this for our country.” – [REDACTED], 58 years old.⁷
- “My country needs me. I’m here because I’m a patriot.” – unnamed man, 47 years old.⁸
- “I don’t know how I’m going to feel. I pretty much believe that if I should [have] to do it, I will have some heavy psychological circumstances after that. But what other choice do I have?” – [REDACTED], 27 years old.⁹

Extensive political and media coverage of Ukraine’s determined opposition to the Russian invasion has left little space for discussion of conscientious objection, or the experiences of men who would prefer to flee Ukraine along with the millions of their fellow citizens who have already fled the war.

The New York Times has covered this issue, notably in its podcast titled “The Daily”. On 1 March 2022, reporter Lynsea Garrison spoke to a 23-year-old Ukrainian man named [REDACTED], who had tried to flee the country but been stopped at the Polish border by officials enforcing the departure ban in relation to men aged 18-60. [REDACTED] said:

⁴ https://edition.cnn.com/europe/live-news/ukraine-russia-news-02-24-22-intl/h_4309a4916d57670f85519210a07fb2c9

⁵ <https://www.nytimes.com/2022/03/06/world/europe/ukraine-poland-families-separation.html>

⁶ Ibid.

⁷ <https://theintercept.com/2022/02/26/ukraine-russia-invasion-conscription/>

⁸ Ibid.

⁹ <https://www.nytimes.com/2022/03/01/podcasts/the-daily/ukraine-russia-kyiv-civilian-military.html?showTranscript=1>

I think [the ban is] unfair... I think if you want to go – I mean, there [are] people who are motivated to go to the army and understand what they are doing, protecting. But I'm not understanding when government is forced [sic] you.

I mean, I can't imagine myself doing military stuff just because I have no experience in it. I'm afraid of holding gun... I cannot imagine myself holding a gun. I can imagine myself volunteering and helping, but not holding a gun.

I'm making donations to support Ukrainian army. I do anything I can do. I'm illustrator. I'm trying to draw some motivational posters.¹⁰

Following this story, Associate Professor Amy Maguire (co-author of this submission), published an article for The Conversation titled 'Why banning men from leaving Ukraine violates their human rights'.¹¹ Maguire has since received correspondence from four men directly affected by the departure ban – two are Ukrainian nationals who wish to avoid conscription and two are living outside Ukraine but have a gay male partner or friend in Ukraine. In this submission we identify these correspondents by numbers only, due to concerns for their privacy and safety, however Maguire has their information on secure file.

Correspondent 1 and Maguire have had extensive correspondence. He has called the departure ban an “absolutely totalitarian policy”. He noted an order of the Lviv mayor that “all men must register themselves in 24 hours after arriving to Lviv city or Lviv region” in order to be conscripted for military service. He conveyed the following information relevant to his current circumstances:

- “It's incredibly frightening to realize that I'll need to fight or die on the battlefield. I have never taken weapons. ... And I'm afraid that I'll be mobilized. All I want is to survive and leave the country ... I feel embarrassed because men who try to leave the country are called “traitors” or “cowards”. But I believe that the right for life is a basic right of every human. And no one can steal it. I have even thought about illegal border crossing, but this is risky and I don't want to commit a crime.”
- “I was forced to leave Kyiv because of bombing and currently I'm in the Western part of Ukraine (Lviv oblast). It's safe here, but I'm afraid to leave the house, because all people who moved here must register in local military commissariats. Police and military will be patrolling streets and looking for newly arrived men. If they catch me, I'll be forced to do the medical check and start the military service on the same day. I hope this dystopia will end eventually.”
- “I live with relatives who agreed to hide me. I don't leave the house and they buy some food for me. I have to say that I live in better conditions than other Ukrainians who stay directly in a war zone.”

¹⁰ Ibid.

¹¹ <https://theconversation.com/why-banning-men-from-leaving-ukraine-violates-their-human-rights-178411>

- “There are cases when they [the Ukrainian border service] don't let men leave Ukraine even if these men have the right to skip the military service.”
- “Instead of protecting our borders, our border service staff thought that it was funny to greet men who were escaping the country with International Women’s Day and present them flowers. This is a rude case of discrimination and bullying.”

Correspondent 2 considered both the human rights and practical implications of the Ukrainian departure ban currently impacting men who wish to flee the conflict. He wrote in response to Maguire’s article, which argued that Ukraine’s departure ban violates human rights and humanitarian protections:

Let me say, that, as a Ukrainian citizen trapped in this absurd war, I couldn't agree more with your arguments. It is a great shame that Ukrainian government resorted to restricting the human rights of its citizens in order to afford itself a marginal defense benefit in this war. A great number of civilian lives might be lost at the altar of nebulous antiquated concepts, such as "homeland", "civic duty".

Another travesty is to see the contrast between the neighbouring countries, Poland, Hungary, Slovakia and others doing so much to help Ukrainian refugees, with our own government not letting the millions of people fleeing the war out in the first place...

In a subsequent email, Correspondent 2 said:

I'd like to reiterate my impression that Ukraine's current border policy is a major contributor to an ongoing humanitarian catastrophe. Millions of people are fleeing into west Ukrainian regions that are still relatively safe, but those regions simply can't accommodate every fleeing person. The housing and other basic needs are getting less affordable and accessible, tents are now being erected to house people in Lviv, and the situation might only worsen, as Russian occupation of the country progresses and more people are displaced.

A lot of families, my own included, would prefer to evacuate abroad but don't want to leave service-age men behind, we are figuratively stuck between the approaching Russian army on one side and Ukrainian border guard on the other.

From the angle of conscientious objection, I don't feel that this is my war to fight, the political stakes don't seem that high to me, as I strongly believe that human life is much more valuable than whatever political arrangements will be instituted at the end of this all. More fighting only further contributes to human suffering on both sides.

Correspondent 3 asked Maguire how he could protect his Ukrainian partner: “My boyfriend is a Ukrainian citizen, he is currently unable to leave. He is a gay male and a pacifist. He is completely terrified of the horrors to come. I am terrified of losing him to violence.” Correspondent 4 also asked Maguire what options there may be to facilitate his gay friend’s

escape from Ukraine. These correspondents raised particular concerns about the safety of gay people in Ukraine, given the explicitly anti-gay laws and policies of the Russian state, whose forces are advancing into Ukraine.

Additional human rights and humanitarian concerns

Ukraine's current approach to forced mobilisation and the departure ban on men aged 18-60 has significant additional impacts.

As noted above, there are particular concerns in relation to LGBTQI+ people in Ukraine, due to discriminatory Russian laws and policies, which some Ukrainians fear may be imposed upon them if Russia gains greater control over Ukrainian territory and – eventually – government. This fear is held by [REDACTED], a transgender woman whose passport identifies her as a man. She is therefore prevented from leaving Ukraine by the departure ban. She fears that an occupation led by Putin's Russia, a man who has "waged an all-out assault on the LGTBQ" community, could lead to a rapid deterioration of her quality of life.¹² Ukraine is arguably interfering with the right of people in these circumstances to seek asylum across national borders due to a well-founded fear of persecution, as enshrined in the *Refugee Convention*.

Another issue is that of the widespread family separation occurring at the border, with men being forced to stay in Ukraine while sending their partners and children, and often the elderly members of their families too, out of the country to seek refuge elsewhere. The result is such, as stated in a New York Times article, that "overnight, so many mothers have become heads of households in a foreign land".¹³ The departure ban violates the right of families to unity under international human rights law¹⁴ and is driving a growing child protection crisis, with significant numbers of Ukrainian children now lacking family support and facing risks of exploitation, trafficking and abuse.¹⁵

Recommendations

Australian law

In its submission for the "OHCHR report on approaches and challenges for obtaining the status of conscientious objector to military service" for the 41st session of the HRC, the Australian Government outlined the process for recognising conscientious objection in Australia.²³ Section 60 of the *Defence Act 1903* (Cth) ("the Act") empowers the Governor-General of Australia, in a time of war, to call upon those aged 18-60 who have resided in Australia for at least 6 months to serve in the Australian Defence Force.

¹² <https://www.latimes.com/world-nation/story/2022-03-03/lgbt-ukrainians-are-terrified-of-a-life-under-russia-where-homophobia>

¹³ <https://www.nytimes.com/2022/03/06/world/europe/ukraine-poland-families-separation.html>

¹⁴ <https://www.unhcr.org/5a8c40ba1.pdf>.

¹⁵ <https://theconversation.com/russias-bombardment-and-ukraines-departure-ban-leave-children-and-those-with-disabilities-most-vulnerable-178991>

Section 61A(1)(h)-(i) of the Act grants an exemption from service for “persons whose conscientious beliefs do not allow them to participate in war or warlike operations” or “a particular war or particular warlike operations”. Section 3 defines a “conscientious belief” as one that:

*“...involves a fundamental conviction of what is morally right and morally wrong, **whether or not based on religious considerations**, and is so compelling in character for that person that he or she is duty bound to espouse it, and is likely to be of a long standing nature.” (emphasis added)*

Further, Section 123B notes an individual with a conscientious objection shall not be compelled to answer any question as to the individual’s religion.

Section 61(1A) elaborates that those of conscientious objector status are not exempt from liability to serve in the Defence Force in time of war but are exempt “from such duties while members of the Defence Force as long as those beliefs continue”, thus providing for alternative service.

Part IV Divisions 2-5 of the Act provide for the operation of a Conscientious Objection Tribunal, which a person claiming exemption from service must apply to, in writing, in order to be granted the status of conscientious objector. The Tribunal is an independent body established by the Minister for Defence and comprised by three members appointed by the Minister, the presiding member of which must be a legal practitioner.

Importantly, Section 61CP explicitly states that the Tribunal must provide informal, quick, fair, just, and economical procedures according to substantial justice and the merits of the case, and is not bound by technicalities, legal forms or rules of evidence – satisfying the objective of expediting claims to ensure those who conscientiously object to military service are provided access to their rights.

It should be noted that these provisions are purely theoretical in Australia today, with conscription having been abolished in law in 1973. To reinstate conscription, the Governor-General would need to sign a proclamation, but this would have no effect without approval by both houses of the Australian parliament.¹⁶

Recommendations for Ukraine and all other states

We note with concern the very short 7-day period allowed by the Australian *Defence Act* for an individual to submit a claim for exemption from military service, and the somewhat high bar to clear to meet the status of conscientious objector. Nevertheless, we submit that

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https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib9900/2000CIB07#:~:text=As%20noted%2C%20conscription%20was%20abolished,called%20up%20in%20this%20way.

Australia's willingness to grant the status of conscientious objector to any who can prove their stance, regardless of religious belief or lack thereof, is an approach that many other states should look to.

We especially urge the OHCHR to call on Ukraine to reverse its departure ban and alter its national mobilisation order, in light of the current circumstances following the aggressive Russian invasion of Ukrainian territory. Ukraine's current law and policy, which bans many adult men from leaving the country and fails to account for the right to conscientious objection, is forcing people to hide in fear and remain at risk as the Russian bombardment and urban conflict across multiple cities and towns continues. Ukraine is failing to adequately distinguish¹⁷ between civilians and combatants, risking greater humanitarian violations against its own population, in addition to the gross violations of humanitarian standards being inflicted by Russian attacks.

The men whose accounts are cited in this submission would almost certainly meet the criteria for conscientious objector status under international law. As a signatory to the *International Covenant on Civil and Political Rights*, Ukraine is obliged to honour that protection. Ukraine is undoubtedly exercising its legitimate right to self-defence in response to an aggressive and illegal invasion by Russia. However, this does not relieve Ukraine of its obligation to protect the right to conscientious objection, particularly as the right to freedom of conscience and religion is not subject to derogation or limitation in any circumstances.

¹⁷ <https://theconversation.com/why-banning-men-from-leaving-ukraine-violates-their-human-rights-178411>