

INTERNATIONAL FELLOWSHIP OF RECONCILIATION

Submission to the 115th Session of the Human Rights Committee

AUSTRIA

(Military service, conscientious objection and related issues)

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Contact:
Derek BRETT
International Fellowship of Reconciliation
Main Representative to the UN, Geneva
derek.brett@ifor.com
Tel: (41) 77 462 9825

SUMMARY: Conscientious objection to military service has been recognised in law for as long as obligatory military service has existed in the modern Austrian state. There are however a number of serious concerns with the details of the current legislative provisions.

Background

Under the 1919 Treaty of Versailles, Austria was prohibited from maintaining conscription. From 1938 to 1945 conscription into the German Army was imposed. Opposition generally went underground, but, as in Germany itself, an unknown number of conscientious objectors openly declared themselves. Most were shot.

Obligatory military service in Austrian armed forces was introduced only by the Defence Act (*Wehrgesetz*) of 1955, which expressly recognised conscientious objection and permitted recognised conscientious objectors to perform non-combatant service in the medical or clerical corps; this service was of 12 months, as against 9 months in the military.¹ This Act has been revised several times - most recently in 1990 and 2001.

In a referendum held on 20th January 2013, Austrian citizens voted to maintain conscription. Figures released by the interior ministry when all votes except postal votes had been counted showed that the proposal had been rejected by a margin of 59.8% to 40.2%.

A civilian “substitute” service² for conscientious objectors was introduced in the Civilian Service Act (*Zivildienstgesetz*) of 1974. The legislation currently in force is the revised Act, No. 679/1986, with subsequent amendments, most recently in Act No. 106/2005. Initially, the duration of civilian service was the same as that of military service. All claims of conscientious objection were scrutinised individually and involved a personal appearance in front of the investigating

¹ Prasad, D. & Smythe, T. , Conscription - a World Survey: Compulsory Military Service and Resistance to it, London, (War Resisters International), 1968, pp 10, 11.

² Although the usual term in English is “alternative service”, Austrian sources stress that their civilian service is an “*Ersatzdienst*” - a substitute or replacement service. “*Alternative*” in German is seen as implying an option open to all, not just conscientious objectors.

commission. The amending Act (*ZDG-Novelle*) of 1991 abolished this process, but at the same time increased the length of the Civilian Service from 8 to 10 months. There were further increases to 11 months in 1994 and to 12 months in 1996. Amending Acts of 2005 reduced the duration of military and civilian service to six months and nine months respectively, thus maintaining the 150% ratio.

Under the current arrangements all resident male Austrian citizens are obliged to register for military service during the calendar year of their 18th birthday; thus those born in 1997 are being registered in 2015. The only absolute exceptions are for priests, members of holy orders, theological students training for a career in the ministry, or those who following such studies are engaged in pastoral work or spiritual teaching - provided in all cases that they are members of “recognised religions”³. In the cases of *Gütl v. Austria* and *Löffelmann v. Austria* the European Court of Human Rights⁴ found violations because the Jehovah’s Witnesses, having the status only of a “registered religious community” do not benefit from the complete exemptions granted to members of recognised churches.

A citizen liable for military service who has his principal residence outside Austria must report the fact to the nearest embassy or consulate. Should he return to live in Austria before the age of 35 he has three weeks in which to report to the provincial military headquarters. Dual nationals “who fulfil the requirements of the Hague Protocol” are required to supply proof that they have already performed obligatory military service in the forces of another contracting State.

Those in the appropriate age cohort are summoned to register on a specific date according to commune of residence and alphabetical order of name. The summons also applies in principle to anyone liable to military service who has for any reason not previously registered. Identity documents and a considerable amount of medical information must be supplied; the principal function of this process is to identify any medical hindrances to recruitment. Devout Islamic and Jewish recruits must provide certification from the appropriate religious authorities (which are both on the list of “recognised religions”); special arrangements will be made for their call up so that their military duties will not conflict with their religious observances; if this information is not provided until after call-up and it is impossible to make suitable arrangements the recruit concerned will be stood down and instead be called up the following year.

From his seventeenth birthday, a citizen may anticipate the summons to register and, subject to the consent of his parent or guardian, may choose to enlist for his obligatory military service before his eighteenth birthday. No recruit is subject to mandatory call-up until after his eighteenth birthday. The Committee on the Rights of the Child, in its concluding observations on Austria’s initial report under the Optional Protocol to the Convention on the Rights of the Child on children in armed conflict (OP/CAC), noted “that Section 9, paragraph 2, of the National Defence Act, sets the minimum age of voluntary recruitment at 17 years.” and recommended “that the State party consider the possibility to increase the minimum age for voluntary recruitment to 18 years”⁵; the Committee did not address the questionable assumption that an option regarding the timing of enlistment for obligatory military service made this “voluntary recruitment”, and thus, subject to certain conditions, permissible under the OP/CAC.

In the first cycle of the Universal Periodic Review process of the Human Rights Council, Ghana and Slovakia recommended that Austria “Raise the age for all enrolments into the armed

³ See paras 290 - 320 of the Austria's Fourth Periodic Report under the ICCPR (CCPR/C/AUT/4). and the list at www.help.gv.at/Content.Node/82/Seite.820100.html

⁴ Applications nos. [49686/99](#) and [42967/98](#); judgements of 12 March, 2009.

⁵ UN Document Ref. CRC/C/OPAC/CO/2, January 2005, paras 5 and 6.

forces to the age of at least 18 in accordance with the CRC recommendation.”⁶

In its written responses⁷ Austria stated that it did not accept the recommendation: “The option of performing the military service starting at the age of 17 is based solely on the voluntary enlistment of the person concerned and requires the consent of his legal guardian. Neither the direct participation in combat nor the voluntary enlistment for military service in international operations is admissible. Under these provisions, full respect of the entire Convention on the Rights of the Child including its Optional Protocol is guaranteed.”

It is believed that the summons to register is accompanied by written information about the possibility of civilian service for conscientious objectors.⁸ No mention of conscientious objection nor of civilian service can however be traced in the section of the Ministry of Defence website⁹ containing information for recruits; for such information a conscientious objector would have to find the website of the Civilian Service Agency (*Zivildienstverwaltung*).

The requirement to perform military service applies until the acceptance of an application to perform Civilian Service, which must incorporate a declaration of conscientious objection which fits the description in the Act. Helpfully, the application form which may be downloaded from the website of the Civilian Service Agency gives the recommended wording in a preprinted declaration; all that the applicant needs to do is add his signature. The declaration reads: “I hereby expressly declare: a) that I am unable to perform military service because I refuse on grounds of conscience to resort to armed force against other human beings - except in self-defence or in emergency to protect others - and thus the performance of military service would present me with a crisis of conscience b) for that reason I wish to perform civilian service.”¹⁰

The Austrian authorities have made it clear, however, that a conscientious objector is free to make a declaration in his own words, and that the application need not be made on the prescribed form; it may even in the first instance be registered orally.¹¹ This could be important in view of the very strict time limits which apply. Under Article 1(2) of the Civilian Service Act application to perform Civilian Service must be made within six months of receiving notification of fitness for military service following first registration; the right to apply for Civilian Service is however suspended from two days before the receipt of call-up notice until military service is performed or the call-up notice is rescinded; there is no possibility of a transfer to Civilian Service after call-up. Moreover reservists may not declare themselves conscientious objectors until three years have elapsed from the day of their first call-up. There are no legislative provisions to allow the release of regular members of the armed forces who declare a conscientious objection.

Under Article 5a(1) of the Act those who have been convicted and sentenced to more than six months imprisonment for an offence involving violence or the threat of violence with the use of a firearm or explosives are permanently debarred from performing Civilian Service. In the case of a genuine character reform or conversion the requirement thereafter to perform armed military service would seem a bizarre form of double punishment for past misdemeanours. Members of the

⁶ A/HRC/17/8, 18th March 2011 (Working Group on 26th January 2011), para 93.47.

⁷ A/HRC/17/8/Add.1

⁸ Ibid.

⁹ www.bmlv.gv.at/rekrut

¹⁰ “Ich erkläre hiemit ausdrücklich, a) die Wehrpflicht nicht erfüllen zu können, weil ich es - von den Fällen der persönlichen Notwehr oder Nothilfe abgesehen - aus Gewissensgründen ablehne, Waffengewalt gegen andere Menschen anzuwenden und daher bei Leistung des Wehrdienstes in Gewissensnot geraten würde, b) deshalb Zivildienst leisten zu wollen.”

¹¹ Reply of the Austrian Government to the questionnaire on “best practices concerning the right of everyone to have conscientious objections to military service”, circulated by the Office of the High Commissioner on Human Rights, 2003.

constabulary (*Wachkörper*) of regional authorities are also debarred from Civilian Service (Article 5a(2); presumably on the grounds that they will have carried weapons. It is indeed implied in Article 6(3)(3) that having held a firearms licence for any purpose debars a person from Civilian Service.

It is reported that in 2000 under new payment arrangements the remuneration of those performing Civilian Service were reduced to approximately half that received by military conscripts. This question had been raised with the Constitutional Court, which found that there was a right of free choice between military and civilian service, and that this difference in pay rates constituted an interference with the right. Even in 2008, the situation had not been resolved.¹²

Austria's Fifth Periodic Report under the ICCPR

In Austria's Report itself, the issue of military service is not mentioned. In the List of Issues, however, the Committee asks, "Please provide information on the justification for the differentiation between the length of substitute civilian service for conscientious objectors and that of military service, in particular indicating whether such differentiation is based on reasonable and objective criteria. Please also indicate whether the State party is considering raising the minimum age for voluntary recruitment into the armed forces to 18 years."¹³

Austria's reply is:

"The amendment to the Civilian Service Act of 1991 facilitated access to alternative civilian service by eliminating the examination of conscientious objection. Following this amendment, alternative civilian service became more attractive and easier to access. Young men who choose to perform alternative civilian service, are not subject to Military Criminal Law and Disciplinary Law, do not have to wear uniforms and most importantly do not have to live in barracks. In order to address these advantages compared with military service, the Austrian legislature extended the duration of alternative civilian service compared with the length of conscript military service.

"Military and civilian service are mandatory public services in line with Article 9a of the Federal Constitutional Law. This service is based on compulsory military service – regardless of the fact that the activity performed by the person doing civilian service is not a military one. The difference in terms of length between basic military service and civilian service (service time of 6 and 9 months respectively) must be considered from a holistic perspective taking account of the level of exertion involved in the two services and – according to the supreme courts – does thus not violate the principle of equality.

"Austria is State Party to the Convention on the Rights of the Child as well as to its Optional Protocol on the involvement of children in armed conflict. Article 9, Article 41 para. 2 and Article 57 of the Defence Act 2001 (*Wehrgesetz 2001*) comply fully with the requirements set out by this Convention. It is possible in Austria, however, to join the army voluntarily at the age of 17, provided certain conditions are met. According to Article 9 in conjunction with Article 57 of the Defence Act 2001, a 17-year-old has to act of his own accord and requires the written consent of a parent or legal guardian to be able to join the army. The idea behind this rule is to provide young men, who have successfully completed their apprenticeship or education at the age of 17, with the opportunity to join the army. Most employers consider the completion of the mandatory military service or the substitute civilian service as a necessary prerequisite for offering a job. The Austrian Federal Army, however, does not actively advertise this opportunity and does not promote the recruitment of under 18-year-olds in any way."¹⁴

¹² Professional soldiers and the right to conscientious objection in the European Union (Information against war, repression, and for another society No 5: Documentation produced for Tobias Pflüger, MEP) Versingte Europäische Links / Nordische Grüne Links, Brussels, Berlin, Tübingen, October 2008, p.11 (also to be found on the website of War Resisters International at: http://www.wri-irg.org/programmes/world_survey/country_report/en/Austria

¹³ CCPR/C/AUT/Q/5, 28th April 2015, para 18.

¹⁴ CCPR/C/AUT/Q/5/Add.1 [a misprint in the document itself replaces "AUT" by "AUS"], 4th August 2015, paras

The fact that the increase in the duration of civilian alternative service to 50% greater than that of military service is explained by saying that civilian service became more attractive once there was no longer an examination of claims of conscientious objection implies that this is indeed intended to discourage young men from opting for the civilian service. It is hard to see how this effect can be achieved without having discriminatory and punitive conditions for alternative service. Although the fact that Austria abandoned the individual examination of claims of conscientious objection is welcome – there is an inherent impossibility about such attempts to probe the inner motivations of another - to substitute a form of trial by ordeal is not a satisfactory result. Austria itself before 1991 did not find that the fact that conscientious objectors did not become subject to military law, have to wear uniform, or to live in barracks necessitated requiring them to serve for longer. Other States¹⁵ where the same differences in the conditions of service apply have not felt precluded from equalising the durations. It is also not at all clear that the examples quoted really contribute to “the level of exertion”. Does being provided with a free uniform really involve extra exertion? Are no civilian service placements residential? In any case, equally significant to the individuals involved is the length of time which the service takes from the rest of life, from education, career development and earning potential. In this last respect the reply to the list of issues makes no mention of the further disincentive to perform civilian service, a rate of pay set at such a level that for the nine months of civilian service a young man will earn substantially less than for the six months of military service. All that changed in Austria in 1991 was that to perform military or civilian service became a free choice; as already noted the constitutional court has defined this as a right, which should mean that there can be no question of the government doing *anything* to interfere with the ability of the individuals concerned to exercise this choice unimpeded.

Whenever governments feel that it is necessary to impose punitive conditions on civilian service, this seems to be based on the misconception that otherwise no one will opt for military service. In fact only for a minority of young men would the classic caring placement in a mental or geriatric institution seem more attractive than military activities. It might also be observed that those who freely opt for military service will almost certainly make more satisfactory soldiers than those who are serve reluctantly.

The reply to the question about the voluntary recruitment of 17-year-olds is weak. Clearly Austria is aware that it is undesirable to be recruiting persons under 18, even though the OP/CAC as drafted does not absolutely prohibit this. A virtue is made of the fact that the army does not advertise or promote such recruitment. The explanation given of the structural features which may make early performance of military service seem to some young men to be in their best interest – that they may have finished education and / or apprenticeship and that employers are reluctant to hire persons who have not performed national service suggests that attention should be directed to addressing these features in some way rather than simply responding by admitting minors into the army.

In addition to the matters covered in the list of issue, Austria might usefully be asked about some of the conditions governing recognition as a conscientious objector and admission to civilian service, including the disbarment of anyone who has ever held a firearms licence for any purpose, and also how it reconciles the strict time limits on applications with the freedom of those affected to change their religion or beliefs.

Serving members of the military

Finally, attention might be given to the position of serving professional soldiers who develop conscientious objections.

Austria is a member of the Council of Europe, whose Committee of Ministers recommended in 2010:

“42. Professional members of the armed forces should be able to leave the armed forces for reasons of conscience.

43. Requests by members of the armed forces to leave the armed forces for reasons of conscience should be examined within a reasonable time. Pending the examination of their requests they should be transferred to non-combat duties, where possible.

44. Any request to leave the armed forces for reasons of conscience should ultimately, where denied, be examined by an independent and impartial body.

45. Members of the armed forces having legally left the armed forces for reasons of conscience should not be subject to discrimination or to any criminal prosecution. No discrimination or prosecution should result from asking to leave the armed forces for reasons of conscience.

46. Members of the armed forces should be informed of the rights mentioned in paragraphs 41 to 45 above and the procedures available to exercise them.”¹⁶

Paragraph H.4 in the Council of Europe's follow-up questionnaire on the implementation of this recommendation, which was circulated early in 2012.¹⁷ asked “Can professional members of the armed forces leave the armed forces for reasons of conscience? If so, please explain the conditions and the procedure, and in particular whether the requests can be reviewed by an independent and impartial authority. If not, please explain why and whether any measure is in preparation.”

Austria replied to this question in the negative, adding “Not foreseen within the Austrian system. Professional members of the armed forces can leave the armed forces by notice of the termination of their contract. There are no measures in preparation to change this system.”

¹⁶ CM/Rec(2010)4, 24th February 2010

¹⁷ See, Council of Europe, Steering Committee for Human Rights (CDDH) Questionnaire on the implementation of Committee of Ministers Recommendation CM/Rec(2010)4 on human rights of members of the armed forces: COMPILATION OF MEMBER STATES' ANSWERS, CDDH(2012)016,Final, Strasbourg, 27th December 2012.