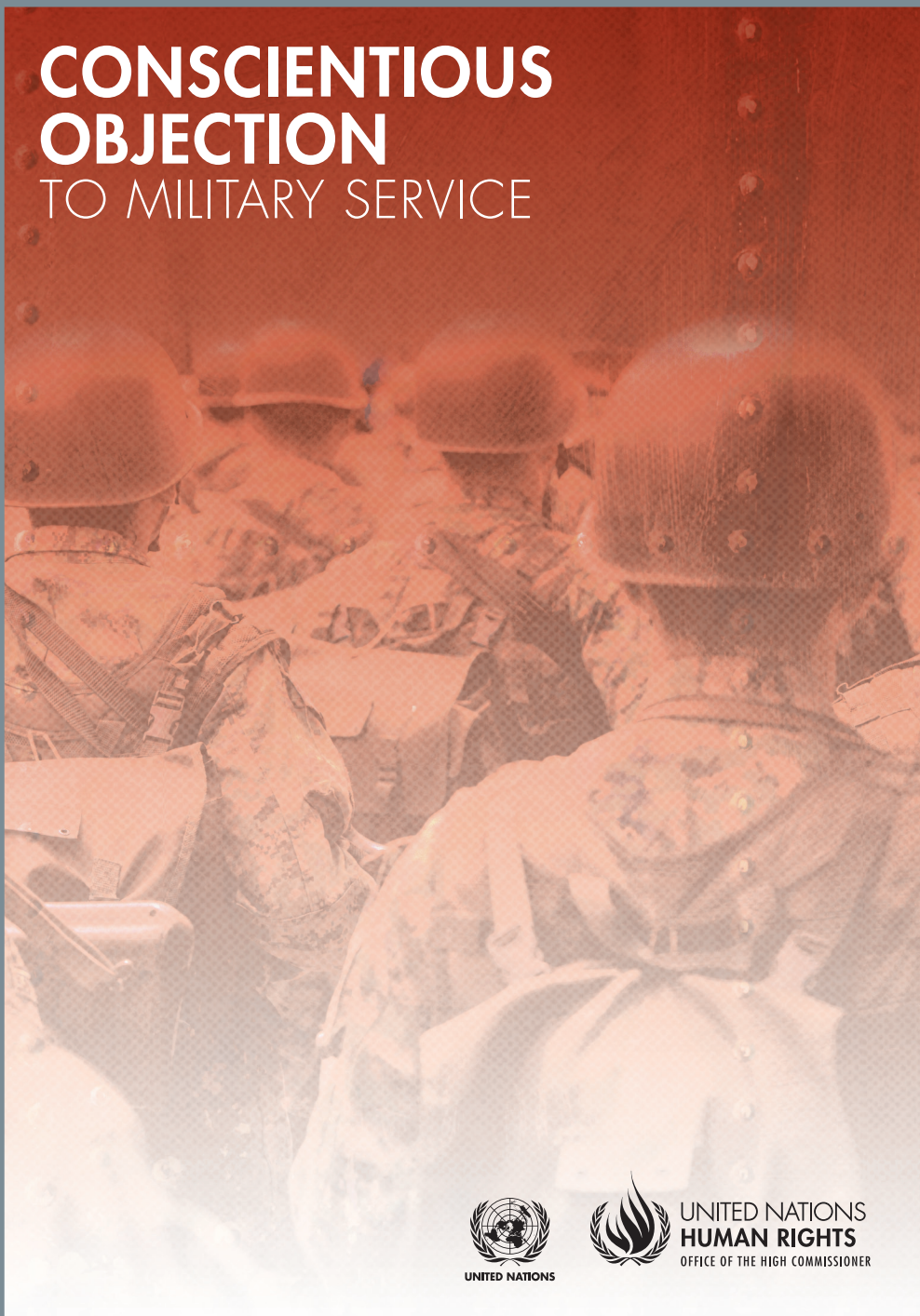
CONSCIENTIOUS OBJECTION
TO MILITARY SERVICE



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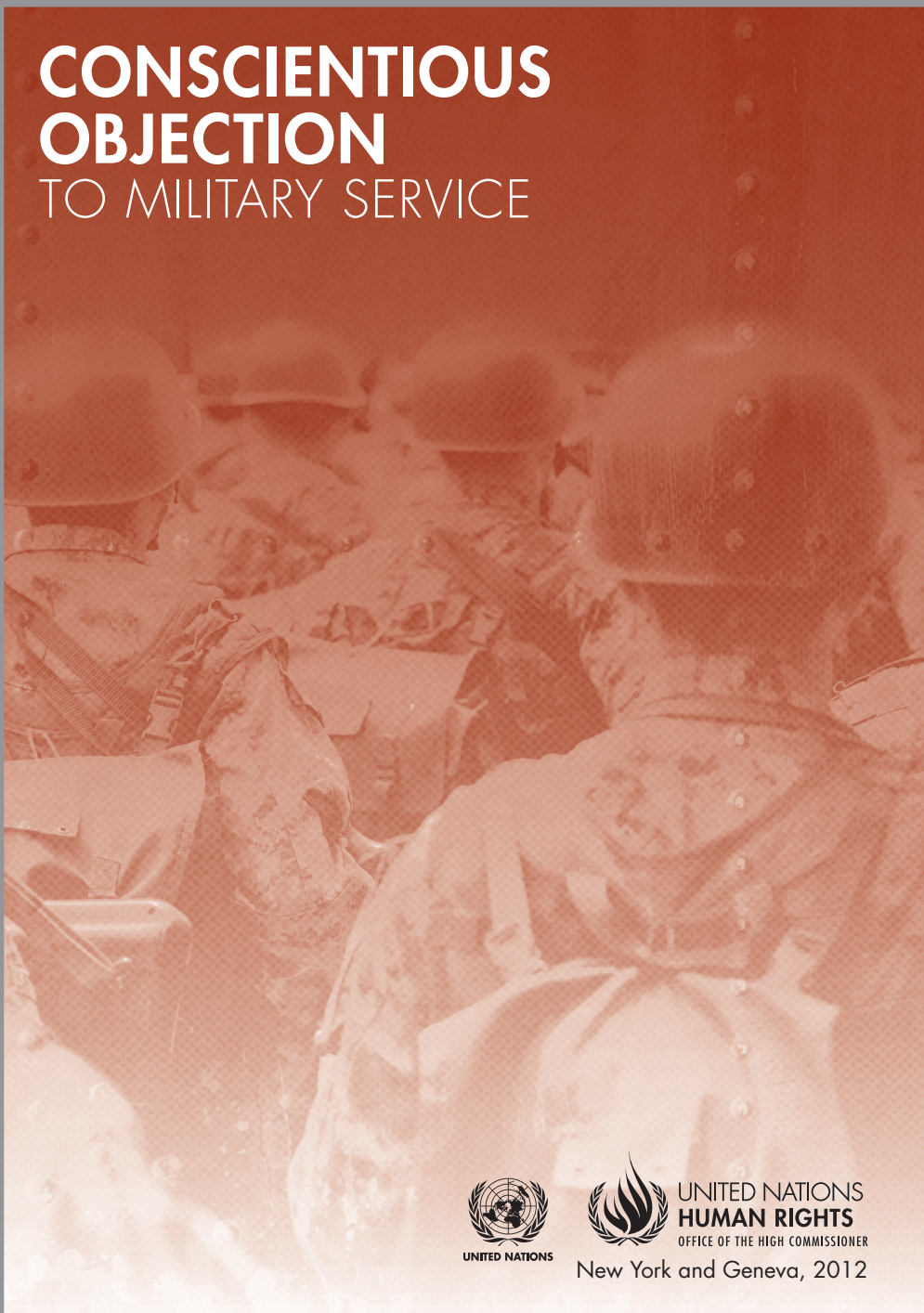

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New York and Geneva, 2012

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HR/PUB/12/1
UNITED NATIONS PUBLICATION
SALES No. E.12.XIV.3
ISBN: 978-92-1-154196-0
e-ISBN: 978-92-1-055405-3

INTRODUCTION

This publication brings together applicable international standards and jurisprudence relating to conscientious objection to military service.* It does not purport to set or establish standards. The publication also addresses the implementation of alternative service to military service for those States that have established programmes of this kind. As questions have often arisen as to how in practice States implement conscientious objection to military service and programmes relating to alternative service, this publication will give examples and highlight those practices that are exemplary. As conscientious objection to military service can, in certain circumstances, be recognized as a basis for refugee status under international refugee law, a chapter of this publication indicates the applicable standards.

This publication is intended as a guide for State officials who are responsible for implementing laws, administrative decrees or regulations relating to conscientious objection to military service, as well as Members of Parliament and Government officials who may be involved in drafting laws or administrative decrees or regulations on this subject. Additionally, this publication is intended to guide individuals who may be called to perform military service and are unsure of what their rights are in this regard, and how and when they can be exercised. The publication is also intended to help civil society, including non-governmental organizations which have been established to help defend the rights of conscientious objectors, as well as other elements of civil society such as the media that may wish to have a better understanding of both international standards and jurisprudence in this regard, as well as examples of national practice. Although the legal focus of this publication is primarily on universal standards and jurisprudence, reference is also made to regional instruments and related action concerning conscientious objection to military service and alternative service.

* The Office of the United Nations High Commissioner for Human Rights (OHCHR) would like to acknowledge the contribution of the late Kevin Boyle, who reviewed this publication.

At least since the middle of the nineteenth century[1] the words "conscientious objection" have been applied intermittently to an unwillingness based on conscience to perform military service. "Conscience" is defined in the *Concise Oxford English Dictionary* (twelfth ed.) as "a person's moral sense of right and wrong". Since the beginning of the twentieth century, in the English language, the phrase "conscientious objection" has been used almost exclusively in the context of refusal to perform military service, to the extent that "to military service" is implied, unless specific reference is made to some other form of objection.

Many conscientious objectors have been, and continue to be, prepared to suffer for their convictions, undergoing repeated imprisonment and even death rather than forgo their principles. This demonstrates both the depth of conviction and its principled rather than expedient nature.

The earliest recorded conscientious objector?

In the year 295, on reaching the age of 21, Maximilianus, as the son of a Roman army veteran, was called up to the legions. However, he reportedly told the Proconsul in Numidia that because of his religious convictions he could not serve as a soldier. He persisted in his refusal and was executed. He was subsequently canonized as Saint Maximilian.

Source: Peter Brock, *Pacifism in Europe to 1914* (Princeton University Press, 1972), p. 13.

The question of conscientious objection to military service has arisen mainly in States where there is an obligation to perform military duties, rather than in those States or societies where military service is voluntary. Throughout history such requirements have been imposed in various forms from time to time and there are many instances where it was recognized that it was inappropriate to lay these demands on minority pacifist religious groups. As early as 1575, during the Dutch wars of independence, Mennonites

[1] An early example can be found in the *New York Assembly Committee on the Militia and Public Defense Report No. 170*, 4 March 1841.

had been exempted from the obligation to take part in the armed guarding of their communities.[2]

In later centuries, there were various instances of similar collective exemptions from militia service or other obligations with regard to communal defence.[3] However, the background to conscientious objection as it is known today was the introduction of a military system based on universal conscription into a standing national army, which spread across Europe following the French Revolution.[4] As conscription was introduced in places or groups that had not previously been subject to any military obligations, it led to major debates and the developments which form the basis of the current recognition of the right of conscientious objection as an individual right as distinct from an exemption for certain groups.

The first decades of the twentieth century produced the first identifiable conscientious objection movements, notably in Australia, Canada, the United Kingdom and the United States, and indeed consolidated the very phrase "conscientious objection", which, supplanting all alternative terms, such as "religious scruples", firmly incorporated the principle of

2 Brock, *Pacifism in Europe to 1914*, p. 167.

3 J. W. Chambers, "Conscientious objectors and the American State from colonial times to the present" in *The New Conscientious Objection: From Sacred to Secular Resistance*, Ch. C. Moskos and J. W. Chambers, eds. (Oxford, Oxford University Press, 1993), p. 26; D. Prasad and T. Smythe, eds., *Conscription: A World Survey—Compulsory Military Service and Resistance to It* (London, War Resisters' International, 1968), pp. 45 and 130; D. Woodside, "A brief history of conscientious objection in Canada", *Conscience Canada*, Newsletter 89 (Fall 2005).

4 "Conscription became more formalized in modern armies. Frederick 'the Great' conscripted a proportion of the Prussian male population (and made wide use of mercenaries) in order to offset the numerical advantages held by his enemies and diminish the demographic cost of the war. The French Revolutionary government, and later Napoleon, conscripted vast numbers of unwilling troops when volunteers became scarce. Indeed, the *levée en masse* introduced by the French Revolutionary government in August 1793 established the practice of large-scale conscription which set the stage for the large scale of warfare in the 19th and 20th centuries." (*The Oxford Companion to Military History*, Richard Holmes, ed. (Oxford, Oxford University Press, 2001)).

individual objection. The first self-identified "conscientious objectors"[5] appeared during the First World War, when these States did eventually resort to conscription. Campaigns ensured that the legislation bringing in conscription included the first modern provisions for conscientious objection. In the United Kingdom, those recognized as conscientious objectors by the tribunals established for this purpose could, depending on the nature of their objection, be assigned to non-combatant duties, required to undertake other civilian work or given "absolute" exemption.[6]

During the First World War, it is estimated that more than 16,000 conscientious objectors refused military service in the United Kingdom[7] and about 4,000 in the United States.[8] When the War ended, conscription and its associated legislative provisions for conscientious objection came to an end and those objectors who had been imprisoned were released.

Many of those who resisted military service in continental Europe and other countries also defined themselves as conscientious objectors. In Tsarist Russia, Mennonites were allowed to run forestry services, work in hospitals or transport the wounded. After the Russian Revolution of 1917, the former Soviet Union issued a decree allowing for alternative service for religious objectors whose sincerity was determined on examination, although the law was unevenly applied. In Canada, Mennonites were automatically exempted from any type of service during the First World War. By the end of the War, Denmark had become the first country with a system of peacetime conscription to pass legislation recognizing conscientious objection. In 1922, Finland introduced the option of non-

5 The term "conscientious objector" was coined much later than "conscientious objection". It seems to have first appeared in the 1890s, when it was applied to those who opposed compulsory vaccination. See Moskos and Chambers, eds., *The New Conscientious Objection*, p. 11.

6 Devi Prasad, *War is a Crime against Humanity: The Story of War Resisters' International* (London, War Resisters' International, 2005), p. 78.

7 Prasad and Smythe, *Conscription: A World Survey*, p. 56.

8 Conscientious Objection in America: Primary Sources for Research, Swarthmore College Peace Collection (www.swarthmore.edu).

combatant military service, although service in the military remained compulsory on pain of imprisonment.

Since the Second World War, when conscription was widely used, the issue of conscientious objection has emerged on all continents, again most notably in countries which have conscription. Many countries have provided legislative or even constitutional recognition of conscientious objection. With the adoption of the Universal Declaration of Human Rights and, subsequently, the International Covenant on Civil and Political Rights, conscientious objection became an important human rights issue.

CONSCIENTIOUS OBJECTION: INTERNATIONAL HUMAN RIGHTS STANDARDS AND JURISPRUDENCE

This chapter presents and analyses the international human rights standards on conscientious objection to military service, its relationship with the right to freedom of thought, conscience and religion, and the requirements with regard to the provision of alternative service to the individual conscientious objector.

A. THE INTERNATIONAL LEGAL FRAMEWORK

Conscientious objection to military service is based on the right to freedom of thought, conscience and religion, set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The right to conscientious objection to military service is not a right per se since international instruments of the United Nations do not make direct reference to such a right, but rather is normally characterized as a derivative right; a right that is derived from an interpretation of the right to freedom of thought, conscience and religion.

The right to freedom of thought, conscience and religion

Universal Declaration of Human Rights, article 18:
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 or belief in teaching, practice, worship and observance.

International Covenant on Civil and Political Rights, article 18:
1. 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.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The right to freedom of thought, conscience and religion is also set out in regional human rights instruments. The Charter of Fundamental Rights of the European Union is the only regional human rights instrument that explicitly recognizes the right to conscientious objection.

European Convention on Human Rights, article 9 (Freedom of thought, conscience and religion):

1. 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 or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as 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.

Charter of Fundamental Rights of the European Union, article 10 (Freedom of thought, conscience and religion):

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

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

American Convention on Human Rights, article 12 (Freedom of conscience and religion):

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

[…]

African [Banjul] Charter on Human and Peoples' Rights, article 8:
Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

The Ibero-American Convention on Young People's Rights specifically recognizes the right to conscientious objection, although to date it has not been widely ratified.[9]

Ibero-American Convention on Young People's Rights, article 12 (Right to conscientious objection)

1. Youth have the right to make conscientious objection towards obligatory military service.

2. The States Parties undertake to promote the pertinent legal measures to guarantee the exercise of this right and advance in the progressive elimination of the obligatory military service.

3. The States Parties undertake to assure youth under 18 years of age that they shall not be called up or involved, in any way, in military hostilities.

B. HUMAN RIGHTS COMMITTEE

The Human Rights Committee, which reviews the implementation of the International Covenant on Civil and Political Rights, has interpreted the right to freedom of thought, conscience and religion and its application

[9] By 1 July 2012, the Convention had been ratified by Bolivia (Plurinational State of), Costa Rica, the Dominican Republic, Ecuador, Honduras, Spain and Uruguay.

in relation to conscientious objection to military service. In its general comment No. 22 (1993),[10] it stated:

> 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 (para. 11).

It is worth noting that the Committee focuses on "the obligation to use lethal force" as the gravamen of a claim of conscientious objection. This position was reiterated in *Westerman* v. *the Netherlands*,[11] where the Committee reaffirmed that it recognized the right to conscientious objection only in relation to the obligation to use lethal force. The *Westerman* case concerned what is called a "total objector", which means that the person not only refuses to undertake any military function involving the use of lethal force, but also refuses any cooperation with the military in any role whatsoever, including in non-combatant functions. The individual's application to be recognized as a conscientious objector had been rejected by the authorities, and he was sentenced to nine months' imprisonment for having refused to put on a uniform and to obey any military orders.

The Human Rights Committee has elaborated its position with regard to conscientious objection both in communications submitted to it under its petitions procedure and also more broadly in its concluding observations adopted following its examination of State parties' reports under the Covenant.

In *Yoon et al.* v. *Republic of Korea*,[12] the Human Rights Committee was asked to decide whether conscientious objection was a right under article 18 of the Covenant or whether such a claim could be made only in those

[10] The general comment appeared to be a departure from the Committee's earlier determination in 1984 that there was no right to conscientious objection to military service under article 18 of the Covenant. See *L.T.K. v. Finland*, communication No. 185/1984.

[11] Communication No. 682/1996.

[12] Communications Nos. 1321/2004 and 1322/2004, Views adopted on 3 November 2006.

States which had chosen to recognize such a right, taking into account article 8, paragraph 3:

> (a) No one shall be required to perform forced or compulsory labour;
> […]
> (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
> […]
> (ii) Any service of a military character *and, in countries where conscientious objection is recognized*, any national service required by law of conscientious objectors […] (emphasis added)

The Committee concluded that the right to conscientious objection was a right based on article 18 and applicable to all State parties to the Covenant:

> […] article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose.

It considered that:

> the State party has failed to show what special disadvantage would be involved for it if the rights of the authors under article 18 would be fully respected. As to the issue of social cohesion and equitability, the Committee considers that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. It likewise observes that it is in principle possible, and in practice common, to conceive of alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service.

A dissenting member of the Committee contested this interpretation and argued that, while the Committee had frequently encouraged States in its concluding observations to recognize a right to conscientious objection, these were "suggestions of 'best practices' and do not, of themselves change the terms of the Covenant." The dissenting member acknowledged that general comment No. 22 (1993) on the right to freedom of thought, conscience and religion stated that "a right to conscientious objection 'can be derived' from article 18. But [...] the Committee has never suggested in its jurisprudence under the Optional Protocol that such a 'derivation' is in fact required by the Covenant. The language of article 8, paragraph 3 (c) (ii), of the Covenant also presents an obstacle to the Committee's conclusion."

Nevertheless, the majority opinion of the Human Rights Committee should be considered an authoritative interpretation of the Covenant and entitled to due consideration by State parties.[13]

In the context of the Human Rights Committee's follow-up procedure in the *Yoon* case, the Republic of Korea reported to the Committee on 8 January 2007 that an outline of the Committee's views had been reported in the major national newspapers and on the principal broadcasting networks, and that the full text of the decision was translated and published in the Government's Official Gazette. It noted that the Alternative Service System Research Committee, established as a policy advisory body under the Ministry of National Defence prior to the Committee's decision, was expected to release its review of the issues involving conscientious objection to military service and an alternative service system could provide a possible basis for follow-up to the case. It also reported that a

[13] See M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2nd rev. ed. (Kehl am Rhein, Germany, N.P. Engel, 2005), p. xxvii ("... decisions and other resolutions of the *Committee* based on consensus rank highly in the interpretation of the Covenant, even though these are not internationally binding. ... the entire case law on individual communications as well as all 'General Comments' and country-specific 'concluding observations' ... have been treated as an 'authoritative interpretation' of the relevant provisions of the Covenant"). Others have noted that concluding observations may also include views on what the Committee considers good public policy relating to the specific circumstances of a State and not necessarily rise to an "authoritative interpretation" of the Covenant.

task force relating to the implementation of individual communications had been established. The Government stated that new legislation would have to be enacted by the National Assembly for the purposes of reversing the final court judgements against the authors.[14]

The Human Rights Committee reaffirmed its position in *Jung et al. v. Republic of Korea*,[15] in which the authors claimed that their rights under article 18 of the Covenant had been violated owing to the absence of an alternative to compulsory military service, since their failure to perform military service had resulted in their criminal prosecution and imprisonment. The Committee noted that the Republic of Korea "reiterate[d] arguments advanced in response to the earlier communications before the Committee, notably on the issues of national security, equality between military and alternative service, and lack of a national consensus on the matter." The Committee stated it could find "no reason to depart from its earlier position" as set out in *Yoon et al.* v. *Republic of Korea*. It concluded that the State was under an obligation to provide an effective remedy, including compensation, for the violation of article 18 and "to avoid similar violations of the Covenant in the future."

In *Jeong et al.* v. *Republic of Korea*,[16] a third communication decided on this subject, the Human Rights Committee noted that the Republic of Korea had again reiterated arguments advanced in the earlier communications. The Committee stated it had "already examined these arguments in its earlier Views and thus finds no reason to depart from its earlier position." The Committee added "the right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs."

The decisions of the Human Rights Committee in *Yoon et al.* v. *Republic of Korea* and, subsequently, in *Jung et al.* v. *Republic of Korea* and *Jeong et al.* v. *Republic of Korea* are important because the question of whether

[14] Report of the Human Rights Committee (A/63/40 (Vol. II), pp. 538–540).

[15] Communications Nos. 1593–1603/2007. These 11 communications were joined in view of their substantial factual and legal similarity.

[16] Communications Nos. 1642–1741/2007, Views adopted on 24 March 2011.

the right to conscientious objection is universally applicable has frequently evoked different views not only internationally, but regionally as well.

In addition to deciding that the right to conscientious objection implies an obligation on all State parties to the Covenant pursuant to the Human Rights Committee's interpretation of article 18 of the Covenant and not a right that exists only subject to its recognition by a State,[17] the Committee has addressed a number of other issues relating to conscientious objection in its concluding observations on State parties' reports. These concern, for example, the basis on which conscientious exemption from military service can be granted and the process for obtaining such exemption. Questions are also commonly raised regarding the provision, length and conditions of alternative service and the rights of those who object to alternative service; whether alternative service provides the same rights and social benefits as military service; and whether there can be repeated punishment for failure to perform military service.[18] Concerns have been raised with individual States relating to the lack of an independent decision-making process,[19] disproportionately lengthy alternative service[20] and the recognition of the right to conscientious objection in a discriminatory manner, e.g., by granting exemption only to religious groups and not to others.

C. REGIONAL HUMAN RIGHTS COURTS AND COMMISSIONS

Before the Human Rights Committee's decision on *Yoon et al.* v. *Republic of Korea*, the Inter-American Commission on Human Rights found, in *Cristián*

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17 *Yoon et al.* v. *Republic of Korea*.

18 For example, in the annual reports of the Human Rights Committee, see its concluding observations on: Venezuela (A/48/40, para. 291); Austria, Ecuador and Belarus (A/47/40, paras. 110, 247 and 536); Spain (A/46/40, para. 172); Portugal, and Saint Vincent and the Grenadines (A/45/40, paras. 156 and 251); Norway and the Netherlands (A/44/40, paras. 83 and 219); Finland and Hungary (A/41/40, paras. 210 and 398); Iceland, Australia and Peru (A/38/40, paras. 113, 150 and 269); Norway (A/36/40, para. 358); and Canada (A/35/40, para. 169).

19 For example, in the annual report of the Human Rights Committee, its concluding observations on Israel (A/58/40, para. 85).

20 For example, in the annual reports of the Human Rights Committee, its concluding observations on Latvia (A/59/40, para. 65) and on Georgia (A/57/40, para. 78).

Daniel Sahli Vera et al. v. *Chile*,[21] that "failure of the Chilean State to recognize 'conscientious objector' status in its domestic law, and failure to recognize [the petitioners] as 'conscientious objectors' [...] does not constitute an interference with their right to freedom of conscience." The Commission rejected the argument that conscientious objection to military service was a right the applicants were entitled to under the American Convention on Human Rights, as Chile had not recognized such a right by law. It found no violation of the applicants' rights under, inter alia, article 12 of the Convention.

The Commission determined that the "American Convention does not expressly create or even mention a right of 'conscientious objection', the alleged right to not be required to comply, for reasons of conscience, with obligations imposed by law." The Commission noted that "article 6 (3) (b), following [International Labour Organization] Convention No. 29 on the same subject, expressly excludes from the definition of forced or compulsory labor 'military service and, *in countries in which conscientious objection is recognized*, national service that the law may provide for in lieu of military service'" (emphasis added in the Commission's opinion). The Commission determined that "international human rights jurisprudence recognizes the status of conscientious objectors in countries that provide for such status in their national laws. In countries that do not provide for conscientious objector status, the international human rights bodies find that there has been no violation of the right to freedom of thought, conscience or religion."

The European Court of Human Rights addressed the question of whether a right to conscientious objection is guaranteed under article 9 of the European Convention on Human Rights in *Bayatyan* v. *Armenia*, a case involving a Jehovah's Witness. The Third Section held by a majority that the Convention did not recognize such a right.[22] The Court chose to uphold a consistent position that the mention of conscientious objection in article 4 on forced labour in terms which suggested that provision of alternative service for conscientious objectors was at the discretion of the State also

[21] Report No. 43/05, case 12.129, Merits (10 March 2005).

[22] Application No. 23459/03, Judgement of 27 October 2009.

entailed that a right to conscientious objection could not be derived from article 9 of the Convention on freedom of thought, conscience and religion.

However, on appeal the Grand Chamber reversed the judgement, with one dissenting opinion, and found a violation of article 9 of the Convention.[23] In doing so, it recognized that it was departing from existing jurisprudence of the European Commission on Human Rights, which "drew a link between article 9 and article 4 § 3 (b) of the Convention, finding that the latter left the choice of recognizing a right to conscientious objection to the Contracting Parties."

The Grand Chamber continued:

> the Court is mindful of the fact that the restrictive interpretation of article 9 applied by the Commission was a reflection of the ideas prevailing at the material time […] [and] that its last decision to that effect was adopted as long ago as 1995. […]
>
> The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today […].

The Grand Chamber subsequently determined that:

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

It further reiterated that:

> pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance

[23] Application No. 23459/03, Judgement of 7 July 2011.

must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Thus respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to service society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.

D. COMMISSION ON HUMAN RIGHTS

The Commission on Human Rights, established in 1946, was formerly the intergovernmental body that had principal responsibility within the United Nations system for addressing human rights issues. It was replaced by the Human Rights Council in 2006. In official reports to the Commission, a number of States regularly reported their objections to its resolutions on conscientious objection. For example, in a joint letter to the Commission on Human Rights dated 24 April 2002, 16 Member States stated that they did "not recognize the universal applicability of conscientious objection to military service".[24] In its reply to a request for information for a report prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in 2006, Singapore confirmed its position that Commission on Human Rights "resolution 2004/35 goes beyond what is prescribed in the international law and the applicable human rights instruments."[25]

Despite these objections, the resolutions do appear to recognize such a right. In its resolution 1989/59, the Commission on Human Rights recognized conscientious objection to military service as a manifestation of the right to freedom of thought, conscience and religion, and appealed

[24] The letter (E/CN.4/2002/188) was submitted by the Permanent Representative of Singapore and co-signed by: Bangladesh, Botswana, China, Egypt, Eritrea, Iran (Islamic Republic of), Iraq, Lebanon, Myanmar, Rwanda, Singapore, the Sudan, Syrian Arab Republic, Thailand, United Republic of Tanzania and Viet Nam.

[25] "Analytical report of the Office of the High Commissioner for Human Rights on best practices in relation to conscientious objection to military service" (E/CN.4/2006/51), para. 18.

to States to enact legislation "aimed at exemption from military service on the basis of genuinely held conscientious objection". It should be noted, however, that resolutions of the Commission on Human Rights, as well as its successor, the Human Rights Council, are not legally binding in international law. Nevertheless, resolutions, particularly when they are adopted by consensus, have an undeniable moral force and provide guidance to States in their conduct.

In its resolution 1998/77, the Commission consolidated its previous resolutions and this is, therefore, an important reference for the Commission's views on conscientious objection.

Commission on Human Rights resolution 1998/77 on conscientious objection to military service

The Commission on Human Rights,
Bearing in mind that it is recognized in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights that everyone has the right to life, liberty and security of person, as well as the right to freedom of thought, conscience and religion and the right not to be discriminated against,

Recalling its previous resolutions on the subject, most recently resolution 1995/83 of 8 March 1995, in which it recognized the right of everyone to have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion, as well as article 18 of the International Covenant on Civil and Political Rights and general comment No. 22 of the Human Rights Committee, adopted at its forty-eighth session in 1993,

Having considered the report of the Secretary-General (E/CN.4/1997/99),

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,

Aware that persons performing military service may develop conscientious objections,

Recalling article 14 of the Universal Declaration of Human Rights, which recognizes the right of everyone to seek and enjoy in other countries asylum from persecution,

1. *Draws attention* to the right of everyone to have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion, as laid down in article 18 of the Universal Declaration of Human Rights and article 18 of the International Covenant on Civil and Political Rights;

2. *Welcomes* the fact that some States accept claims of conscientious objection as valid without inquiry;

3. *Calls upon* States that do not have such a system to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held in a specific case, taking account of the requirement not to discriminate between conscientious objectors on the basis of the nature of their particular beliefs;

4. *Reminds* States with a system of compulsory military service, where such provision has not already been made, of its recommendation that they provide for conscientious objectors various forms of alternative service which are compatible with the reasons for conscientious objection, of a non-combatant or civilian character, in the public interest and not of a punitive nature;

5. *Emphasizes* that States should take the necessary measures to refrain from subjecting conscientious objectors to imprisonment and to repeated punishment for failure to perform military service, and recalls that no one shall be liable or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country;

6. *Reiterates* that States, in their law and practice, must not discriminate against conscientious objectors in relation to their terms or conditions of service, or any economic, social, cultural, civil or political rights;

7. *Encourages* States, subject to the circumstances of the individual case meeting the other requirements of the definition of a refugee as set out in the 1951 Convention relating to the Status of Refugees, to consider granting asylum to those conscientious objectors 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;

8. *Affirms* the importance of the availability of information about the right to conscientious objection to military service, and the means of acquiring conscientious objector status, to all persons affected by military service;

[…]

Commission resolutions 2004/35, 2002/45, 2000/34, 1998/77, 1997/117, 1995/83, 1993/84, 1991/65 and 1989/59 on conscientious objection to military service were adopted without a vote, while resolution 1987/46, the first resolution on this subject, was adopted by a vote of 26 in favour, 2 against and 14 abstentions. Therefore, insofar as the Commission's resolutions may indicate the development of a norm in international law, it should be noted that some States object persistently. Hence, the resolutions of the Commission on Human Rights appear to enjoy broad, although not universal, support.

E. SELECTIVE CONSCIENTIOUS OBJECTION

"Selective conscientious objection" is distinct from an objection to participation in any war, military action or armed forces, and accepts the legitimacy of some military action. The General Assembly implicitly recognized one type of selective objection in its resolution 33/165, in which it called upon "Member States to grant asylum or safe transit to

another State […] to persons compelled to leave their country of nationality solely because of a conscientious objection to assisting in the enforcement of apartheid through service in military or police forces".

F. LIMITATIONS ON FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION IN THE CONTEXT OF CONSCIENTIOUS OBJECTION

The right to freedom of thought, conscience and religion as set out in article 18 of the International Covenant on Civil and Political Rights is a non-derogable right under article 4 of the Covenant, even during times of a public emergency threatening the life of the nation. The right to manifest one's religion or belief may be subject "only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (art. 18 (3)). The Human Rights Committee has emphasized the limited nature of permissible restrictions to the right to freedom of religion and belief in its general comment No. 22 (1993): "The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security."

The Human Rights Committee has been critical of States that allow conscientious objection only during peacetime. In its concluding observations on a State report by Finland, it stated that it "regrets that the right to conscientious objection is acknowledged only in peacetime […]. The State party should fully acknowledge the right to conscientious objection and, accordingly, guarantee it both in wartime and in peacetime […]."[26]

G. DEFINITIONS, APPLICABILITY AND RELATED DISCRIMINATION

Although there is no international human rights treaty-based definition of conscientious objection, in its general comment No. 22 (1993), the Human Rights Committee identified conscientious objection as being based on the

[26] CCPR/CO/82/FIN, para 14.

right to freedom of thought, conscience and religion when it conflicts with the obligation to use "lethal force".

In its general comment No. 22 (1993), the Committee also states:

> Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

Since its adoption of general comment No. 22 (1993), the Human Rights Committee has repeatedly referred to the prohibition of discrimination "among conscientious objectors on the basis of the nature of their particular beliefs". For instance:

> The Committee notes with concern the information given by the State party that conscientious objection to military service is accepted only in regard to objections for religious reasons and only with regard to certain religions, which appear in an official list. The Committee is concerned that this limitation is incompatible with articles 18 and 26 of the Covenant.
>
> The State party should widen the grounds for conscientious objection in law so that they apply, without discrimination, to all religious beliefs and other convictions, and that any alternative service for conscientious objectors be performed in a non-discriminatory manner.[27]

[27] CCPR/CO/73/UKR, para. 20. See also CCPR/CO/69/KGZ, para. 18.

The Committee therefore makes it clear that the right to conscientious objection is an individual right as distinct from a right that can be exercised only on the basis of belonging to a specific religious group.

Shortly before issuing general comment No. 22 (1993), the Committee had addressed the question of discrimination between conscientious objectors in *Brinkhof* v. *the Netherlands*.[28] Although the Committee found against the applicant on the facts, the State party's complete exemption of Jehovah's Witnesses from all national service while it excludes others from any possibility of claiming complete exemption was considered to raise issues of discrimination.

Commission on Human Rights resolution 1998/77 states 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 also calls upon States "[…] not to discriminate between conscientious objectors on the basis of their particular beliefs". The Committee added that "there shall be no discrimination against conscientious objectors because they have failed to perform military service."

In *Thlimmenos* v. *Greece*,[29] the European Court of Human Rights held that the conviction of the applicant by the Athens Permanent Army Military Tribunal in 1983 of insubordination for not wearing the military uniform should not bar him from being eligible for appointment to the civil service as a chartered accountant, even though the law prevented appointments of those convicted of "serious crimes". The European Court found that at the time of his conviction there was no evidence to conclude he was not legitimately exercising his religious beliefs. It noted that on the facts of the case the applicant was a member of the Jehovah's Witnesses, "a religious group committed to pacifism," and further determined that "there is nothing in the file to disprove the applicant's claim that he refused to wear the military uniform only because he considered that his religion

[28] Communication No. 402/1990, Views of 27 July 1993.

[29] Application No. 34369/97, Judgement of 6 April 2000.

prevented him from doing so". The European Court held that since his conviction resulted from the exercise of his right to freedom of thought, conscience and religion under article 9 of the European Convention on Human Rights, it could not be said "he was treated like any other person convicted of a serious crime" since "his own conviction resulted from the very exercise of this freedom."

The Court found that the applicant was a legitimate conscientious objector, a status not recognized in Greek law at the time of the conviction, and also took notice of the fact that at the time of the conviction no alternative service was available either. The case would support the conclusion that, in States that do not recognize conscientious objectors, convictions of legitimate conscientious objectors could be considered by regional or international bodies as violating the right to religious belief and such convictions based on the exercise of such rights should therefore be treated differently from other types of convictions.

H. EXEMPTION FROM MILITARY SERVICE ON OTHER GROUNDS AND THE OBLIGATION TO RECOGNIZE CONSCIENTIOUS OBJECTION

States may exempt individuals from military service for a wide variety of reasons (e.g., health, education, family situation), but this is not a substitute for legal recognition of conscientious objection to military service. The Human Rights Committee in its concluding observations on a State report by the Syrian Arab Republic took note that the State party:

> [...] does not recognize the right to conscientious objection to military service, but that it permits some of those who do not wish to perform such service to pay a certain sum in order not to do so (art. 18).
>
> The State party should respect the right to conscientious objection to military service and establish, if it so wishes, an alternative civil service of a non-punitive nature.[30]

[30] CCPR/CO/84/SYR, para. 11.

I. CONSCIENTIOUS OBJECTION FOR PERSONS SERVING IN THE ARMED FORCES

How a change in an individual's religion or beliefs may affect the right to exercise the right to conscientious objection has also been addressed by the Human Rights Committee. It should be recalled that the right to change one's religion or belief is stated in article 18 of the Universal Declaration of Human Rights and elaborated in the Human Rights Committee's general comment No. 22 (1993):[31]

> The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.

The Committee addressed the issue of conscientious objection for persons serving in the armed forces in its concluding observations on a State report of Spain in which it stated that it:

> […] is greatly concerned to hear that individuals cannot claim the status of conscientious objectors once they have entered the armed forces, since that does not seem to be consistent with the requirements of article 18 of the Covenant as pointed out in general comment No. 22.
>
> The Committee urges the State party to amend its legislation on conscientious objection so that any individual who wishes to claim the status of conscientious objector may do so at any time, either before or after entering the armed forces.[32]

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31 The American Convention on Human Rights and the European Convention on Human Rights also recognize the right of an individual to change his or her religion or beliefs.

32 CCPR/C/79/Add.61, paras. 15 and 20. Although Spain abolished conscription in 2001, at the time of the adoption of these concluding observations Spain had compulsory military service. It is not clear whether this language would apply equally to conscripts and persons serving voluntarily.

In resolution 1993/84, the Commission on Human Rights indicated that it was "aware that persons performing military service may develop conscientious objections" and affirmed "that persons performing compulsory military service should not be excluded from the right to have conscientious objections to military service".[33]

In 2010, the Committee of Ministers of the Council of Europe adopted a recommendation which stated that "professional members of the armed forces should be able to leave the armed forces for reasons of conscience."[34]

However, it is not clear that there is a recognized right to conscientious objector status for persons who have volunteered for military service, since this situation has not yet been addressed directly by the Human Rights Committee. Nevertheless, the more consistent position would be to acknowledge that persons who have joined the armed forces, either through conscription or voluntarily, have the right to claim the status of a conscientious objector, given that beliefs can change over time. Many professional armed forces enable their members to leave, whether at the end of a contract period or earlier by mutual agreement. They may also enable a person who develops an objection to bearing arms to transfer to non-combat duties. In order to deal with such situations, including in particular in times of war, procedures should be specified in advance for how conscripts or military personnel serving voluntarily can apply for conscientious objector status after they have joined the armed forces. Reservists, too, may become conscientious objectors and, therefore, provision needs to be made to enable them to be recognized as such. Some examples of such procedures are provided in chapter II.

J. LEGAL BASIS AND PROCESS APPLICABLE TO CONSCRIPTION

Under international human rights law, conscription is not covered by the prohibition of forced labour. Article 8 (3) (a) of the International Covenant on Civil and Political Rights provides that "[n]o one shall be required to

[33] See also its resolutions 1995/83 and 1998/77.

[34] Recommendation CM/Rec(2010)4 of the Committee of Ministers to member States on human rights of members of the armed forces, para. 42.

perform forced or compulsory labour; […] (c) [f]or the purposes of this paragraph the term 'forced or compulsory labour' shall not include: […] (ii) [a]ny service of a military character […]."[35] The 1930 Forced Labour Convention (No. 29) of the International Labour Organization (ILO) has a similar provision.[36]

Legally, it is only States that can require military conscription. The above-mentioned ILO Convention No. 29, for example, requires "military service laws" for this to be a valid exemption from the prohibition on forced labour.

The Human Rights Committee has addressed the forced recruitment of minors into militias and State armed forces under article 8 of the Covenant:

> […] the Committee remains concerned at […] the forced recruitment of many children into armed militias and, although to a lesser extent, into the regular army (article 8 of the Covenant).
>
> The State party should pursue its efforts to eradicate these phenomena. Information on steps taken by the authorities to […] eliminate the forced recruitment of minors into the armed forces and rehabilitate and protect the victims, among other things by reinforcing the activities of the National Commission for the Demobilization and Reintegration of Child Soldiers (CONADER), should be provided in the next periodic report.[37]

The ability of States to conscript is to be construed narrowly and must fulfil certain fundamental criteria, including that conscription is:

- Prescribed by law;
- Executed in a lawful manner;
- Implemented in a way that is not arbitrary or discriminatory.[38]

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35 A similar provision exists in the American Convention on Human Rights (art. 6) and in the European Convention on Human Rights (art. 4).

36 Ratified by 175 countries as of July 2012.

37 Concluding observations of the Human Rights Committee on the Democratic Republic of the Congo (CCPR/C/COD/CO/3), para. 18.

38 Inter-American Commission on Human Rights, "Fourth report on the situation of human rights in Guatemala" (OEA/Ser.L/V/II.83, Doc. 16 rev., 1 June 1993, chap. V).

The Inter-American Commission on Human Rights has found that forced recruitment is a violation of the rights to personal liberty, human dignity and freedom of movement under the American Convention on Human Rights.[39] It has determined that "round-ups" of youth are forced recruitment and noted specifically that the conscription process must enable the individuals to challenge the legality of their recruitment (for example, by reference to their age or membership of an exempted group).[40]

K. MINIMUM AGE FOR RECRUITMENT, INCLUDING CONSCRIPTION

All recruitment, including conscription, of those who are under 15 years of age is prohibited by international treaty law: the 1977 Additional Protocols I (art. 77 (2)) and II (art. 4 (3) (c)) to the 1949 Geneva Conventions, and the Convention on the Rights of the Child (art. 38). It is also prohibited under customary international law.[41] Furthermore, such recruitment is a war crime under the Rome Statute of the International Criminal Court (art. 8 (2) (b) (xxvi) and (e) (vii)) and under customary international law, according to the Special Court for Sierra Leone.[42]

The trend in international law is to prohibit conscription of those below 18 years of age. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict provides in article 2 that "States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces." By July 2012, 147 States were parties to this Protocol.

The Human Rights Committee has also addressed this issue of child soldiers under the International Covenant on Civil and Political Rights:

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39 *Piché Cuca* v. *Guatemala*, Report No. 36/93, case 10.975, decision on merits, 6 October 1993.

40 "Fourth report on the situation of human rights in Guatemala", chap. V.

41 International Committee of the Red Cross, *Customary International Humanitarian Law*, vol. I, by Jean-Marie Henckaerts and Louise Doswald-Beck (Cambridge University Press, 2005), Rule 136, p. 482.

42 Case No. SCSL-2003-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004.

> The Committee regrets that the State party has not provided detailed information on steps taken to abolish the recruitment of children for military service and is concerned about the persistence of this practice, especially in rural areas. Child soldiers are said to be used as forced labour, and cases of ill-treatment and death have been reported (arts. 6, 8 and 24 of the Covenant).
>
> The State party should abolish the recruitment of children for military service, investigate cases of ill-treatment and death of conscripts and compensate the victims.[43]

Both the 1990 African Charter on the Rights and Welfare of the Child[44] and the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa prohibit all recruitment of children under 18 years of age as well as their use in hostilities.[45] By July 2012, there were 41 State parties to the former and 28 to the latter.

Under the ILO Worst Forms of Child Labour Convention (No. 182), State parties are to take immediate and effective measures to secure the prohibition and elimination of **the worst forms of child labour**. Article 3 specifies that "the term the worst forms of child labour comprises: (a) all forms of slavery or practices similar to slavery, such as […] forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict". The ILO Committee of Experts has indicated that this provision prohibits conscription of those under 18 in time of war.[46]

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43 CCPR/C/PRY/CO/2, para. 14.

44 States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child (art. 22 (2)). (A "child" is defined in art. 2 as "every human bring below the age of 18 years".)

45 States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier (art. 11 (4)).

46 Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries, 2011 (ILC.100/III/1A), Chad, p. 293.

By July 2012, there were 175 State parties to ILO Convention No. 182. Combined with the 147 State parties to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the 41 State parties to the African Charter on the Rights and Welfare of the Child and the 28 State parties to the Protocol on the Rights on Women in Africa, the overwhelming majority of States have accepted a legal obligation not to conscript persons under 18 years of age at all. A review of domestic legislation bears out the fact that very few States provide for peacetime conscription of those under 18.

L. CONSCRIPTION: INTERNATIONAL HUMANITARIAN LAW AND THE UNITED NATIONS GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

In addition to age limitations, international humanitarian law prohibits compulsory recruitment of protected persons by an occupying Power:

> The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted. […] Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations.[47]

Similarly, it is prohibited for prisoners of war to be compelled to serve in the forces of a hostile Power[48] and the 1907 Hague Regulations (art. 23) establish that a belligerent may not compel nationals of the hostile party to take part in operations of war directed against their own country, even if they were in the belligerent's armed forces before the war began.[49]

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47 Fourth Geneva Convention of 12 August 1949 (art. 51). To do so is a "grave breach" under art. 147 and also a war crime under art. 8 (2) (a) (v) of the Rome Statute.

48 Third Geneva Convention. It also constitutes a war crime under the Rome Statute (art. 8 (2) (a) (v)).

49 As a serious violation of the laws and customs of war, to do so would be a war crime under article 8 (2) (b) (xv) of the Rome Statute.

While not prohibiting conscription of internally displaced persons, the question of discriminatory recruitment is addressed in principle 13 (2) of the United Nations Guiding Principles on Internal Displacement: "Internally displaced persons shall be protected against discriminatory practices of recruitment into any armed forces or groups as a result of their displacement. In particular any cruel, inhuman or degrading practices that compel compliance or punish non-compliance with recruitment are prohibited in all circumstances." Principle 13 (1) does prohibit displaced children from being recruited, required or permitted to take part in hostilities.

M. NATIONAL IMPLEMENTATION PROCEDURES: ACCESS TO INFORMATION AND DECISION-MAKING PROCESS

1. Access to information

The Human Rights Committee has addressed access to information about conscientious objection to military service and provided a measure of guidance. In its concluding observations on a State report by Paraguay, it stated that:

> it regrets that access to information on conscientious objection appears to be unavailable in rural areas (art. 18 of the Covenant).
>
> The State party should pass specific regulations on conscientious objection so as to ensure that this right can be effectively exercised, and guarantee that information about its exercise is properly disseminated to the entire population.[50]

The Commission on Human Rights in its resolution 1998/77 also affirmed "the importance of the availability of information about the right to conscientious objection to military service, and the means of acquiring conscientious objector status, to all persons affected by military service". The resolution's language would appear to apply to all categories of military personnel and therefore information should, in principle, be available to conscripts, personnel serving voluntarily and reservists.

[50] CCPR/C/PRY/CO/2, para. 18.

2. Decision-making process

After reviewing a State report by Greece, the Human Rights Committee in its concluding observations requested it to "consider placing the assessment of applications for conscientious objector status under the control of civilian authorities."[51] Thus, while not appearing to require the assessment of applications for conscientious objector status under the control of civilian authorities, the Committee may nevertheless recommend this if it appears there is a concern with respect to the independence and impartiality of the existing process.

The Commission on Human Rights in its resolution 1998/77 underlined the importance of independent and impartial decision-making bodies in the assessment of applications:

> 3. *Calls upon* States that do not have such a system to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held in a specific case, taking account of the requirement not to discriminate between conscientious objectors on the basis of the nature of their particular beliefs.

In its resolution, the Commission also noted that some States accept without assessment a claim of conscientious objection and indicated that it "[*w*]*elcomes* the fact that some States accept claims of conscientious objection as valid without inquiry".

The Committee of Ministers of the Council of Europe has also specified the need for a fair procedure. Its Recommendation No. R (87) 8 regarding conscientious objection to compulsory military service adds two procedural safeguards not found in the resolutions of the Commission of Human Rights; it provides for the right to appeal against the decision at first instance, and the requirement that the appeal authority should be independent and "separate from the military administration". It should

[51] CCPR/CO/83/GRC, para. 15. See also CCPR/C/RUS/CO/6, para. 23.

be noted that Recommendation No. R (87) 8 applies only to compulsory military service. It also states:

> 5. The examination of applications shall include all the necessary guarantees for a fair procedure;
>
> 6. An applicant shall have the right to appeal against the decision at first instance;
>
> 7. The appeal authority shall be separate from the military administration and composed so as to ensure its independence.

Examples of different types of national decision-making processes are given in chapter II. It should be added that the two systems of recognition of conscientious objection—an inquiry system based on documentation and other types of evidence, which can include a personal interview, and a system whereby a State accepts a person's claims of conscientious objection as valid without inquiry—are equally valid under international human rights law. Proponents of the procedure without inquiry contend that this procedure is preferable because of the inherent difficult of evaluating another person's convictions. However, supporters of the inquiry procedure maintain that it is important that there should be sufficient evidence to indicate the convictions asserted are sincerely held and that giving the claimant an opportunity to be heard can be useful in making such an assessment.

N. IMPRISONMENT AND THE DEATH PENALTY FOR CONSCIENTIOUS OBJECTORS

In States that do not recognize conscientious objection to military service, certain forms of punishment should not be applied, in particular imprisonment or a sentence of death. The Commission on Human Rights emphasized in its resolution 1998/77 "that States should take the necessary measures to refrain from subjecting conscientious objectors to imprisonment […]"; a position that it repeated in resolution 2004/12 when it called on Turkmenistan "to stop imprisoning conscientious objectors".

Similarly, the Sub-Commission for the Promotion and Protection of Human Rights, in its resolution 1999/4 on the death penalty, particularly in relation to juvenile offenders, called "upon all States that retain the death penalty especially for refusal to undertake military service or for desertion not to apply the death penalty where refusal to undertake military service or the desertion is the result of conscientious objection to such service".

O. PROHIBITION OF REPEATED PUNISHMENT

If a State does not recognize conscientious objection to military service, the question of the use of judicial processes to punish, or to try to force conformity, arises. The international standards are clear that repeated punishment for continued refusal to perform military service is contrary to the *non bis in idem* principle in article 14 of the International Covenant on Civil and Political Rights. The Human Rights Committee specifically addressed this situation in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial:

> Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience (para. 55).

In resolution 1998/77, the Commission on Human Rights made a similar point when it emphasized that:

> States should take the necessary measures to refrain from subjecting conscientious objectors […] to repeated punishment for failure to perform military service, and recalls that no one shall be liable or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The United Nations Working Group on Arbitrary Detention has examined a number of cases of repeated imprisonment of conscientious objectors,

both pacifists and selective objectors, and found that their imprisonment amounted to arbitrary detention after the first punishment. Repeated punishment would violate not only the *non bis in idem* principle of article 14 of the International Covenant on Civil and Political Rights, but equally article 18 protecting religion and belief, since repeated punishment in such circumstances is directed to changing an individual's convictions. In connection with it views in opinion No. 36/1999 (Turkey), it issued the following recommendation:

> *Recommendation 2: detention of conscientious objectors*
>
> 91. The Working Group notes that conscientious objection—which has its theoretical basis in the freedom of conscience and thus of opinion—gives rise, particularly in countries that have not yet recognized conscientious objector status, to repeated criminal prosecutions followed by sentences of deprivation of liberty which are renewed again and again.
>
> 92. The question before the Working Group was whether, after an initial conviction, each subsequent refusal to obey a summons to perform military service does or does not constitute a new offence capable of giving rise to a fresh conviction. If it does, deprivation of liberty, when applied to a conscientious objector, is not arbitrary, provided that the rules governing the right to a fair trial are respected. If it does not, detention must be considered arbitrary as being in breach of the principle of *non bis in idem*, a fundamental principle in a country where the rule of law prevails, as borne out by article 14, paragraph 7, of the International Covenant on Civil and Political Rights, which states that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or punished. This principle is the corollary of the principle of *res judicata*.
>
> 93. Notwithstanding the above, repeated incarceration in cases of conscientious objectors is directed towards changing their conviction and opinion, under threat of penalty. The Working Group

> considers that this is incompatible with article 18, paragraph 2, of the International Covenant on Civil and Political Rights, under which no one shall be subject to coercion which would impair his freedom to have or adopt a belief of his choice.
>
> 94. Accordingly, the Working Group recommends that all States that have not yet done so adopt appropriate legislative or other measures to ensure that conscientious objector status is recognized and attributed, in accordance with an established procedure, and that, pending the adoption of such measures, when de facto objectors are prosecuted, such prosecutions should not give rise to more than one conviction, so as to prevent the judicial system from being used to force conscientious objectors to change their convictions.

Repeated call-ups and punishment for refusal to do military service may contravene other prohibitions under international law, including that on inhuman and degrading treatment. In 2006 in the case of *Ülke* v. *Turkey*, the European Court of Human Rights held that repeated imprisonment of a conscientious objector constituted degrading treatment.

> The Court notes in the present case that, despite the large number of times the applicant has been prosecuted and convicted, the punishment has not exempted him from the obligation to perform his military service. He has already been sentenced eight times to terms of imprisonment for refusing to wear uniform. Upon each release from prison after serving his sentence, he has been escorted back to his regiment, where, upon his refusal to perform military service or put on uniform, he has once again been convicted and transferred to prison. Moreover, he has to live the rest of his life with the risk of repeatedly being sent to prison if he persists in refusing to perform compulsory military service.
> […]
> […] taken as a whole and regard being had to its gravity and repetitive nature, the treatment inflicted on the applicant has caused him severe pain and suffering which goes beyond the

normal element of humiliation inherent in any criminal sentence or detention. In the aggregate, the acts concerned constitute degrading treatment within the meaning of article 3 of the Convention.[52]

P. POST-CONFLICT AMNESTIES

If persons have left the country rather than violate their conscience by participating in the armed forces, providing amnesty for them at the end of the conflict will facilitate their return. In its resolution 2004/35, the Commission on Human Rights encouraged States, "as part of post-conflict peacebuilding, to consider granting, and effectively implementing, amnesties and restitution of rights, in law and practice, for those who have refused to undertake military service on grounds of conscientious objection".

Q. ALTERNATIVE SERVICE

The Human Rights Committee has frequently referred to the fact that States may, if they so desire, establish alternative service in place of compulsory military service, and this is also recognized in article 8 of the International Covenant on Civil and Political Rights. It should be noted, however, that there is no requirement under international law for States to establish such a system. They can, if they so wish, excuse conscientious objectors from military service with no further action.

The European Convention on Human Rights (art. 4) and the American Convention on Human Rights (art. 6 (3) (b)) both exclude alternative service in place of compulsory military service from the prohibition of forced labour.

The Human Rights Commission, in its resolution 1998/77, set out criteria for alternative service:

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[52] Application No. 39437/98, Judgement of 24 January 2006, paras. 60 and 63.

> 4. *Reminds* States with a system of compulsory military service, where such provision has not already been made, of its recommendation that they provide for conscientious objectors various forms of alternative service which are compatible with the reasons for conscientious objection, of a non-combatant or civilian character, in the public interest and not of a punitive nature.

The recommendation for different types of alternative service compatible with the reasons for the objection can be understood to distinguish those conscientious objectors whose objection is to personally bearing arms, but who are not opposed to unarmed military service. For this category of conscientious objector, non-combatant service in the military is acceptable.

However, for those whose objection is to any participation in the armed forces, alternative service should be of a civilian character, in the public interest and not of a punitive nature.[53] The Human Rights Committee, in its concluding observations on a State report by the Russian Federation, noted that alternative service should be compatible with the convictions on which the conscientious objection is based:

> While the Committee welcomes the introduction of the possibility for conscientious objectors to substitute civilian service for military service, […] the law does not appear to guarantee that the tasks to be performed by conscientious objectors are compatible with their convictions.[54]

Similarly, the Committee, in its concluding observations on a State report by Lithuania, recommended that alternative civilian service be available outside the military:

> The Committee recommends that the State party clarify the grounds and eligibility for performing alternative service to persons objecting to military service on grounds of conscience or religious belief, to ensure that the right to freedom of conscience and

[53] Recommendation of the Committee of Ministers of the Council of Europe No. R (87) 8.

[54] CCPR/CO/79/RUS, para. 17.

> religion is respected by permitting in practice alternative service outside the defence forces, and that the duration of service is not punitive in nature (arts. 18 and 26).[55]

The Committee has also addressed this issue in its communications. In *Jeong et al.* v. *Republic of Korea*, it stated:

> A State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights.

The term "punitive", as used by the Committee, covers the conditions of the alternative service as well as its duration in relation to the length of military service.

For example, in the concluding observations on a State report by the Russian Federation in 2009,[56] the Committee found that the conditions of alternative service were "punitive in nature, including the requirement to perform such services outside the places of permanent residence, the receipt of low salaries, which are below the subsistence level for those who are assigned to work in social organizations, and the restrictions in freedom of movement for the persons concerned."

The Human Rights Committee has adopted a considerable number of decisions and concluding observations on the length of alternative service. Its approach is set out in *Foin* v. *France*. In a divided vote the Committee recognized "the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service." The Committee, nevertheless, found

[55] CCPR/CO/80/LTU, para. 17.

[56] CCPR/C/RUS/CO/6, para. 23.

that the French law was based primarily "on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions", and determined that this did not constitute reasonable and objective criteria.[57]

It has been argued that the *Foin* case is inconsistent with an earlier decision of the Committee, *Järvinen* v. *Finland*, which found that alternative service that could be up to twice as long as military service was neither punitive nor unreasonable, in the context of a procedure that granted conscientious objector status without evaluation of the applicant's motives.[58] Subsequent decisions by the Committee have followed the reasoning in *Foin*.[59] The Committee's concluding observations have also subsequently expressed concern that alternative service of two and 1.75 times the length of military service may be "punitive".[60]

The Council of Ministers of the Council of Europe stated in 2002 that "the less onerous duties of civilian service may justify a longer duration than that of military service. It considers that member States must enjoy a certain discretion in deciding on the length and organisation of the alternative service."[61]

In a divided vote the European Committee of Social Rights of the Council of Europe also accepted "that the less onerous nature of civilian service justifies a longer duration than that of military service", adding that the "Contracting Parties to the [European Social] Charter indeed enjoy a certain margin of appreciation in this area." Nevertheless, the Committee

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57 Communication No. 666/1995, Views adopted on 9 November 1999.

58 See Nowak, *U.N. Covenant on Civil and Political Rights*, pp. 613–614; and *Järvinen* v. *Finland*, communication No. 295/1988, Views adopted on 25 July 1990.

59 *See Maille* v. *France*, communication No. 689/1996, Views adopted on 10 July 2000; *Vernier* v. *France*, communication No. 690/1996, Views adopted on 10 July 2000; and *Nicolas* v. *France*, communication No. 691/1996, Views adopted on 10 July 2000.

60 See, for instance, its concluding observations on Estonia (CCPR/CO/77/EST) and on the Russian Federation (CCPR/CO/79/RUS).

61 Reply to Recommendation 1518 (2001) of the Parliamentary Assembly on the exercise of the right to conscientious objection to military service in Council of Europe member States (Doc. 9379).

found that alternative civilian service twice the duration of military service was "excessive" in character, and amounted to a "disproportionate restriction on 'the right of the worker to earn his living in an occupation freely entered upon', and is contrary to article 1 para. 2 of the Charter."[62] The Committee has taken the position that, under article 1, section 2, of the revised European Social Charter, alternative service should not exceed one and half times the length of military service.[63]

The Council of Ministers of the Council of Europe has adopted two relevant recommendations: one on conscientious objection to compulsory military service (see box below) and the other on the human rights of members of the armed forces, which includes provisions on conscientious objection (see sect. I above).

Recommendation No. R (87) 8 of the Committee of Ministers to member States regarding conscientious objection to compulsory military service

(adopted on 9 April 1987)

The Committee of Ministers, under the terms of article 15.b of the Statute of the Council of Europe,

[…]

Recommends that the Governments of member States, insofar as they have not already done so, bring their national law and practice into line with the following principles and rules:

A. Basic principle

1. Anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service, on the conditions set out hereafter. Such persons may be liable to perform alternative service;

62 *Quaker Council for European Affairs* v. *Greece*, complaint No. 8/2000, Decision on the merits, 25 April 2001.

63 See European Committee of Social Rights, *European Social Charter (Revised): Conclusions 2008* (vol. I), Estonia, p. 231.

B. Procedure

2. States may lay down a suitable procedure for the examination of applications for conscientious objector status or accept a declaration giving reasons by the person concerned;

3. With a view to the effective application of the principles and rules of this recommendation, persons liable to conscription shall be informed in advance of their rights. For this purpose, the state shall provide them with all relevant information directly or allow private organisations concerned to furnish that information;

4. Applications for conscientious objector status shall be made in ways and within time limits to be determined having due regard to the requirement that the procedure for the examination of an application should, as a rule, be completed before the individual concerned is actually enlisted in the forces;

5. The examination of applications shall include all the necessary guarantees for a fair procedure;

6. An applicant shall have the right to appeal against the decision at first instance;

7. The appeal authority shall be separate from the military administration and composed so as to ensure its independence;

8. The law may also provide for the possibility of applying for and obtaining conscientious objector status in cases where the requisite conditions for conscientious objection appear during military service or periods of military training after initial service;

C. Alternative service

9. Alternative service, if any, shall be in principle civilian and in the public interest. Nevertheless, in addition to civilian service, the State may also provide for unarmed military service, assigning to it only those conscientious objectors whose objections are restricted to the personal use of arms;

10. Alternative service shall not be of a punitive nature. Its duration shall, in comparison to that of military service, remain within reasonable limits;

11. Conscientious objectors performing alternative service shall not have less social and financial rights than persons performing military service. Legislative provisions or regulations which relate to the taking into account of military service for employment, career or pension purposes shall apply to alternative service.

CONSCIENTIOUS OBJECTION AND ALTERNATIVE SERVICE: NATIONAL LAW AND PRACTICE

This chapter will focus on the practical implementation of the right to conscientious objection and alternative service at the national level. It will give different examples drawn from actual State practice, with a view in particular to providing guidance to States considering the adoption or modification of legislation or regulations.

A. EXEMPTIONS FROM CONSCRIPTION UNRELATED TO CONSCIENTIOUS OBJECTION

Although national conscription is usually assumed to be universal for all male citizens within the specified age range—and occasionally female citizens or resident non-citizens—in practice, all countries have other qualifying criteria and/or exemptions that are unrelated to conscientious objection.

Health grounds—physical and mental—are the most common criteria for exemption from military service. Minimum (and, at least in the Netherlands, maximum) heights are often specified. In addition to the minimum age requirement, there is normally also a maximum one.

A number of States have exemptions from conscription for various groups. These may encompass the whole population of some areas, such as the Åland Islands,[64] or particular groups partially or wholly, such as indigenous peoples.[65] Most countries exempt (or exclude) women from conscription. Eritrea and Israel, for example, are exceptions, although many States now permit women to volunteer for military service.

In many countries, certain categories of people are exempted for family reasons, such as being an only son, caring for aged parents, being the family's sole breadwinner, because of the military service of other family members, or being descendants of victims of human rights violations. Other exempted categories are individuals undertaking or completing studies or

[64] In June 1921 the Council of the League of Nations reached a decision that Finland should receive sovereignty over the Åland Islands. Finland undertook to guarantee the population of Åland its Swedish language, culture and local customs. The Council of the League of Nations also prescribed that an international agreement should be drawn up confirming the demilitarization of the Åland Islands from 1856 and expanding it to include neutrality.

[65] For example, Constitution of Paraguay, art. 67, and Colombia Military Service Act (48/1993).

who have achieved a certain degree of education, those in particular categories of employment, nationals residing abroad, those convicted of crimes of moral turpitude, or those who have acquired nationality by naturalization. Although relatively rare, some States require the payment of a tax by those who are exempted from military service.[66]

In a number of countries, there is an exemption to enable religious officials to carry out their religious functions, an exemption which is sometimes extended to theology students and other specified categories of religious personnel. This type of exemption is not based on conscientious objection to military service or belief but rather on occupation, and should not be confused with the granting of conscientious objector status to members of religious groups, such as Jehovah's Witnesses or Quakers, which have strong pacifist traditions.

As mentioned in chapter I, the Human Rights Committee has noted the existence of national exemptions from conscription and pointed out that this is not the same as recognition of conscientious objection to military service.[67]

The question arises whether other exemptions should be considered by the State before or after a claim of conscientious objection. As an initial matter, it should be noted that there is no guidance on this by the United Nations or regional intergovernmental bodies and it is therefore an issue for the national authorities.

In some countries, exemptions are considered before any claim of conscientious objection. In countries where such a claim involves an individual interview, the submission of substantial documentation and the possibility of an appeal, it would appear better practice to address other exemptions first.

For example, in Austria and Greece a conscientious objection application is not accepted until after the medical examination. Thus a potential conscript who is not deemed apt for medical reasons will be exempted from military service

[66] Information received from Chile, Kazakhstan, Lebanon, Mexico and the Philippines (E/CN.4/2006/51). See also Conscience and Peace Tax International, "Military recruitment and conscientious objection: A thematic global survey" (May 2006), table 6.

[67] CCPR/CO/84/SYR, para. 11.

and will not be able to register a conscientious objection. In Switzerland, exemption on other grounds precludes the registration of a conscientious objection claim. It has been advanced by some that it might be advisable to allow individuals who so wish to indicate in writing that they intend to apply for conscientious objectors status as otherwise they might refuse to participate in a medical examination or processes associated with other exemptions.[68]

The Russian Federation first considers the conscientious objection application in principle. If approved, this leads to a "decision on substitution". This is followed by a medical examination and only if the applicant is determined to be fit does the commission responsible for conscription notify the alternative service agency of an "assignment decision".[69]

B. REGISTRATION FOR CONSCRIPTION WHERE COMPULSORY SERVICE HAS BEEN ABOLISHED OR SUSPENDED

A related issue arises where there is no current conscription but an obligatory registration process still exists. For example, although conscription was suspended in the Netherlands in 1997, young men are still required to register for military service at the age of 17. Similarly, despite the suspension of obligatory military service in Peru in 1999, 17-year-olds must register in order to obtain national identity documents.[70]

In the United States, all male citizens and residents have to register for the draft at the age of 18, even though conscription is not currently practised. Failure to register can result in penalties (e.g., ineligibility for student financial aid, federal job training and federal jobs). Although there is no place on the registration form for the individual to indicate that he is a conscientious objector, the online site for registration does contain information indicating that, once registered and found eligible for service, one can make such a claim.[71]

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68 "Military recruitment and conscientious objection: A thematic global survey", p. 54; E/CN.4/2006/51, footnote 11.

69 "Military recruitment and conscientious objection: A thematic global survey", p. 54.

70 Ley del Servicio Militar, No. 29248 (art. 23).

71 See www.sss.gov.

C. LEGAL BASIS IN NATIONAL LAW

In most countries that recognize conscientious objection, there are provisions either in the constitution[72] or in legislation[73] or both[74] that recognize the right. However, conscientious objection can also be recognized through administrative decision or regulation or judicial decision.[75] Moreover, rights relating to conscientious objector status can be broadened or restricted by judicial decision.[76]

Legal recognition of conscientious objection or alternative service, without implementing provisions, can lead to legal uncertainty and frustrate the

[72] E/CN.4/2006/51, paras. 21–22. See, for instance, replies from Belarus, Croatia, Lithuania, the Russian Federation and Slovenia.

[73] Ibid. See, for instance, replies from Greece, the United States, and the Human Rights and Equal Opportunity Commission of Australia.

[74] Ibid. See, for instance, replies from Belarus, Croatia, Lithuania, the Russian Federation and Slovenia. States which have constitutional provisions recognizing the right to conscientious objection but do not have implementing legislation can run into difficulties in giving effect to this right.

[75] For example, the Armed Forces of Israel in 1995 established the Committee for Granting Exemptions from Defence Service for Reasons of Conscience, "Military recruitment and conscientious objection: A thematic global survey"; and the Constitutional Court of Colombia recognized conscientious objection through judicial decision, "Colombia: Constitutional Court recognises conscientious objection", *CO Update*, No. 52 (November–December 2009).

[76] The United States Supreme Court has broadened the right of conscientious objectors to include non-religious conscientious objectors. See *United States* v. *Seeger*, 380 U.S. 163, 166 (1965) (extending application of law on conscientious objection from religious beliefs to those who have secular beliefs that are "sincere and meaningful (and occupy) a place in the life of the possessor parallel to that filled by an orthodox belief in God"); *Welsh* v. *United States*, 398 U.S. 33, 344 (1970) (plurality opinion) (conscientious objector status applies to all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."). However, in the Republic of Korea, the Constitutional Court and the Supreme Court have ruled that there is no right to conscientious objection. See "Conscientious objector sentenced to 18 months in jail", *Korea Herald*, 4 July 2005; see also *CO Update*, No. 4 (December 2004). In Azerbaijan, the Supreme Court on 4 February 2005 rejected the claim of a Jehovah's Witness for conscientious objector status, based on article 76 (2) of the Azeri Constitution, which states, "If beliefs of citizens come into conflict with service in the army then in some cases envisaged by legislation alternative service instead of regular army service is permitted." The Court reasoned that as Azerbaijan has not yet passed any law implementing this right, the appeal had to be rejected. See *CO Update*, No. 7 (March 2005).

exercise of these rights in practice. Brazil has a constitutional provision recognizing conscientious objection as well as legal regulations that conscientious objectors may be required in peacetime to perform substitute tasks, although there is no substitute service outside the Armed Forces.[77] In Ecuador, even though conscientious objection and alternative civilian service are provided for in the Constitution, no civilian service has been established.[78] In Georgia, the right to conscientious objection was recognized by law in 1997, but there have reportedly been significant problems in implementing the provisions on alternative civilian service.[79] The Bolivarian Republic of Venezuela has reported that it has no legislation on conscientious objection, although under its Constitution alternative civilian service should be available if an individual wishes to claim conscientious objector status. In Paraguay, conscientious objection is recognized in the Constitution of 1992, but the implementing legislation providing the modalities for applying for conscientious objector status and the alternative service obligations was adopted only in 2010.[80]

Some States, such as Argentina, Australia, Canada, Denmark and the United States, which at present do not have conscription but have provisions in law allowing it to be introduced or activated, provide for recognition of conscientious objection should compulsory service be activated.

D. DEFINITIONS IN NATIONAL LAW

The Australian Defence Act of 1903 defines conscientious belief as something that: "(a) involves a fundamental conviction of what is morally right and morally wrong, whether or not based upon religious convictions; and (b) is so compelling in character for that person that he or she is duty bound to espouse it; and (c) is likely to be of a long standing nature." The Australian Defence Legislation Amendment Act of 1992 provides that

77 "Brazil: More conscription as a result of the modernisation of the Brazilian military", *CO Update*, No. 44 (January 2009).

78 "Military recruitment and conscientious objection: A thematic global survey".

79 "The right to conscientious objection in Europe".

80 "Paraguay: Law on conscientious objection as backlash", *CO Update*, No. 57 (July 2010).

conscripts are exempt if they hold conscientious beliefs that do not allow them "to participate in war or warlike operations", or conscientious beliefs that do not allow them "to participate in a particular war or particular warlike operations".

In Canada, conscientious objection is legally defined as "a sincerely held objection to participation in war or armed conflict in general; or the bearing and use of arms as a requirement of service in the Canadian Forces". It goes on to disqualify "an objection based primarily on one or more of the following … participation or use of arms in a particular conflict or operation; national policy; personal expediency; or political beliefs".[81]

In Finland, the Conscription Act (1438/2007) provides that "a person liable for military service who asserts that serious reasons of conscience prevent him from performing armed military service and who applies for unarmed service will be exempted from armed service and assigned to unarmed service."

In Germany, article 4 (3) of the Constitution provides "no person shall be compelled against his conscience to render military service involving the use of arms."

In the United States, the legal definition of a conscientious objector is set out in Department of Defense instruction 1300.6, which is based on the conscientious objector provisions in the Military Selective Service Act. Under the instruction, a conscientious objector is a person who has "a firm, fixed, and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and/or belief". People who object to war "solely upon considerations of policy, pragmatism, expediency, or political views" do not qualify. The instruction explains that "religious training and/or belief" means "belief in an external power or 'being' or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being."

[81] Defence Administrative Orders and Directives 5049-2, Conscientious Objection (30 July 2004).

The courts of the United States have established, through a series of cases, that in order to be recognized a conscientious objector must object on the basis of religious, moral or ethical beliefs; the objection must be to war in any form; and must be sincere. It does not require pacifism.[82] In *Welsh* v. *United States*, the Supreme Court said that a person could qualify for conscientious objector status as long as his or her belief was central to his or her life.

Some States recognize the right of conscientious objection to military service without specifying what it comprises. For example, in the United Kingdom the application form to the Advisory Committee on Conscientious Objectors requires the applicant to sign a declaration stating "I declare that I have a conscientious objection to performing military service …".[83]

As explained in chapter I, the Human Rights Committee has stressed that States may not discriminate on the basis of the particular beliefs of the objector. The Commission on Human Rights in its resolution 1998/77 also called on States "not to discriminate between conscientious objectors on the basis of the nature of their particular beliefs". Some States nevertheless incorrectly restrict the application of conscientious objection to religious beliefs or to members of religious groups recognized as "requiring" pacifism of their members, such as Quakers, Mennonites, the Church of the Brethren and Jehovah's Witnesses.

E. APPLICATION FOR CONSCIENTIOUS OBJECTOR STATUS: TIME LIMITS, TREATMENT PENDING A DECISION, FORMAL REQUIREMENTS AND CONDITIONS RESULTING IN DISQUALIFICATION

1. Time limits and treatment pending a decision

In general, the preferred practice is to complete the consideration of any claim of conscientious objection, including appeals, before conscripts are

[82] Army Regulation 600-43: Personnel-General—Conscientious Objection.

[83] Navy Personnel Management, Application format for the Advisory Committee on Conscientious Objectors, BR 3, annex 54B (June 2012).

enrolled in the armed forces. For this to happen, either the time limits for claims have to be such that the claim can be considered before actual call-up or provision has to be made to suspend call-up until the completion of the claim. A strict time limit for conscientious objector claims relating to initial conscription may be linked to a commitment to processing claims before the date of enrolment. For example, in the Russian Federation the application must be submitted six months before enlistment.[84] The more complicated the application requirements, the more time may be needed to have a final decision. For example, if it is simply a question of notifying the authorities on a pre-prepared form which is readily available, a short time limit is less problematic than if an individual statement, certificates from religious or police authorities, supporting references or other documentation are required. Time limits for applying for conscientious objector status before call-up should be well publicized. Time limits for lodging appeals against rejections of such claims are the norm. An applicant whose claim has been rejected should be notified of the time limits for appeal, as well as the reasons for the decision.

Although Germany abolished compulsory military service and alternative service as of 1 July 2011, it is nevertheless interesting to refer to how its process worked as it was one of the largest and most comprehensive programmes. The German Law on Conscientious Objection stated in article 3 (2) that an applicant for conscientious objection could be called up for military service only when the application had been finally turned down, including all appeals, or withdrawn. Someone who had already received his call-up papers had to report for military service but then other regulations applied, and it was common practice for a conscientious objector not to be assigned to service with arms if he so requested. Furthermore, applications from soldiers, reservists and those who had been notified about call-up received preferential treatment so that their cases were decided faster.

Failure to allow for adequate time to consider claims before enlistment could lead to further complications of charges for failure to report for

84 "Military recruitment and conscientious objection: A thematic global survey", p. 58.

duty, which may amount to being absent without leave (AWOL), or refusal to obey orders to put on a uniform or pick up a weapon and so on. Better practice is for the potential recruit to remain a civilian throughout the process. This allows any potential penalty for failure to comply with a lawful order to report for military service to be considered by a civilian court, since it is the refusal to become part of the military that is the point at issue. For example, while conscription was in operation in the United States, a conscientious objector whose claim had been rejected, but who reported to the induction ceremony itself only in order to restate his refusal, would be prosecuted in a civilian and not a military process, as he had not taken the military oath.[85]

A study by a non-governmental organization in 2005 found that, in 18 of the 29 European countries with active conscription programmes, applications for conscientious objector status could be made only before starting military service. While, as stated above, there may be very valid reasons for resolving such claims before conscripts are enlisted, it should be recalled that, according to Commission resolution 1998/77, "persons performing military service may develop conscientious objections". Therefore, in principle, a request for conscientious objector status should be able to be considered after enlistment, and should equally be available to armed forces personnel serving voluntarily and those serving in the reserves. In practice, however, according to the 2005 study cited previously, only in 7 of the 29 States could applications for conscientious objector status be made by serving conscripts and reservists.

A number of States (Norway and Slovenia, for example)[86] explicitly allow for more rapid processing of applications received from those who are already serving in the armed forces. In Norway, all duties involving the bearing of arms are suspended upon application from a serving conscript for recognition as a conscientious objector pending the decision on the application, which must be made within four weeks.[87]

85 Ibid., p. 57.

86 Ibid., table 13; "The right to conscientious objection in Europe", p. 51.

87 "The right to conscientious objection in Europe", p. 51.

2. Formal requirements and conditions resulting in disqualification

Some States have conditions that may disqualify individuals from obtaining conscientious objector status. For example, in Austria applicants can be rejected if they have been convicted of a criminal offence, employed by the State police, hold a gun licence, or if their objections to the use of violence are considered to be conditional and politically motivated. In Croatia, an application may be rejected if the applicant has been convicted of a criminal offence or if he possesses weapons.[88]

In Greece, persons who have completed any period of armed military service in Greek or foreign armed forces or security services; persons who have obtained a permit to carry a weapon or who have applied for such a permit, as well as persons who participate in individual or collective activities of shooting events, hunting and like activities that are directly related to the use of weapons; and persons who have been convicted of a crime relating to the use of weapons, ammunition or illegal violence or persons against whom criminal proceedings for the above are pending, cannot be considered under the legislative provisions for granting conscientious objector status.[89]

States that have such disqualifying conditions may wish to reconsider at least some of them, given their automatic character. Evidence of a criminal offence (particularly if no arms were involved) or having a gun licence for hunting may not be directly relevant to whether a person is willing to use lethal force against human beings. Therefore, it is advisable for States to consider at least some of the situations identified above as rebuttable presumptions, and allow applicants to make a claim of conscientious objection and provide them with an opportunity to explain.

In some States, applications can be denied if some formal requirement is lacking in the documentation submitted, such as a statement of motivation. In Croatia, applications may be rejected if the applicant does not clearly state that he refuses military service for moral or religious reasons.

88 E/CN.4/2006/51, para. 34.

89 Ibid.

F. CONSCIENTIOUS OBJECTION FOR THOSE SERVING VOLUNTARILY

Many States take the position that the question of conscientious objection to military service applies only to conscripts and that, since their armed forces are based on volunteers, the issue of conscientious objection to military service does not arise. A limited number of States, including Canada, Croatia, Germany, the Netherlands, the United Kingdom and the United States, recognize that professional military personnel may become conscientious objectors during their service.[90] This recognition is based on the right to change one's religion or belief, and the fact that an individual's deeply held convictions can evolve and change over time.

It is essential to decide applications from individuals serving voluntarily in the armed forces expeditiously, both for the applicant and for the armed forces. Moreover, while the application is under consideration it is also advisable to make efforts not to give orders and assignments incompatible with the reasons for the objection.

Canada, in 2004, introduced a specific provision for voluntary release on the basis of conscientious objection for the members of its Armed Forces who have enrolled voluntarily. This is available on the basis of objection to participation in war or armed conflict in general, or to the bearing and use of arms as a requirement of service in the Canadian Forces. While the request is under review, "to the extent that the exigencies of service allow … [the applicants] shall not be assigned duties that conflict with their stated beliefs". If still in training, the applicant will immediately cease training until a decision is reached.[91]

The United States provides for two types of conscientious objector claims for serving personnel: a non-combatant status for those who are willing to continue in the military providing that they do not have to bear arms; and conscientious objector status for those opposed to any participation in war. The procedures are quite clear that conscientious objectors may not be offered non-combatant status as a compromise. The United

90 Ibid., para. 26.

91 Defence Administrative Orders and Directives 5049-2.

States Department of Defense instruction No. 1300.6 provides for the honourable discharge or transfer to non-combatant duties of a serving member of the Armed Forces "who has a firm, fixed, and sincere objection to participating in war in any form or the bearing of arms, by reason of religious training and/or belief."

United States regulations state that, as soon as serving personnel submit a conscientious objection claim, the command must make "every effort" to assign them to duties which "conflict as little as possible" with their beliefs.[92] Those still at the training stage will not be required to train in the study, use or handling of arms or weapons.[93]

Conscientious objection for those serving voluntarily in the military appears to concern only a very small number of those in the professional armed forces. In April 2006, the Ministry of Defence of the United Kingdom reported to the Select Committee on Armed Forces that three service personnel had been discharged as recognized conscientious objectors since the start of the Iraq conflict.[94] Between 2001 and 2005, 122 conscientious objection claims were accepted by the United States Army.[95]

In some countries that do not recognize conscientious objection for professional soldiers, but deal with the issue pragmatically and not as an issue of military discipline, the practical outcome may be similar. For example, Slovenia does not recognize conscientious objection for professional soldiers, but if a contractual soldier asserts this right during the term of his or her service, typically five to seven years, the employment contract is terminated. In Australia, even though there is no recognition of conscientious objection for professional soldiers, if they develop a general opposition to military service or to a particular conflict they can apply for discharge or transfer to another unit.[96] If discharge from the armed forces

92 Department of Defence instruction 1300.6.

93 Army Regulation 600-43.

94 Further Memorandum from the Ministry of Defence: Conscientious Objectors.

95 United States Army Public Affairs, quoted in "The soul of a soldier", *Columbia Missourian*, 19 March 2006.

96 E/CN.4/2006/51, para. 27.

is for reasons of religion or belief, the individual concerned should not be penalized in the type of discharge received.

Normally professional military personnel regularly have opportunities to leave the armed forces and this may obviate the need to seek recognition as conscientious objectors, particularly if there are no ongoing reserve obligations. If reserve obligations do accompany a separation from active service, then recognition of conscientious objector status becomes an issue.

G. CONSCIENTIOUS OBJECTION FOR THOSE SERVING IN THE RESERVES

Different countries have different requirements in relation to reserve obligations for military service. These may apply only to conscripts or also to professional military personnel. They may require regular military training or only call-up in times of mobilization. Reserve obligations may continue for a significant number of years, and the possibility that deeply held beliefs or convictions evolve and change therefore increases over time. Whatever the system, it is advisable for States to have procedures to enable reservists to apply for conscientious objector status, rather than dealing with the issue during a period of military call-up or deployment of reserve units.

In the Czech Republic, reservists could, prior to the abolition of conscription, lodge conscientious objection claims in January of each year. The Republic of Moldova provides for the transfer of former servicemen to an alternative service reserve.

In the United States, "separations", for example, owing to pregnancy or family hardship, may result in transfer to the inactive reserve, which could lead to subsequent call-up in a mobilization. However, if the person receives a conscientious objection "discharge", there is no possibility of being called up for active duty or being placed in the reserves.

H. SELECTIVE CONSCIENTIOUS OBJECTION

When the objection is not to all wars but to participating in a particular war or military action, this is known as selective conscientious objection. This may arise with conscripts or with personnel serving voluntarily. Very few countries currently recognize selective conscientious objection. The focus here will be on providing examples of countries where selective objection has been legally recognized or implemented in practice.

Australia recognizes selective conscientious objection for conscripts, but not for volunteers who choose to serve in the Armed Forces. Selective conscientious objection in Australia developed during the 1960s with some successful claims made during the Viet Nam war. The issue received renewed attention during the Gulf war in 1990 and the Defence Legislation Amendment Act of 1992 provides that conscripts are exempt if they hold conscientious beliefs that do not allow them "to participate in a particular war or particular warlike operations".[97]

In Germany, the Federal Administrative Court in 2005 reversed a disciplinary action against Major Pfaff, a member of the German Armed Forces, who had refused to work on a computer software program that had potential application in the Iraq conflict because of his belief that the Iraq war was unjust and illegal. The Court found that although the major had not applied for conscientious objector status, and was otherwise willing to continue in the Armed Forces, he still enjoyed freedom of conscience and had not violated military law.[98]

In Norway, opposition to the use of nuclear weapons (beliefs "related to the use of weapons of mass destruction as they might be expected to be used in the present day defence") is included as a legal ground for conscientious objection.[99]

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[97] See also Lieutenant Colonel Ian Wing, "Selective conscientious objection and the Australian Defence Force", *Australian Defence Force Journal*, No. 137 (July/August 1999), pp. 31–40.

[98] E/CN.4/2006/51, para. 30.

[99] Law 42/1990 amending the Law on Exemption from Military Service for Reasons of Personal Conviction.

Some States have exempted particular groups from conscription in specific conflicts because of an assumed conflict of interest. For example, Australians of German origin were excluded from the Australian Defence Force during the First World War and the Irish were not conscripted by the British Armed Forces despite the fact that Ireland was then still part of the United Kingdom. Strictly speaking, this type of action is more similar to partial or total exemptions for specific groups discussed earlier in this chapter, as it does not involve either a claim for or the granting of conscientious objector status to anyone. However, it does highlight that, in specific situations, issues relating to deeply held convictions may arise if members of the armed forces are requested to engage in military operations against those having the same ethnicity or religion.

Although few States recognize selective conscientious objection, they still have to deal with it when it occurs. In the Netherlands, for example, conscientious objection for professional soldiers is allowed, but selective objection to particular campaigns is not admitted. In such a case, a professional soldier in the Dutch military who has a conscientious objection to a particular conflict may only seek discharge from the Armed Forces.[100]

I. INFORMATION ABOUT APPLYING FOR CONSCIENTIOUS OBJECTOR STATUS

As indicated in chapter I, the Commission on Human Rights affirmed "the importance of the availability of information about the right to conscientious objection to military service, and the means of acquiring conscientious objector status, to all persons affected by military service". National practice shows the variety of approaches used.

In some countries, such as Hungary and the United States, information about the possibility of registering as a conscientious objector would be included with initial call-up papers if the draft were activated (currently there is no conscription in either country). Hungary includes information about the conscript's rights and obligations with the initial documents for

[100] "The right to conscientious objection in Europe", p. 50.

military registration and the form supplied contains a question about the possibility of performing civilian service.[101] In the United States, if the draft were reintroduced, every post office would be issued with copies of the forms for "reclassification", which is the official terminology for application for conscientious objector status. There is a checklist for the person receiving the application to ensure that it is complete and that the applicant has been provided with the required information and guidance, and there are guidelines for the person considering applications.

Having an actual application form readily available assists the process. For example, in Austria the application form can be obtained from the Internet and the required wording is printed on the form.[102] However, in both Austria and the United States, the initial application can be lodged without using the form—in Austria it may even be notified orally—and the form is then sent to the applicant for completion.[103]

Where there is a requirement to refer to a specific legal provision, it would facilitate the process if the wording to be used by the applicant is clearly indicated on the form.

Publication of the relevant legislation in the official gazette or reference to a legal provision in the call-up paper without further explanation is probably not by itself adequate provision of information. Ideally, the information provided should be clear and easily understood by those who are to receive it, indicate what action is necessary to make a claim of conscientious objection, what type of documentation is required, where or how a claim can be filed, and applicable deadlines. It would also be advisable to indicate what would be the consequences of a positive or negative decision (e.g., in some States there would an obligation of alternative service). There is some evidence that information about making such a claim is easier to obtain because of the Internet, which allows both

[101] "Military recruitment and conscientious objection: A thematic global survey", p. 64.
[102] Ibid., p. 72.
[103] Ibid., p. 70.

governmental and non-governmental organizations to post information and relevant forms.

Non-governmental organizations can play an important role in providing information about conscientious objection. "At Ease", an independent voluntary organization in the United Kingdom, provides confidential information and non-directive counselling to members of the Armed Forces. It has no connection with the Ministry of Defence. It has a publicly accessible website and phone and e-mail contacts. Its website provides information for armed service personnel who may wish to apply for recognition as conscientious objectors. In the United States, there is an organization named the GI Rights Hotline, which is an independent, voluntary body providing information and counselling through a website and phone lines about the rights of Armed Forces personnel, including conscientious objection. In the United States, military personnel have the right to possess literature with information about conscientious objection.

Some States have laws on "incitement to disaffection" or similar provision which could be misused to criminalize the distribution of information on the right to conscientious objection. In the Republic of Korea, incitement to conscientious objection is a crime under the Criminal Code.[104] However, laws used to target those providing information about conscientious objection and how to claim it are problematic, and have been successfully challenged. The Turkish Supreme Court acquitted a journalist in a prosecution based on article 318 of the Penal Code, which provides that "anyone who instigates, recommends or spreads propaganda with the aim of turning society against military service … shall be punished with a prison term from 6 months to 2 years." The law further provides for a longer penalty if the offence is committed "by way of the press". The Supreme Court reasoned that the law was inapplicable because defence of conscientious objection to military service was permissible.

[104] Criminal Code (Formation of Criminal Organization), art. 114: "Those who have formed or joined a criminal organization with the purpose of refusing military service or a legal obligation to pay taxes shall be sentenced to imprisonment of up to 10 years or to the penalty fine of up to 1.5 million won."

J. DECISION-MAKING PROCESS

As the legal criteria for the decision-making process is discussed in chapter I, the focus here is on different examples of the national decision-making processes or bodies that are used.

The above-mentioned 2005 study of European countries found that 11 countries normally choose not to conduct a personal interview of an applicant who requests conscientious objector status in relation to compulsory military service. The study found that applications tend to be accepted unless there is a disqualifying condition, a formal requirement lacking in the application or the application was not submitted within the time limits.[105]

In many countries, however, the applicant is interviewed in person to make an individualized determination, a process that may also require certain documentation. Most States have established boards or committees as decision-making bodies for applications for conscientious objector status. Although it is difficult to generalize as to the composition of these boards, broadly speaking they tend to be made up of representatives of different ministries, some are entirely civilian and others include civilians and representatives of the military. In some cases civilians outside government are included as well. In other cases, the boards are composed primarily or exclusively of representatives of the military, but often drawn from different functions within the military.[106]

The above-mentioned study of European countries found that in 10 countries the responsibility for the application procedure was with civilian ministries, while in 16 countries it was with the ministry of defence.[107]

Croatia is an example of a country that has a predominantly civilian board, but with military representation. Its decision-making body is the Civilian Service Commission, with representatives of the Ministry of

[105] "The right to conscientious objection in Europe".

[106] E/CN.4/2006/51, para. 38.

[107] "The right to conscientious objection in Europe", p. 14, table 3.

Defence, the Ministry of Justice Administration and Local Self-Government and the Ministry of Health and Social Welfare. Decisions can be reviewed by an appeal panel.[108]

Greece has an intermediate system, with a consultative body consisting of a legal adviser of the Legal Council of State, two professors of higher educational institutes, specializing in philosophy, social or political sciences and psychology, and two superior officers of the Armed Forces, one from the military corps and one from the medical corps. The application contains a statement of the reasons for requesting conscientious objector status, supporting documentation showing that the individual does not fall into one of the categories that would lead to disqualification, and any other documentation that would support or clarify the request. The consultative body may, after a review of the documentation, request an interview of the applicant. The consultative committee elaborates its opinion on each application to the Minister of National Defence, who decides whether to grant conscientious objector status. The applicant may appeal a refusal to the court.[109]

In Bulgaria, the Alternative Service Commission (under the Ministry of Welfare and Labour) is chaired by a lawyer, and includes a doctor and representatives of the Ministry of Defence and the Ministry of Religious Affairs. The Latvian commission has representatives of the National Human Rights Commission as well as the Ministry of Defence.[110]

The United States, which does not have conscription, has a decision-making system within the Armed Forces for its serving personnel. The application is subject to an investigative process by a senior officer not in the applicant's chain of command. In the Air Force, there is an additional requirement that the investigative officer should be from the military's legal corps. The investigation includes an interview of the applicant by a military chaplain as well as a psychiatrist or medical officer. The investigative

[108] E/CN.4/2006/51, para. 39.

[109] Ibid., para. 40.

[110] "Military recruitment and conscientious objection: A thematic global survey", pp. 67–69.

officer conducts an informal hearing at which the applicant can submit evidence. The applicant, at his or her expense, may be represented by counsel, who has access to all materials in the investigative file and who may assist and provide legal advice to the applicant at the hearing, including in the examination of witnesses. The investigative officer prepares a report, which includes conclusions and recommendations regarding the underlying basis of the applicant's conscientious objection and the sincerity of his or her beliefs. The applicant has access to the entire file and may present a rebuttal statement.[111]

The decision is made by the designated approving authority for the branch of the military in which the individual serves. If the headquarters of the applicant's military service has not delegated approval authority to a lower command, or if the lower authority, when delegated, has recommended disapproval of the applicant's request, the military service headquarters makes the final decision. A negative decision can be appealed to the federal civilian courts. The United States Department of Defense's Informal Guide for the Investigating Officer explains, inter alia, what is and is not considered to be conscientious objection. For example: "Conscientious objector beliefs must be held personally by the applicant. Membership in a certain church group is not necessary or sufficient, even if that group professes conscientious objection" (D-4 (c)). "A conscientious objector is not necessarily a pacifist. An applicant may be willing to use force to protect himself or herself or his or her family and still be a conscientious objector" (D-4 (d)).

Appeals processes also differ considerably from country to country. For example, in the United Kingdom, which has provision for members of its Armed Forces to be recognized as conscientious objectors, the initial process is through military channels, but appeals go to the civilian Advisory Committee on Conscientious Objection, which is independent of the Armed Forces and chaired by a QC (a senior lawyer/barrister). The Advisory Committee holds its hearings in public. The travel costs of both

[111] E/CN.4/2006/51, para. 41.

the applicant and the applicant's witnesses are covered. The applicant may request to wear civilian clothes for this appearance.[112]

In Bulgaria, a formal motivation of the decision must be issued within 30 days and can be appealed in the first instance to the Ministry of Labour and Social Policy, which may order a reconsideration if the correct procedures have not been followed. Austria provides for appeal to a civil court.[113]

K. ALTERNATIVE SERVICE: NON-COMBATANT AND CIVILIAN SERVICE

A State may provide for complete exemption for conscientious objectors without requiring performance of alternative service. For example, Norway announced in July 2011 that alternative service for conscientious objectors would end in late 2011, even though the country will maintain compulsory military service.[114]

1. Non-combatant service

Most countries that have compulsory military service require some type of alternative service if an individual is recognized as a conscientious objector.

The variety of beliefs on which conscientious objection is based means that some individuals may have an objection only to personally bearing arms, but be prepared to undertake an unarmed military service, which is also referred to as non-combatant service. Many militaries provide this as an alternative to armed military service—often in clerical or medical assignments within the military. This is a legitimate alternative for those whose objection can be accommodated in this way, but is not an adequate provision for those whose objection is to any involvement with the armed forces.

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112 Instruction No. 6: Retirement or Discharge on the Grounds of Conscience.

113 "Military recruitment and conscientious objection: A thematic global survey", p. 80.

114 "Norway: End of substitute service for conscientious objectors", *CO Update*, No. 67 (10 August 2011).

Many countries that require alternative service provide a choice between non-combatant or civilian alternative service so that the type of service is compatible with the nature of the objection.

2. Alternative service of a civilian character

As mentioned in section F above, the United States provides for two types of conscientious objector claims for serving personnel: a non-combatant status for those who are willing to continue in the military providing that they do not have to bear arms; and conscientious objector status for those opposed to any participation in war.

In Mexico, conscripts who object to military service can contribute to the country's development by participating in socially beneficial programmes in education, sports, the preservation of cultural heritage, the prevention of addiction and social work.

A study of European countries found that in 18 countries alternative service consisted of civilian service outside the armed forces, mostly in the health and social sectors.[115]

Some countries have more flexibility in their alternative service programmes, with the objector able to suggest a placement to the administering authority, provided this meets the criteria for the scheme and the organization is willing to enter into the relevant agreement with the authorities. For example, in Finland most objectors find their own placements within a specified time limit.[116] In Croatia, the objector's stated preference will usually be respected although the law does not require this.[117]

Austria allows conscripts to seek retrospective recognition of a longer period of independently performed community or voluntary service as satisfying the requirement of alternative service (2 years' community

115 "The right to conscientious objection in Europe".

116 "Military recruitment and conscientious objection: A thematic global survey", pp. 110–111, table 15.

117 Ibid.

service in development cooperation abroad or 14 months' voluntary service substituting for one year's alternative service).[118]

If a conscientious objector is not able to choose a placement, some States provide for an appeal procedure should the placement allocated not be compatible with the reasons for the objection. This is the case, for example, in the Russian Federation (appeal to the Federal Service for Labour and Employment).

A particular problem can arise where the objector breaches the terms of the alternative service. Usually the body administering the alternative service system has a process for the resolution of disputes. Infringements of the terms of an alternative service placement that do not call into question the conscientious objection itself cannot justify requiring the person to perform military service instead of alternative service.

If on completion of alternative service a conscientious objector is to be assigned to some kind of a reserve, this should be for civilian purposes only (e.g., humanitarian assistance, natural disaster response, firefighting).

3. Length and conditions of alternative service

Practice regarding the length of alternative service indicates that the duration can vary significantly. Many countries have alternative service that is longer than military service, although for a number of States their duration is the same.[119]

It is noteworthy that within different types of alternative service there can be variations as well. In Germany, prior to the abolition of conscription, military service and the official alternative civilian service were of equal duration. Individuals who opted for a "voluntary social year" or a "voluntary ecological year" served longer than they would have in the military.[120]

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[118] Ibid., p. 117 (citing a response from Austria to an OHCHR questionnaire, 2003).
[119] Ibid., pp. 121–123, table 17.
[120] E/CN.4/2006/51, para. 43.

In countries that provide either unarmed military service or civilian service, there can also be differences in length of service between the two. For example, in Greece for those who perform unarmed military service instead of armed military service, the duration of service is 18 months, whereas for those performing alternative civilian service in the social sector, it is 23 months.

The justification frequently advanced for such differences in duration of service is that the overall terms and conditions of alternative service are less onerous than is the case of military service. For example, it has been argued that while working hours are normally fixed in alternative service, the obligations of the military service and the command relationship are permanent. Living conditions and lodging may be different too. These reasons presumably explain the differences in duration of service between different categories of alternative service as well in many countries. States should be prepared to explain why and how certain categories of alternative service are less onerous than military service, if they are to justify longer periods of alternative service.

In practice, some States set the same rate of pay for those undertaking military and alternative service. In others the rate of pay depends on the employing organization and is more likely to be linked to the going rate of pay for the job. Some also specifically include the same benefits as conscripts, for example, housing (if living away from home), health care, travel and, if needed, protective clothing.

L. DOCUMENTATION ISSUED AT THE CONCLUSION OF MILITARY OR ALTERNATIVE SERVICE

Countries with compulsory military service commonly issue a document as evidence of the completion of such service. It may have one or more functions and may, for example, confer exemption from further call-up in normal circumstances and often release the holder from restrictions such as leaving the country. It may also provide access to benefits in housing, employment and other areas.

Given that such a document is essential to demonstrate that State obligations regarding compulsory military service or alternative service have been fulfilled and to access certain rights, recognized conscientious objectors also need to receive documentation that fulfils these requirements. If the document is not identical to the one issued to those who have done military service, it should be issued for the same legal purposes and recognized in practice. This is to ensure non-discrimination between those who have performed military service and conscientious objectors.

In a friendly settlement of a case involving a Bolivian national claiming conscientious objector status, given effect to by the Inter-American Commission on Human Rights, Bolivia agreed that a document issued at the end of compulsory military should be provided to the conscientious objector. The friendly settlement provided that there would be no charge for the document since there would not be a charge for a person who had performed military service.[121]

In some countries, individuals who have not been recognized as conscientious objectors through the official process but nevertheless refuse to perform military service may have to serve time in prison. In Finland, an offence of this kind is not considered a criminal conviction, and such individuals consequently do not have a criminal record which could bar them from certain occupations or some types of benefits.

M. ARRANGEMENTS DURING PERIODS OF TRANSITION

Problems may arise where conscientious objection has not previously been recognized and a change in the law or in practice takes place. There may be situations where those who served under compulsion in the absence of the possibility of recognition are listed as reservists and thus it is advisable that transitional provisions should enable them to apply for conscientious objector status and to be reclassified.

[121] *Alfredo Diaz Bustos* v. *Bolivia*, case No. 12.475, 27 October 2005.

Transitional arrangements may also be needed for those who have evaded call-up, for example, by leaving the country. In such circumstances, transitional arrangements could allow for the filing of an application even if they are outside the application "window" provided for in the new legislation. This can also arise in relation to a post-conflict amnesty for those who have refused to do military service where there was no provision, or inadequate provision, for conscientious objection and who may receive an amnesty for their past evasion but still be liable to be called up.[122]

It is also advisable that transitional arrangements should permit convictions for refusal to do military service for reasons of conscience to be set aside or expunged from a person's record on the individual's request, given that the offence is no longer a crime. An individualized review procedure may be necessary when the motives for the refusal to perform military service are not clear.

[122] See Commission on Human Rights resolution 2004/35.

III

PROTECTION OF CONSCIENTIOUS OBJECTORS IN INTERNATIONAL REFUGEE LAW

Conscientious objectors, including draft evaders or deserters, may flee their country as a direct result of, or in anticipation of, being called up (or recalled in the case of reservists) for military service (whether personally or through a general announcement or notice to a particular group). Those already abroad may also refuse to return to their country. Those already in the armed forces may flee the country following desertion or be absent without leave, whether they were originally conscripted or enlisted voluntarily. The fact that they are draft evaders or deserters does not preclude the possibility of also being refugees.

The need for international protection as refugee under the 1951 Convention relating to the Status of Refugees arises if such individuals have a well-founded fear of persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion. Alternatively, complementary forms of protection may be applicable if they cannot be returned to their own country because of the likelihood of their being subjected to torture or other serious human rights violations.

Normally, prosecution and/or punishment for draft evasion or desertion from military service alone does not give rise to international protection. However, such protection may be needed if the law or practice on conscription or conscientious objection to military service is not compatible with international standards.

A. UNITED NATIONS ACTION RELATING TO INTERNATIONAL PROTECTION

The need for international protection for those refusing military service was recognized by the General Assembly as long ago as 1978 in the context of apartheid. In its resolution 33/165, it recognized the right of all persons to refuse service in military or police forces used to enforce apartheid and called upon Member States to grant asylum or safe transit to another State to persons compelled to leave their country solely because of a conscientious objection to assisting in the enforcement of apartheid through service in military or police forces.

Subsequently, the more general situation of those who flee their own country because of their conscientious objection to serving in the armed forces has been addressed. Commission on Human Rights resolution 1998/77 recalled "article 14 of the Universal Declaration of Human Rights, which recognizes the right of everyone to seek and enjoy in other countries asylum from persecution" and encouraged States, subject to the individual concerned meeting the requirements of the definition of a refugee as set out in the 1951 Convention, to consider granting asylum to those conscientious objectors 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.

The *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (December 2011) of the Office of the United Nations High Commissioner for Refugees (UNHCR), in particular paragraphs 167–174, and subsequent guidelines, in particular the "Guidelines on international protection: religion-based refugee claims under article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees" (HCR/GIP/04/06), provide detailed information about the relevant refugee law provisions and their interpretation.

B. DETERMINING THE INTERNATIONAL PROTECTION NEEDS OF CONSCIENTIOUS OBJECTORS, DRAFT EVADERS AND DESERTERS

Whether military service is compulsory or not, desertion is invariably considered a criminal offence. Although penalties vary from country to country, they are not normally considered persecution. Fear of prosecution and/or punishment for desertion or draft evasion does not as such constitute a well-founded fear of persecution under the definition. A person is clearly not a refugee if his or her only reason for desertion or draft

evasion is dislike of military service or fear of combat. However, a need for international protection may arise if a person's refusal to perform military service is based on genuine political, religious or moral convictions, or valid reasons of conscience. Such claims for refugee status need to distinguish between "prosecution" and "persecution" because prosecution and/or punishment under a law of general application are not generally considered to constitute persecution. As with all asylum claims, persecution related to military service obligations will give rise to eligibility for refugee status only if linked to one or more of the five grounds enumerated in the 1951 Convention.[123]

C. PERSECUTION

Refugee status requires the applicant to have a well-founded fear of being persecuted. A military service obligation could amount to persecution if the application of a law which imposes a general obligation of military service has the effect of rendering the situation intolerable for a particular applicant, given his or her specific circumstances, and the only way to avoid this situation is by fleeing the country of origin.

This arises most frequently in cases where compulsory military service would be in breach of the right to conscientious objection, but it could also result from other circumstances. For example, for conscientious objectors, a law may, depending on all of the circumstances of the case, be persecutory if:

- It has a different impact on particular groups;
- It is applied or enforced in a discriminatory manner;
- The punishment for breaching it is excessive or disproportionately severe; or

[123] *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, paras. 167–168.

- Military service cannot reasonably be expected to be performed by the individual because of his or her genuine beliefs or religious convictions.[124]

If alternatives to or exemptions from compulsory military service are available there would not usually be a basis for a claim to refugee status. However, some forms of alternative service may be so excessively burdensome as to constitute a form of punishment, or might require the carrying-out of acts which are incompatible with the person's beliefs or conscience.[125] This is why the Commission on Human Rights in its resolution 1998/77 refers to the possibility of refugee status arising where there is either "no provision, or no adequate provision" for conscientious objection. If the individual has a well-founded fear of serious harassment, discrimination or violence by other individuals (for example, soldiers, local authorities or neighbours) for his or her refusal to serve, this may also give rise to a claim for refugee status irrespective of the legal provisions.[126]

The conditions of military service could amount to persecution if, during military service, the applicant was subjected to serious harm, for example:

- Torture or other forms of cruel, inhuman or degrading treatment within the armed forces; or
- Other violations of human rights which had a serious impact on the situation of the applicant.

Although punishment for avoiding military service would not normally constitute persecution, it could do so if the punishment is sufficiently severe as to cause serious harm. In determining whether punishment for actions resulting from an unwillingness to undertake military service results in harm which is serious enough to meet the threshold required for persecution, the following factors should be considered:

- Whether the conscription and/or conditions of service are in themselves persecutory. For example, if the law defining the criteria

[124] HCR/GIP/04/06, para. 26.
[125] Ibid.
[126] Ibid.

and/or conditions of military service in itself violates international human rights law, or the enforcement of the law or conditions of military service involve serious violations of international standards, prosecution or punishment for non-compliance would be excessive and, if sufficiently serious, could amount to persecution;

- Whether the applicant would receive a fair hearing. Relevant factors are whether the tribunal is impartial, independent and competent and otherwise provides for due process guarantees as set out in international law, including whether the applicant would have the opportunity to present evidence and answer the charges against him or her, or whether he or she would have the right to appeal against a conviction;
- Whether the punishment would amount to persecution. This may be the case if the punishment imposed for not complying with a military service obligation is excessive or disproportionate with regard to the offence committed and causes serious harm to the individual affected. The punishment would also constitute persecution if it involves a serious violation of human rights standards, for example where the penalty or conditions of imprisonment amount to inhuman or degrading treatment.

Other relevant considerations are whether the nature of the punishment for the same offence varies for members of different groups, thus resulting in disproportionately severe penalties for members of specific groups (e.g., deserters of one ethnic group are imprisoned while others are merely reprimanded and required to continue their military service). In all such cases, it is necessary to examine whether the impact of the punishment on the individual concerned is sufficiently serious to meet the threshold of persecution.

Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft evasion. It is not enough for a person to be in disagreement with his or her Government regarding the political justification for a particular military action. However, if the type of military action with which an individual does not wish to be associated is condemned by the international community as contrary to

basic rules of human conduct, punishment for desertion or draft evasion could, in the light of all other requirements of the definition, constitute a form of persecution.[127]

In such cases, the requirement that the applicant should participate in such military action may be persecutory if all the following criteria are met:

- The religious, moral or political conviction advanced is reasonably credible and sufficiently profound;
- Military service would require the applicant to engage in conduct contrary to this conviction; and
- There is no possibility of alternative service or the alternative service is not compatible with the applicant's beliefs or is punitive in nature and there are no applicable exemptions.

D. UNDERAGE RECRUITMENT AND PARTICIPATION IN HOSTILITIES

If the case involves underage recruitment into armed forces or groups or participation in hostilities, a need for international protection arises. As the Committee on the Rights of the Child has stated:

> As underage recruitment and participation in hostilities entails a high risk of irreparable harm involving fundamental human rights, including the right to life, State obligations deriving from article 38 of the Convention [on the Rights of the Child], in conjunction with article 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, entail extraterritorial effects and States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of underage recruitment [...] or where there is a real risk of direct or indirect participation in hostilities.[128]

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[127] *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, para. 171.

[128] General comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, para. 28.

The Committee went on to highlight this as a child-specific form of persecution and thus "underage recruitment […] and direct or indirect participation in hostilities constitutes a serious human rights violation and thereby persecution, and should lead to the granting of refugee status where the well-founded fear of such recruitment or participation in hostilities is based on 'reasons of race, religion, nationality, membership of a particular social group or political opinion' (art. 1A(2), 1951 Convention)."[129]

Please refer to chapter I for additional information relating to international standards prohibiting the recruitment and participation of underaged persons in armed conflict.

E. LINKS TO THE GROUNDS SET OUT IN THE 1951 CONVENTION

As mentioned above, persecution related to military service obligations will give rise to refugee status only if it is linked to one or more of the five grounds set out in the 1951 Convention.

Persecution in military service cases for reasons of religion has most frequently been invoked in relation to conscientious objectors whose refusal to serve is based on religious convictions. In the past there was some debate on whether punishment in such cases was "for reasons of" religion or simply as a measure imposed because of the applicant's refusal to undertake military service. It is now generally accepted that, where no alternative form of service is available, forcing an individual to undertake military service, or punishing him or her for a refusal to serve contrary to his or her profound religious convictions, would—for that individual—amount to persecution for reasons of religion.

Political opinion—actual or imputed—has been applied in several jurisdictions as a ground under the 1951 Convention in cases based on the applicant's unwillingness to undertake military service. A refusal to bear

[129] General comment No. 6 (2005), para. 59. See also UNHCR, "Guidelines on international protection: child asylum claims under articles 1(A)2 and 1(F) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees" (HCR/GIP/09/08), paras. 19–23.

arms will very often be seen as expressing a political opinion regarding the permissible limits of State authority, regardless of the motivation behind it.

As a consequence, the act of resisting military service may in itself be interpreted as an expression of political opinion, whether or not the applicant would describe it as such. In some cases, the motivation for avoiding military service is in fact based on political opinion (for example, if the applicant disagrees with the State's actions in waging a war of aggression or in engaging in armed conflict with a particular secessionist group). In other situations, the State imputes a political opinion to the applicant based on a perception of his or her actions as disloyal or as evidence of dissent from State policies. In determining such claims, the overall profile of the applicant will be relevant, including his or her background and any previous activities which might increase the likelihood that his or her resistance would be perceived as political. Political opinion—real or imputed—has also been found relevant where individuals perceived as hostile to the Government are subjected to persecution within the armed forces.

Race and nationality, in the form of ethnicity, have been applied where the criteria for conscription, conditions of military service or punishment for resistance discriminate against particular groups. These grounds have also been applied where the applicant's refusal to serve is based on a principled objection to participating in an internal conflict of an ethnic nature, on account of his or her ethnic background.

The ground of membership of a particular social group has not been widely used in relation to military service cases. The possibility of doing so has not been ruled out, however.

The genuineness of a person's political, religious or moral convictions or his or her reasons of conscience for objecting to performing military service will need to be established by a thorough investigation of the individual's personality and background. The fact that the person may have manifested views prior to being called to arms, or that he or she may have already encountered difficulties with the authorities because of his or her convictions, are relevant considerations. Whether the person has been

drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of the person's convictions.

F. STATE PRACTICE

A significant number of States provide international protection to conscientious objectors for the reasons outlined above. States have recognized that conscientious objection, which may, inter alia, be expressed through draft evasion and desertion, can arise from a political opinion or a religious belief, that conscientious objection can itself be regarded as a form of political opinion and, more rarely, that objectors or a particular class of them can constitute a particular social group.[130]

State practice is evolving on specific cases of selective conscientious objectors. It serves the integrity of the international legal regime as a whole if an individual for whom fleeing and claiming asylum is the only way of avoiding participation in an internationally condemned war involving conduct contrary to international law or in wars which systematically breach international humanitarian law is granted international protection.[131]

G. POST-CONFLICT SITUATIONS

In post-conflict situations, the Commission on Human Rights in its resolution 2004/35 encouraged States to grant and effectively implement post-conflict amnesties, in law and practice, to those who have refused military service on grounds of conscience. This builds on its recognition in earlier resolutions of the need for asylum for conscientious objectors who have to leave their country of origin because conscientious objection is not recognized. Post-conflict amnesties are, therefore, relevant to consolidating peace and promoting returns in safety and security, and without such objectors being liable to discrimination or persecution for their refusal to fight.

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[130] E/CN.4/2006/51, para. 58.

[131] *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, para. 171.

In post-conflict situations, voluntary repatriation can be assisted by amnesties that grant returnees immunity from prosecution for offences they may have committed in relation to military conscription, desertion or armed service, including in or from non-recognized armed forces, as long as these amnesties exclude returnees charged, inter alia, with serious violations of international humanitarian law, or genocide, or a crime against humanity, or a crime constituting a serious violation of human rights, or a serious common crime involving death or serious bodily harm, committed prior to or during exile.[132] Such provisions, to be effective, should ensure that any continuing liability to military (or reserve) service includes the possibility of claiming recognition as a conscientious objector, and that in practice no punishment or discrimination occurs—both in order not to inhibit returns and also because this would itself be a violation of the prohibition of discrimination.[133]

[132] UNHCR Executive Committee, Conclusion No. 101, 2004, on legal safety issues in the context of voluntary repatriation of refugees, para. (g). On a similar basis, international humanitarian law advocates application of the widest possible amnesty at the end of civil wars, not for the purpose of exempting those who have committed such crimes, but to cover the fact that they could otherwise be tried for "treason" for taking up arms against the State and/or for what would in international armed conflicts be "lawful acts of war".

[133] E/CN.4/2006/51, para. 60.

FINAL OBSERVATIONS: THE CHALLENGE TO STATES

States that do not provide for conscientious objection to military service are sometimes concerned that such recognition would compromise the system of conscription for the armed forces. Experience does not bear this out, even where the system of self-assignment as a conscientious objector applies. Figures indicate that there are always more people who avoid military service by other means than those who seek exemption as conscientious objectors.[134] Conversely, even where exemption on grounds of conscience is relatively easy to obtain, a significant proportion continue to undertake military service.

Sometimes members of a particular religious minority, often the Jehovah's Witnesses, are associated with the refusal to undertake compulsory military service and are either exempted as a group or are frequently imprisoned for their refusal to undertake military service. But where there are no procedures for dealing with claims, conscientious objectors will often see no reason to identify themselves. Even those who have grounds of conscience may seek to avoid military service rather than refuse it.

In such circumstances, change is often precipitated as a result of one individual being prepared to take a public stand as a conscientious objector, rather than seek to avoid military service through one of the recognized channels permitting postponement or exemption on health or other grounds. Such action leads others to consider this possibility and to put pressure on the authorities to provide for conscientious objection. For example, in Spain, José Luis Beunza's public stand as a conscientious objector in 1971 and his subsequent imprisonment precipitated domestic and international attention which eventually led to a change in the law.[135]

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[134] See e.g. F. Rojas, "El servicio militar obligatorio en Paraguay: entre la contestación social y la inercia de las instituciones del Estado autoritario", paper delivered to the Panel on Military Service, Center for Hemispheric Defense Studies, REDES 2001 (Research and Education in Defense and Security Studies), Washington D.C., 22–25 May 2001.

[135] Prasad, *War is a Crime against Humanity*, pp. 419–426; Movimiento Objeción de Conciencia, *En Legítima Desobediencia: tres décadas de objeción, insumisión y antimilitarismo* (Madrid, 2002), pp. 52–53.

The precise form that conscientious objection to military service takes will be unique to each individual. Although categories can be identified, they should not be applied in an inflexible manner; a case which does not fit a prior definition must be examined on its own merits rather than dismissed out of hand. The fact that conscientious objection may have different forms has led States to provide more than one and, in some cases, several forms of alternative service.

As the Human Rights Committee has observed "respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society [...] alternatives to compulsory military service [...] do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service."[136]

[136] *Yoon et al.* v. *Republic of Korea.*

Designed and printed by the Publishing Service, United Nations, Geneva
GE.12-18465 — February 2013 — 3,480 — HR/PUB/12/1

United Nations publication
Sales No. E.12.XIV.3.
USD 14
ISBN 978-92-1-154196-0