Chapter 2
Right to Conscientious Objection in the United Nations Human Rights Law

Abstract Chapter 2 traces the history of conscientious objection from the perspective of United Nations human rights law. Since its establishment the United Nations has consistently focused on the issue of conscientious objection. The change in attitudes toward ‘conscientious objection to military service’ and ‘conscription’ by the international community following the Cold War has been mirrored by the progressive interpretation of international human rights law by the Human Rights Committee. A major stumbling block to reading Article 18 of the International Covenant on Civil and Political Rights as basis for a right to conscientious objection is the language on conscientious objection in Article 8 of the Covenant. This construction prevented the recognition of the right to conscientious objection at international level for many years. However, following the General Comment to Article 18 of the Covenant the interpretation traditionally adopted by the Human Rights Committee has shifted significantly.

The right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his conduction in life. The desire to enjoy this right has already proved itself to be one of the most potent and contagious political forces the world has ever known. But its full realization can come about only when the oppressive action by which it has been restricted in many parts of world is brought to light, studied, understood and curtailed through cooperative politics; and when methods and means appropriate for the enlargement of this vital freedom are put into effect on the international as well as on the national plane.

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The first and foremost legal basis of the right to conscientious objection to military service undoubtedly must be the right to freedom of thought, conscience and religion. The word ‘conscientious’ objection itself implies the relationship between two concepts. It is guaranteed by article 18 of the Universal Declaration of Human Rights (1948) and article 18 of the International Covenant on Civil and Political Rights (1966). At the regional level, it has also appeared in article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) as well as article 12 of the American Convention on Human Rights (1969). Africa has the African (Banjul) Charter on Human and People’s Rights, adopted 27 June 1981, which protects freedom of conscience, and the profession and free practice of religion, which will never be subject to law and order, under article 8. Unlike article 18(1) of the International Covenant on Civil and Political Rights, article 8 of the African Charter does not expressly recognise freedom of thought (Ouguerouz 2003, p. 156). Nonetheless, this may not make this article less effective in providing a legal basis for the right to conscientious objection to military service as long as article 8 embraces freedom of conscience which alone may provide sufficient basis for the right to conscientious objection.

The non-discriminatory guarantee and application of freedom of conscience is required according to article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (see Epstein 2002, p. 305, 306). The non-discriminatory guarantee of freedom of conscience is again recognised by article 5 of the Teheran Proclamation of the International Conference on Human Rights held in 1968.

Although it is true that this right consists of freedom of thought, conscience and religion, freedom of thought on its own may not be of much relevance here as far as the right to conscientious objection to military service is concerned. In practice, freedom of thought on its own, separated from freedom of conscience, is rarely likely to be resorted to by an individual. While freedom of conscience can be regarded as a particular instance of freedom of thought, both may be distinguishable from each other (Epstein 2002, p. 306). Freedom of thought includes research and political activities which are sometimes aimed at influencing a society rather than self-satisfaction (Epstein 2002, p. 306). By contrast, the activities legally based on freedom of conscience often relate more to one’s own conviction and exemption of oneself from what one does not value. Freedom of thought may have some relevance to civil disobedience since it is designed to change a society, law or public policy and is not of a personal ‘hand-washing’ character. Therefore the right to freedom of thought itself is not considered in this Chapter.

As described below, a major stumbling block to reading article 18 of the International Covenant on Civil and Political Rights as basis for a right to conscientious

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objection is the language on conscientious objection in article 8 of the Covenant which has dogged the understanding of article 18. This construction had prevented the recognition of conscientious objection system at international level for a long time.

2.1.1 Activities Before 1970

The United Nations Sub-Commission on the Promotion and Protection of Human Rights (formerly Sub-Commission on Prevention of Discrimination and Protection of Minorities, which was established under the authority of the Economic and Social Council in 1947) had actively studied the general issue of conscientious objection and the right to conscientious objection since the 1970s. It had also been ‘very active to strengthen the role of youth in the promotion and protection of human rights, including the question of conscientious objection to military service’ (Angel 1995, p. 24). After a long debate over the shortcomings of the Sub-Commission, its mandate was terminated by the Human Rights Council as of June 2007. The Sub-Commission will be replaced by the Human Rights Council Advisory Committee. 4

Although the activities of the Sub-Commission became prominent in the 1970s, based on the work of its Special Rapporteur on the question of discrimination in the matter of religious rights and practices, it had already affirmed the right to conscientious objection to military service in the context of freedom and non-discrimination in the matter of religious rights and practices. 5 Entrusted with the task of preparing a study on discrimination in the matter of religious rights and practices, in 1959 the Sub-Commission’s Special Rapporteur, Arcot Kishnaswami, presented a report titled ‘Study of Discrimination in the Matter of Religious Rights and Practices’. 6

The report concludes that: ‘There is no uniform solution to the problem of conscientious objection to military service based on the ground that such service is contrary to the prescription of a religion or belief’, as the solution ‘varies considerably from country to country, and even in various parts of the same country, according to circumstances and the state of public opinion’. 7 The report especially notes the delicate aspect of national sovereignty concerning conscientious objection: ‘[n]ormally recognition of the claim of conscientious objection to full or partial exemption from military service is left to the discretion of the State’ (see Note 7). In order to support this position, the report refers to article 8 of the draft Covenant on Civil and Political Rights which dealt with forced or compulsory labour and

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4 UN Doc. A/RES/60/251 (30 April 2006) [1]. The General Assembly decided to establish the Human Rights Council which replaces the Commission on Human Rights. See also ‘United Nations Human Rights Council Institution Building President’s text’ (17 June 2007) 8ff.
7 UN Doc E/CN.4/Sub.2/200/Rev.43.
which specifically laid down that this term shall not include: ‘any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors’ (see Note 7). Nevertheless, the word ‘normally’ in the wording of the report implies that there must be a situation in which the international concern for recognition of the right to conscientious objection overrides the interests arising from the national sovereignty of a State. Moreover, the report recognises the difficulties by stating that: ‘It must be realized that even though the right to conscientious objection is recognised by the law, impediments may be placed in the way of conscientious objection by the public particularly in regard to their access to employment and to social life’ (see Note 7). Notwithstanding this generous understanding of the issue of conscientious objection, at the end of the section dealing with conscientious objection the report includes the warning that, whether an individual is reluctant to perform any services remotely connected with a military effort, or is willing to perform alternative compensatory national service, ‘the population of the country as a whole may feel that any exemption (from military service) creates a privilege entailing discriminatory treatment of others’.\(^8\) so that ‘where the principle of conscientious objection to military service is recognised, exemption should be granted to genuine objectors in a manner ensuring that no adverse distinction based upon religion or belief may result’ (see Note 8). The programme for action proposed in this report states: ‘In a country where the principle of conscientious objection is recognised, exemptions should be granted to genuine objectors in a manner ensuring that no adverse distinction based upon religion or belief may result’ (Rule 13).\(^9\)

The impact of adverse discrimination caused by exemptions of conscientious objectors from military service was not completely clarified by this report, though this is the report of the study on discrimination in the matter of religious rights and practices. The recognition of conscientious objection to military service requires a system for ensuring the right to freedom of thought, conscience and religion, and the need of such a mechanism is to eliminate any inconvenience and discrimination for the sake of those who find their government’s policy or the duty to military service opposed to their beliefs or conscience. Hence the necessity to recognise conscientious objection should be weighed against potentially adverse discriminatory effects, as the latter may be a minor side-effect in order to achieve a greater objective.

### 2.1.2 Travaux Préparatoires of the International Covenant on Civil and Political Rights

The Universal Declaration on Human Rights of 1948 is a basic catalogue of human rights and does not directly contain and raise the issue of a right to conscientious objection. A limited substantive discussion on the subject of conscientious objection

\(^8\) UN Doc E/CN.4/Sub.2/200/Rev.44.
to military service can be found in the course of drafting the International Covenant on Civil and Political Rights of 1966. The United Nations Commission on Human Rights was first charged with the task of translating the content of the Universal Declaration of Human Rights. Then the further drafting of covenants was referred to the General Assembly’s Third Committee. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were simultaneously and unanimously adopted by the United Nations General Assembly on 16 December 1966.10

The discussion of conscientious objection can be found in the travaux préparatoires of article 8, dealing with slavery, instead of those of article 18, which concerns freedom of conscience. This is due to the fact that the only article of the International Covenant of Civil and Political Rights that refers to ‘conscientious objection/conscientious objectors’ is article 8(3)(c)(ii):

3. (c) (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

The fact that this is the only article directly referring to conscientious objection has made the Human Rights Committee, established under article 28 of the International Covenant of Civil and Political Rights, construe this provision as providing discretion for States to recognise conscientious objection. The travaux préparatoires of this article indeed show that this line of argument is in favour of discretion of States. Nevertheless, it should be noted that there was an argument that at least the idea of conscientious objection should be mentioned since it was ‘the beginning of a growing movement’11 of State practices.

The starting point in the drafting of article 8(3)(c)(ii) was a paragraph prepared by the Drafting Committee:

3. For the purposes of the article, the term ‘forced or compulsory labour’ shall not include:
(a) Any service of a purely military character, or service in the case of conscientious objectors, enacted in virtue of compulsory military service laws, provided that the service of conscientious objectors be compensated with maintenance and pay not inferior to what a soldier of the lowest rank receives.12

At the Fifth Session of the Commission on Human Rights, the United States of America proposed a simpler paragraph: ‘The term “forced or compulsory labour” shall not include: (a) Services pursuant to compulsory military service laws’.13 However it was not voted upon (Bossuyt 1987, p. 177). Following this United States proposal, the United Kingdom proposed a similar paragraph, stating that ‘For the purposes of this article the term “forced or compulsory labour” shall not

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include: (a) any service of a purely military character or in the case of conscientious objectors exacted in virtue of compulsory military service laws.\textsuperscript{14} It was withdrawn in favour of the revised version (Bossuyt 1987, p. 177). The revised proposal took out the term ‘purely’ in front of ‘military character’.

The first part of the proposal by the Drafting Committee stating that ‘any service of a military character or’, was adopted by 14 votes to none, with 2 abstentions.\textsuperscript{15} The Chilean delegate requested a roll-call vote on the next part, reading ‘or, in the case of conscientious objectors’, because of the grave responsibility involved in the case of those countries which did not recognise that concept (see Note 15). It was adopted by 7 votes to 4, with 5 abstentions. Accordingly, Belgium, Denmark, Egypt, France, India, the United Kingdom and the United States of America voted in favour of it. Chile, Guatemala, Iran and Uruguay voted against it. China, Philippines, Ukrainian Soviet Socialist Republic, the USSR (Union of Soviet Socialist Republics) and Yugoslavia abstained (see Note 15).

The third paragraph of the proposal by the Drafting Committee that: ‘[...] exacted in virtue of laws requiring compulsory national service’ was adopted by 10 votes to none, with 6 abstentions (see Note 15). Eventually, sub-paragraph (b) of the Drafting Committee as a whole was adopted by 7 votes to 1, with 8 abstentions (see Note 15).

Considering the fact that the concept of conscientious objection was not recognised in many countries, the phrase ‘in countries where conscientious objection is recognized’ was inserted by the French proposal.\textsuperscript{16} This French proposal was adopted by 8 votes to 2, with 6 abstentions.\textsuperscript{17} Delegates from Chile, Iran and Egypt stated that such an amendment was essential since numerous countries did not recognise this concept (see Note 16). Iran would even have preferred that the question of conscientious objectors had been omitted from the Covenant (see Note 16).

Before voting on the French proposal, the Chairman, and representative of the United States, Mrs. Roosevelt, spoke in favour of the inclusion of the concept of conscientious objection, arguing that:

Modern means of transportation and travel would spread concepts and traditions which, in the past, had been held by only a limited number of countries. Immigration and other factors contributed to the dissemination of ideas and the possibility of rapid development in that field would have to be taken into consideration in the drawing up of the Covenant.\textsuperscript{18}

The delegate of Lebanon supported the Chairman’s argument:

The Commission should take into consideration the fact that the concept of the conscientious objector was not a dying tradition but the beginning of a growing movement. The idea should be included in the text although there were States which did not recognize it, just as the Covenant referred to slavery although it no longer existed (see Note 19).

\textsuperscript{14} UN Commission on Human Rights, 5th Session (19 May 1949) UN Doc ECN.4/202.

\textsuperscript{15} UN Doc E/CN.4/SR.104, 9.

\textsuperscript{16} UN Doc E/CN.4/SR.104, 6.

\textsuperscript{17} UN Doc E/CN.4/SR.104, 8.

\textsuperscript{18} UN Doc E/CN.4/SR.104, 7.
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The adopted proposal of the French, with the wording ‘in countries where conscientious objection is recognized’, ‘made it clear that it was applicable only to those countries which already recognized that principle’ according to the Lebanese delegate (see Note 18). Therefore, ‘the misgivings expressed by some delegations that the proposed text might imply the inclusion of the concept of the conscientious objector in their national legislations was unfounded’ (see Note 18).

The French delegate subsequently suggested the following amendment in the Sixth Session of the Commission on Human Rights:

Any service of a military character or exacted in virtue of laws requiring compulsory national service, including services required to be done by conscientious objectors, in countries where they are recognized.\(^{19}\)

Subsequently, the French and the British delegates proposed to substitute the following text:

Any service exacted by virtue of laws requiring military service, including any service required of conscientious objectors in countries where they are recognized.\(^{20}\)

The delegate of Australia suggested that the word ‘service’ should be inserted after ‘recognized’.\(^{21}\) While the Australian proposal was adopted, the Chairman recalled that the representative of France had requested that the vote on subparagraph (b) should be postponed.\(^{22}\) She therefore proposed that the vote on the article as a whole should be postponed to a later stage (see Note 22).

Hence this sub-paragraph was the last paragraph which remained to be settled amongst other parts of article 8.\(^{23}\) As the French and the British joint amendment was withdrawn, the original draft text as amended by Australia was voted on.\(^{24}\) The draft text was adopted by 11 votes to none with 2 abstentions.\(^{25}\) These changes had been made by 1950.

France tried to modify the text later, in 1952, proposing replacement of the text of this subparagraph as follows, though it was withdrawn in favour of the revised version (see Bossuyt 1987, p. 179):

Any service of a military character, or, in the case of conscientious objectors in countries where conscientious objection is taken into consideration, any other national service instituted by law in place of compulsory military service.\(^{26}\)


\(^{21}\) UN Commission on Human Rights, 8th Session (17 April 1950) UN Doc E/CN.4/149, 3 [1].

\(^{22}\) UN Doc E/CN.4/149 3 [3].

\(^{23}\) UN Commission on Human Rights, 6th Session (21 April 1950) UN Doc E/CN.4/SR.154, 3 [4].

\(^{24}\) UN Commission on Human Rights, 6th Session (21 April 1950) UN Doc E/CN.4/SR.154, 3 [4]–[6].

\(^{25}\) UN Commission on Human Rights, 6th Session (21 April 1950) UN Doc E/CN.4/SR.154, 3 [8].

\(^{26}\) UN Commission on Human Rights, 8th Session, Agenda Item 4, Original French (19 May 1952) UN Doc E/CN.4/L.158.
The French delegate proposed the revised amendment, which reads as follows:

Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objection.27

This amendment was intended to avoid any discussion of service of a military character.28 Although the United Kingdom understood perfectly the French representative’s objection to paragraph 3(c)(ii), the delegate of the United Kingdom wondered whether the legal scope of the expression ‘in virtue of laws requiring compulsory national service or compulsory military service’ of the draft would not be sufficiently wide in France to allow for the idea of conscientious objection.29 The United Kingdom felt that: ‘the idea of compulsory military service was included in that of compulsory national service’ (see Note 29). In addition, the United Kingdom suggested that: ‘the French delegation’s amendment to paragraph 3(c)(ii) was not satisfactory because it might imply that a special law providing for special work for conscientious objectors would have to be adopted’.30 Eventually the French amendment to paragraph 3(c)(ii) was adopted by 11 votes to 3, with 4 abstentions.31

It is remarkable that, at the time of drafting article 8 of the International Covenant on Civil and Political Rights, there was a proposal with regard to decent treatment of conscientious objectors. The Lebanese amendment to insert the words, ‘provided that the services of conscientious objectors be carried out in conditions equal to those accorded to all other citizens subjected thereto’ was put to the vote. It was rejected by 3 votes to 1, with 12 abstentions (see Note 17). As their amendment had been rejected, the Lebanese delegation proposed the insertion of the sentence used in the Drafting Committee’s text (see Note 17). Accordingly, the Lebanese proposal to insert the following sentence, ‘provided that the service of conscientious objectors be compensated with maintenance and pay not inferior to that a soldier of the lowest rank receives’, was rejected by 5 votes to one with 10 abstentions (see Note 15), even though the Lebanese delegate had made it clear that the text proposed by the Drafting Committee was not designed to require nations to accept principles of conscientious objection, but rather to protect conscientious objectors in those countries where the principle was supposedly recognised (see Note 15).

Those who supported the proposals pointed out that in certain countries where conscientious objectors were released from military obligations, they were subjected

28 UN Commission on Human Rights, 8th Session, Summary Record of the Three Hundred and Thirteenth Meeting (10 June 1952) UN Doc E/CN.4/SR.313, 9.
29 UN Commission on Human Rights, 8th Session, Summary Record of the Three Hundred and Thirteenth Meeting (10 June 1952) UN Doc E/CN.4/SR.313, 10.
30 UN Commission on Human Rights, 8th Session, Summary Record of the Three Hundred and Thirteenth Meeting (10 June 1952) UN Doc E/CN.4/SR.313, 11.
31 UN Commission on Human Rights, 8th Session, Summary Record of the Three Hundred and Thirteenth Meeting (10 June 1952) UN Doc E/CN.4/SR.313, 12.
to treatment inconsistent with human dignity, so that it was essential to provide some minimum safeguards (see Bossuyt 1987, p. 178). In the Lebanese delegate’s view:

Although he was not in sympathy with the views of conscientious objectors, he had been impressed by their experiences. In certain countries where conscientious objectors were permitted release from military obligations, they were treated in a manner inconsistent with human dignity. They were set to compulsory labour, were paid little or nothing, and in many cases their health or sanity broke down. If the system of conscientious objection were permitted at all, the countries permitting it must honestly accept their responsibility to grant the objectors human treatment. […] It would be more advisable, however, to adopt the original text, with its vital stipulation that conscientious objectors should receive maintenance and pay not inferior to that of the lowest rank of soldier. Such a stipulation provided at least a minimum safeguard.32

Some of the delegates appreciated the remarks by the Lebanese delegate. The Australian delegate fully appreciated the position of the Lebanese representative in regard to conscientious objectors and he held he would support any suitable text that would ensure decent treatment of conscientious objectors (see Note 32). The United States’ delegate, the Chairman, ‘could not but agree that the provision in the original text which guaranteed them a minimum living wage was of the utmost importance. If the rights of conscientious objectors were to be respected, a living wage had to be assured first of all; other aspects of the problem might be taken are of by a gradual development in various countries’ (see Note 32).

The other delegates, who opposed the proposals, argued that it was inappropriate to go into details concerning the treatment of conscientious objectors.33 For example, for the delegate of the USSR, ‘the Drafting Committee’s text went too far in laying down exactly what the pay of conscientious objector should be’.34 The Chilean delegate described it as ‘dangerous’ (see Note 34). The delegate of Denmark held that the question of pay was only one of many points on which they should be protected; for example, there was the matter of hours of work or length of service. Since the problem was such a complicated one the covenant should not stress only one aspect of it (see Note 36).

For the French delegate, a reference to the treatment of conscientious objectors might have an impact upon many States without such a system. The French delegate:

…did not think it necessary to include in the article the provision with respect to remuneration of conscientious objectors which appeared in the original draft [of the Drafting Committee]; it might make an unfortunate impression on a number of States which did not recognize the right of the individual to refuse to fight for his country.35

There was the embarrassment of a country not recognising the system of conscientious objection in the midst of heated debate of how the Covenant dealt with it. The Belgian delegate showed his regret ‘that his country, which considered a conscientious objector to be guilty of a serious violation of the law, followed a less

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32 UN Doc E/CN.4/SR.94, 10.
33 The statement of the delegate of the United Kingdom, UN Doc E/CN.4/SR.104, 5.
34 UN Doc E/CN.4/SR.104, 5.
35 UN Doc E/CN.4/SR.94, 12.
liberal policy in that regard than the United Kingdom’. According to the Belgian delegate, ‘[t]he Commission’s major concern should be to ensure legal recognition of the position of the conscientious objector and of his right to fulfil his duty to his country in some way or other than by military service, without fear of punishment’ (see Note 36).

The substantive discussion on article 8 was mainly carried out before the Commission on Human Rights. The original text submitted by the Commission on Human Rights was adopted by the Third Committee with only a minor change (United Nations Yearbook 1958, p. 205). The change was essentially nothing to do with the issue of conscientious objection to military service. The only sub-paragraph within paragraph 3 that was amended by the Third Committee is paragraph 3(c)(i) in accordance with the proposed amendment by the Netherlands. The other point of draft article 8 discussed to some extent by the Third Committee was whether a reference should be made in article 8 to the existing international convention on slavery and on forced labour, i.e., the Supplementary Convention on the Abolition of Slavery and the Slave Trade and Institutions and Practices Similar to Slavery of 1956 and the Abolition of Forced Labour of 1957. While the amendment was not put to the vote, the Committee adopted, by 30 votes to 26, with 16 abstentions, a proposal by Bulgaria that action on the amendment should be postponed until part II of the Draft Covenant was considered.

At the request of the Philippines, paragraph 3(c)(ii) was voted on by parts. A separate vote was preferred by the Philippines since its delegate wished to abstain in the vote on that section as conscientious objection did not exist in the Philippines. The words ‘any service of a military character’ were adopted by 68 votes to none, with 1 abstention (see Note 41). The remaining words were adopted by 61 votes to nine, with 11 abstentions (see Note 41). Some delegates were displeased at the phrase regarding conscientious objection since their countries were not familiar with the concept.

Then article 8 as a whole was put to a roll-call vote. The article was adopted by 70 votes to none, with 3 abstentions. Even though there was almost unanimity

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36 UN Doc E/CN.4/SR.94, 8.
38 UN Doc. A/4045 [29].
39 UN Doc. A/4045 [30(b)], see also UN Doc. A/C.3/SR.860 [37].
40 UN Doc. A/4045 [30(c)], see also A/C.3/SR.860 [39].
41 A/C.3/861 [2].
42 The delegate for Israel said that he had voted for the article as a whole although he had abstained on the phrase regarding conscientious objection, because of doubt that that concept, as formulated in paragraph 3(c)(i), existed in Israel’s legislation. A/C.3/860 [47]. The Cambodian delegate also claimed that he had abstained on the second part of paragraph 3(c)(ii) because conscientious objection was unknown in Cambodia, there being no compulsory military service. A/C.3/SR.861 [5].
43 UN Doc. A/4045 [30 (d)].
44 UN Doc. A/4045 [30 (d)]; UN Doc. A/C.3/SR.860 [40]. Iraq, Lebanon, and the Union of South Africa abstained, though Iraq seemingly abstained in error. The delegate said that she had been
on the votes for the paragraph and the article and this fact would imply international recognition for the system of conscientious objection to military service, there appears to have been no consensus on the issue of conscientious objection as an international human right among drafters of the *travaux préparatoires* of article 8 of the Covenant. Questions remain regarding the relationship between article 8(3)(c)(ii) and article 18, which concerns freedom of thought, conscience and religion.

In the course of the drafting of article 8, only the Philippine delegate expressed the view that: ‘the provision concerning conscientious objectors might be taken up in connection with [draft] article 16 [draft article 16 became article 18 in the final version], which dealt with the freedom of thought, conscience and religion’.\(^\text{45}\) No other delegates followed up this remark. Therefore it can be concluded that drafters had not discussed the relationship between article 8(3)(c)(ii) and article 18.

### 2.1.3 NGO Initiatives from the Late 60s

The active involvement of the Commission on Human Rights on this issue was supported by studies by NGOs in the late 1960s. In 1967, five NGOs, the International Peace Bureau, Amnesty International, Friends World Committee for Consultation, War Resisters International and Service Civil International, began a study on conscientious objection.\(^\text{46}\) These initiatives in the United Nations must have been the result of the European activities on this issue, since the first formal attempts to establish an international right to conscientious objection occurred at the European regional level (Lippman 1990/1991, p. 46, 48).

The Vietnam War in the 1960s and 1970s had motivated NGOs to act on behalf of conscientious objectors to military service. In the United States, one of the founders of Pax Christi USA established a ‘Rights of Conscience’ campaign during the Vietnam War.\(^\text{47}\) The end of the Vietnam War also gave American NGOs incentives to act for preventing future wars. A series of actions taken by the founder of Pax Christi USA included obtaining NGO status for Pax Christi International and establishing an experienced team of representatives at the UN in New York in the late 1980s.

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\(^{45}\) UN Doc E/CN.4/SR.142, 8 [30].


2.1.4 Discussion Before the Third Committee of the General Assembly in 1970

On 18 September 1970, the General Assembly allocated to the Third Committee agenda item 55 titled ‘Youth, its education in the respect for human rights and fundamental freedoms, its problems and needs, and its participation in national development: report of the Secretary-General’. The Third Committee considered the item at its Twenty-fifth Session. During this Session, the General Assembly discussed the results of the World Youth Assembly and the Seminar on the Role of Youth in the Promotion and Protection of Human Rights and consequently adopted Resolution 2633 (XXV).

While discussing the agenda, the delegate of Saudi Arabia to the Third Committee referred to the problem of the conscription of young people for service in the armed forces of their countries and of the conscientious objection of many of them to taking part in murderous wars. The same representative demanded that the United Nations take action in the form of suggesting to governments that they should recruit only volunteers for their armed forces (see Note 49).

The Saudi Arabian delegate, Baroody, explained the contents of the draft:

Armies should be made up of volunteers and... young people should on no account be coerced into joining the armed forces, not even to defend their country from aggression, since nobody should be forced to be involved in the act of killing. Unquestionably, it was adults between the ages of 25 and 50 who unleashed wars. For that very reason, it was they who should join the armed forces in order to give the youth of the world the opportunity to attain its full development. There were of course many young people who considered it a sacred duty to participate actively in the defence and protection of their country and they should certainly not be denied the opportunity of doing so. On the other hand, they should not be compelled to take part in acts of slaughter or aggression.

Thus the delegate of Saudi Arabia submitted a draft resolution to the Third Committee. The interests of the Saudi Arabians in a system of conscientious objection seem to have been so profound that the delegate proposed the following as operative paragraph 1 of the original draft:

1. Calls upon Member States:

(a) To refrain from coercing any youth to join the armed forces of his country if such youth conscientiously objects to being involved in the act of

49 UN Doc A/8149 [18].
50 UN Doc A/CN.3/SR.1749 (5 October 1970) 75 [39].
killing regardless of whether the armed forces are engaged to repel foreign aggression or protect economic interests abroad;
(b) Only to enlist in the armed forces those youths who volunteer strictly to defend their country from flagrant aggression (see Note 51);

However, such strong wording of the draft generated resentment from not a few countries, even though Saudi Arabia introduced a revised text whose paragraph 1(a) was worded differently from the previous draft resolution at the 1752nd Meeting:

1. Suggests to Member States:

(a) Not to conscript arbitrarily any youth to join the armed forces of his country if such youth conscientiously objects to being involved in war;\(^{52}\)

A further revised version was introduced at the 1754th Meeting:\(^{53}\)

1. Suggests to Member States:

(a) Not to punish any youth who refuses to join the armed forces of his country if such youth conscientiously objects to being involved in war and to take into consideration his deep convictions;\(^{54}\)

Some representatives, while praising the generosity which had promoted the proposal, pointed out the constitutional and practical difficulties with regard to the issue (see Note 49). Some also pointed out that defensive wars and wars of national liberation should be distinguished from aggressive wars of occupation and domination (see Note 49).

Later Saudi Arabia decided not to keep the text it had submitted in the form of a draft resolution after two revisions of the draft.\(^{55}\) Rather, the delegate of Saudi Arabia submitted the text in the form of a document and mentioned it in a draft resolution.\(^{56}\) At last the delegate of Saudi Arabia revealed that it would suffice if the document was mentioned in the Committee’s report and, through the Economic and Social Council, referred to the Commission on Human Rights.\(^{57}\) The Committee, therefore, made a reference to Saudi Arabia’s document in its recommendation. The interests of Saudi Arabia in the question may be explained by its strong will for playing significant role in the Middle East peace process at the earlier time of King Faisal’s reign (see Sullivan 1970, p. 431, 451).

53 UN Doc A/8149 [18].
   UN Doc A/8149 [20]-[21].
55 UN Doc A/8149 [22].
56 UN Doc A/8149, 9 [22]. See also A/C.3/L.1791.
57 UN Doc A/8149, 11 [25].
Another draft resolution was submitted by 24 States. This original draft resolution does not mention the issue of conscientious objection itself. However, it touches on opposition to the military when the Byelorussian Soviet Socialist Republic later submitted an amendment to insert the following paragraph to the draft resolution: ‘Considers it important that young people of all countries of the world should resolutely oppose military and other action designed to suppress liberation movements of peoples still under colonial or racist domination, and should support those peoples in every way possible in their efforts to attain independence in accordance with the inalienable right of self-determination’. It was later orally amended by the sponsors.

This proposed paragraph was adopted by roll-call vote at the request of the representatives of Iraq and Yugoslavia. The vote clearly showed the effects of the Cold War, with the Eastern bloc and African countries voting for this paragraph, and the Western countries opposing it.

The countries voting in favour were in fact in the minority. Paragraph 10 of the adopted Resolution 2,633 states:

Considers it important that young people of all countries of the world should resolutely oppose military and other action designed to suppress the liberation movements of peoples still under colonial, racist, or alien domination and under military occupation, and should support those peoples in every way possible in conformity with the principles of the Charter of the United Nations and the legitimacy of the struggle of the peoples for their freedom and independence, in their efforts to attain independence in accordance with the inalienable right of self-determination.


59 UN Doc A/8149, 14 [27].

60 UN Doc A/C.3/L.1775; cf. UN Doc A/8149, 28 [33].

61 UN Doc A/8149, 37 [61].

62 The amendment was adopted by 51 votes to 15, with 38 abstentions. UN Doc A/8149, 37-38 [61]: In favour: Afghanistan, Algeria, Bolivia, Bulgaria, Burundi, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Central African Republic, Ceylon, Chad, Cuba, Cyprus, Czechoslovakia, Ghana, Guinea, Guyana, Hungary, India, Iran, Iraq, Jordan, Kenya, Kuwait, Lebanon, Libya, Mali, Mongolia, Morocco, Nepal, Nigeria, Pakistan, People’s Republic of the Congo, Peru, Poland, Romania, Saudi Arabia, Senegal, Sierra Leone, Somalia, Syria, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yemen, Yugoslavia, Zambia. Against: Australia, Belgium, Canada, Denmark, Finland, France, Israel, Italy, Netherlands, New Zealand, Norway, Portugal, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America. Abstaining: Argentina, Austria, Barbados, Brazil, Burma, Chile, China, Colombia, Costa Rica, El Salvador, Ethiopia, Gabon, Greece, Guatemala, Honduras, Indonesia, Ireland, Ivory Coast, Jamaica, Japan, Lesotho, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Mexico, Nicaragua, Niger, Philippines, Rwanda, Spain, Swaziland, Togo, Trinidad and Tobago, Upper Volta, Uruguay, Venezuela.

This paragraph may be evaluated as a 'direct appeal to object to certain military services' (De Jong 2000, p. 173). Operative paragraph 10 was adopted by 92 votes to none, with 11 abstentions, on 14 October 1970.\(^\text{64}\)

Considering the successful outcome of the draft resolution by Eastern European and African countries, and the altogether failed attempt of the other draft resolution by Saudi Arabia, the cause of conscientious objection has been a focal point. Certainly the tide of the national liberation movements of the 1970s might have influenced the outcomes of the draft resolutions. While the Saudi Arabian draft was ready to accept any claim of conscientious objection from youth, irrespective of the nature of the conflict to which the conscientious objector objected, the adopted successful paragraph only supports conscientious objections of youth as long as they object to military service which suppresses liberation movements.

### 2.1.5 Resolution 11 B (XXVII) of 1971 by the Commission on Human Rights

The issue of conscientious objection has been on the agenda of the United Nations Commission on Human Rights since 1971 (Alfredsson and Eide 1999, p. 388). The United Nations Commission on Human Rights was undoubtedly another driving force behind the recognition of the right to conscientious objection in the context of international human rights law. The prolonged debate at the Commission reveals the tension between the most delicate issue for States – national security and the liberty of each individual’s inner thoughts.

The 1970s saw the germination of the movement to recognise conscientious objection as a human right before the Commission on Human Rights. The World Youth Assembly, which was assembled in support of the United Nations, recommended that conscientious objection should be treated as a human right and that the subject would be on the agenda of the twenty-seventh session of 1971 of the United Nations Commission on Human Rights.\(^\text{65}\) Meanwhile, an organisation of conscientious objectors, War Resisters International, collected 40,000 signatures from 27 countries in 1970 to call upon the Commission on Human Rights to recognise conscientious objection as a human right, and Pax Romana, an international association of Roman Catholic professionals and intellectuals, brought this petition to the attention of the Commission in 1970 in a statement on conscientious objection.\(^\text{66}\)


What does the term ‘youth’ stand for? When the United Nations refers to ‘youth’, it refers to persons between the ages of 15 and 24 years.\(^6^7\) Aside from youth, more broadly even ‘children’, who are defined under article 1 of the United Nations Convention on the Rights of the Child as persons up to the age of 18, are vulnerable to recruitment by armies.\(^6^8\) Oppression, militarisation, ideology and living in certain social situation are factors likely to predispose children to become involved in armed conflicts (Wessells 2002, p. 249). As seen in the case of Sierra Leone, abject poverty results in frustration and hopelessness (Wessells 2002, p. 249). Under these severe circumstances, joining a military group may provide a channel for meeting basic needs (Wessells 2002, p. 249).

The issue of conscientious objection before the United Nations Commission on Human Rights emerged as a human right of youth. Conscientious objection is described as a human right particularly applicable to youth because normally only young people are called upon to do military service (Schaffer and Weissbrodt 1972, p. 35). Eligibility for military service is usually set at an age between 16 and 18 (Schaffer and Weissbrodt 1972, p. 35). Hence the duty to perform military service may arise before conscripts have attained the legal right to vote or take part in the decisions that affect their own lives (Schaffer and Weissbrodt 1972, p. 35). Therefore the right to conscientious objection is effectively promoted and protected as a right of children and of youth.\(^6^9\) The awareness among the Member States of the United Nations of prohibition of the use of child soldiers had already grown since the 1960s against the backdrop of the increasing use of children in armed conflicts especially in Indochina (Mann 1987, p. 32). In the course of drafting the Convention on the Rights of the Child, the terminal point of the concept of child became a moot point.\(^7^0\) Columbia described the minimum age of 15 years for taking part in armed conflicts, set forth in article 38 of the Convention on the Rights of the Child, as the outcome of serious negotiations which reflect various legal, political and cultural...
systems in the world.\textsuperscript{71} Thus Columbia made the reservation upon ratification that for the purpose of article 38(2) and 38(3) of the Convention, the age referred to in said paragraphs shall be understood to be 18 years (see Note 71). The same reservation was made by Uruguay upon its ratification.\textsuperscript{72} Similarly Argentina made a declaration upon signature that child means every human being from the moment of conception up to the age of 18.\textsuperscript{73} Germany also expressed regret at the 15 year old age limit of article 38.\textsuperscript{74} Germany and Austria declared that they would not make any use of the possibility afforded by the Convention of fixing the age limit at 15 years.\textsuperscript{75} The Netherlands put a similar declaration on article 38 to raise the minimum age for recruitment.\textsuperscript{76}

The question of the system of conscientious objection to military service was incorporated in the agenda item: ‘Study of the Question of the Education of Youth all over the World for the Development of its Personality and Strengthening of its Respect for the Rights of Man and Fundamental Freedoms’, for the United Nations’ Twenty-seventh Session in 1971.\textsuperscript{77} The discussion at this session shows that:

There was general agreement as to the duty of the individual citizen to contribute to his country’s response to treaty obligations arising, for example, under the United Nations Charter or other treaties of collective or mutual defence against aggression. Differences of opinion, however, arose concerning the possibility of permitting exceptions to bearing arms for active military service on grounds of conscientious objection, religious belief or moral conviction.\textsuperscript{78}

At the 1128th Meeting, on 19 March 1971, a draft resolution concerning conscientious objection was submitted by Austria, Chile, the Netherlands, New Zealand and Uruguay.\textsuperscript{79} The draft resolution noted the increasing interest among young people in the question of conscientious objection to military service; considered it to be of importance that the domestic laws of all countries should provide for the recognition and just treatment of conscientious objectors to military service; and finally requested the Secretary-General to submit a report on this matter to the Commission (see Note 79). The basic idea of the draft was explained by the delegate of the Netherlands, van Boven, as the right of every individual to refuse to perform

\textsuperscript{72} Uruguay, reservation, see Lebranc (1996, p. 357 (especially 365)).
\textsuperscript{73} Argentina, declaration, see Lebranc (1996, p. 357 (especially 365)).
\textsuperscript{74} Germany, declaration upon ratification, see Lebranc (1996, p. 357 (especially 365)).
\textsuperscript{75} Germany, declaration upon ratification; Austria, declaration upon ratification, see Lebranc (1996, p. 357 (especially 365)).
\textsuperscript{76} The Netherlands, declaration upon ratification, see <http://www2.ohchr.org/english/bodies/ratification/11.htm> accessed 30 October 2008.
\textsuperscript{78} UN Doc E/4949, E/CN.4/1068, 48 [202].
\textsuperscript{79} UN Doc E/4949, E/CN.4/1068, 49 [209].
military service on the grounds of conscience.\textsuperscript{80} It raises the issue of the security of States and the relationship between the State and the individual (see Note 80).

The reaction to the draft resolution was that the question concerned the interests of young people in certain countries rather than all countries.\textsuperscript{81} Therefore the sponsors accepted an oral amendment by India and modified the draft to indicate the desirability of having more information before proceeding to further study of the question (see Note 81).

The representatives sympathetic to recognition of conscientious objections stressed the importance of collecting the information of State practices at an international level without necessarily prejudging the issue. The delegate of the United Kingdom, Sir Keith Unwin, was aware of the emerging trend towards recognition of the right to conscientious objection: ‘A number of countries, however, were beginning to recognise the right to conscientious objection and to agree that those who refused to bear arms could serve the community in another way’.\textsuperscript{82} However, the following idea proposed by Sir Keith must be a unique one:

Perhaps it might be possible to organise some kind of service under civilian control which would give conscientious objectors an opportunity to serve mankind under the auspices of the United Nations. By adopting a Resolution on the recognition of that right, the Commission would demonstrate that it did not confine itself to condemning war but that it was also capable of taking a positive decision in support of freedom of conscience and of the ideals of many young people who wanted to serve humanity and not war.\textsuperscript{83}

Representatives whose countries support mandatory military service in all just wars claimed that no exceptions could be made to what was a duty to one’s country and society.\textsuperscript{84} They preferred to have discretion for their own national authorities on the entire question of conscientious objection to military service rather than being subject to international regulation.\textsuperscript{85} However, these representatives at least noted that individuals could be expected to object on grounds of conscience to wars unjustly undertaken by their governments, such as wars of aggression and colonialist oppression.\textsuperscript{86} This sort of conditional conscientious objection in the representatives’ minds would have been recognised as mere illusion if they had regarded the question of conscientious objection as an internal matter essentially within domestic concerns. In that case, it is hard to imagine that a government would recognise objection on the ground of unjust war undertaken by the government itself.

\textsuperscript{80} UN Doc E/CN.4/SR.1132, at 80.
\textsuperscript{81} UN Doc E/4949, E/CN.4/1068, 49 [210].
\textsuperscript{82} UN Doc E/CN.4/SR.1125 at 14.
\textsuperscript{83} UN Doc E/CN/4/SR.1125, 15.
\textsuperscript{84} For example, see the comment of the delegate of the USSR, UN Doc E/CN.4/SR. 1129 at 53; the comment of the delegate of the United Arab Republic, UN Doc E/CN.4/SR. 1129, 58; UN Doc E/4949, E/CN.4/1068, 48 [204].
\textsuperscript{85} UN Doc E/CN.4/SR.1129, 58-59 (the United Arab Republic); UN Doc E/4949, E/CN.4/1068, 48 [204].
\textsuperscript{86} UN Doc E/4949, E/CN.4/1068, 48 [204].
The counter-argument for objection to the notion of conscientious objection in favour of the right to self-defence was presented by the delegate of the United Kingdom:

The right of self-defence was of course universally recognised, but the United Nations was an organization created in the interests of peace, and young people who objected to compulsory military service on conscientious grounds were taking those ideas a step further. Those who held such ideas were sometimes ready to risk their lives in order not to kill; that often showed a higher courage than in reacting to violence with violence.87

Strong objections to conscientious objection were raised by some countries. From the perspective of one of the Muslim countries, the delegate of Iraq said that: ‘Holy War is a sacred duty for every Moslem and to renounce it would be to renounce one of the bases of the Islamic religion’.88 The representative of the Ukrainian Soviet Socialist Republic severely criticised a Draft resolution to support the idea of conscientious objection: ‘To ask the Commission to adopt a Resolution in support of conscientious objection would be almost like forcing the tradesmen’s entrance in a house whose main door was wide open’.89

To the objection from the USSR90 that the issue of conscientious objection is contrary to its Constitution, the delegate of the Netherlands responded that: ‘It did not seem to be contrary to the Marxist-Leninist doctrine, however, since a decree signed by Lenin in 1920 had provided for the exemption of certain persons from military service’.91

Other representatives observed a difference between the bigger and the smaller States. The argument was that the question of conscientious objection was of less immediate interest to countries with large manpower reserves than to small countries, and that geographically vulnerable countries or newly independent countries could be expected to have varying approaches to the question of universal national service and to the complementary question of compulsory military service.92 The delegate of the Ukrainian Soviet Socialist Republic argued: ‘It was perhaps in the interests of the wealthy countries that the Draft resolution on conscientious objection should be adopted, since these countries could always recruit mercenaries; they had long experience of that practice. The poor countries could not pay their soldiers’.93

Another controversy concerned the question whether the right to life relates to the issue of conscientious objection. As regards the reference to the right to life, Egypt (The United Arab Republic) observed that ‘it was impossible to link the principle of conscientious objection with the notion of the right to life, which might raise serious problems connected with war of aggression, disarmament, and even the progress of

88 UN Doc E/CN.4/SR.1129, 55.
89 UN Doc E/CN.4/SR.1125, 16.
90 UN Doc E/CN.4/SR.1129, 53.
91 UN Doc E/CN.4/SR.1131, 80.
92 UN Doc E/4949, E/CN.4/1068, 48 [205].
the developing countries’. The Netherlands defended the Draft resolution and its reference to the right to life, ‘since article 3 of the Universal Declaration of Human Rights, which mentioned that right, did not refer solely to the right of a person to his own life but also to the right of others to life. That was why that right implied the right not to take the life of others’. Eventually reference to the right to life, that is, article 3 of the Universal Declaration of Human Rights, was made in the adopted Resolution. Preambular paragraph 2 mentions that: ‘Recalling articles 3 and 18 of the Universal Declaration of Human Rights, enunciating the right to life, liberty and the security of person and the right to freedom of thought, conscience and religion’.

In the end, at the 1131st Meeting, the Draft resolution, as amended, was adopted by 18 votes to 3, with 7 abstentions. The delegation of Iraq explained its vote against the draft resolution as follows: ‘Despite its moderate wording the draft resolution dealt with a substantial question and was in conflict with constitutional and moral principles of vital importance’ (see Note 97). The delegation of the USSR voted against the draft. For the Soviet delegate, ‘In cases where Governments were engaged in aggressive or colonial wars, a refusal to undertake military service was entirely justified’, but the idea of conscientious objection was contrary to the Constitution of the USSR and legislation for exemption from military service falls within ‘the domestic competence of States’. The Ukrainian Soviet Socialist Republic explained its abstention vote by stating that: ‘The resolution […] applied only to certain States which were waging wars condemned by the conscience of mankind; it did not in any way concern his country’ (see Note 97).

2.1.6 The Secretary-General’s Activities Following Resolution 11 B (XXVII) of 1971

In Resolution 11 B (XXVII) of 19 March 1971, the Commission requested the Secretary-General of the United Nations to prepare a report on the matter of conscientious objection and to seek from Member States ‘up-to-date information on national legislation and other measures and practices relating to conscientious objection and alternative service’.

94 UN Doc E/CN.4/SR.1129, 58.
95 UN Doc E/CN.4/SR.1131, 81.
97 UN Doc E/CN.4/SR.1131, 90.
98 UN Commission on Human Rights, Summary Record of the 1132nd Meeting, held on Tuesday, 23 March 1972, at 10.20 am, UN Doc E/CN.4/SR.1132, 93.
99 At its 1131st Meeting, on 22 March 1971, the Commission adopted the Draft Resolution (E/CN.4/L.1176) as orally amended, by 18 voters to 3, with 7 abstentions. UN Doc E/4949, E/CN.4/1068/49 [211].
Following this Resolution, the Secretary-General sent a letter to the permanent representative of each of the Member States of the United Nations requesting any pertinent information especially for the purpose of responding to questions such as:

Whether there is any national legislation, other measure or practice relating to conscientious objection to military service and alternative service; the grounds upon which conscientious objection to military service may be claimed; the authorities competent to determine exemptions from military service on grounds of conscientious objection, and the procedures applicable to conscientious objectors; the forms of alternative service required or permitted, and the conditions of such alternative service in relation to military service; and whether national legislation or other measures and practices relating to these matters apply equally in peacetime and emergency situations (Schaffer and Weissbrodt 1972, p. 33).

The Secretary-General prepared a report on ‘Role of the Youth in the Promotion and Protection of Human Rights: The Question of Conscientious Objection to Military Service’ accordingly in 1972. This report is nothing more than a compilation of national legislation on conscientious objection and was not supposed to serve for addressing the issue of conscientious objection to military service as a human right (Engram 1982, p. 359, 363). Although consideration of the question was repeatedly postponed (Angel 1995, p. 26), the Commission on Human Rights mentioned the report on the question of conscientious objection to military service prepared by the Secretary-General in its Resolution 1 A (XXXII) of 11 February 1976 by stating that: ‘[n]oting the report on the question of conscientious objection to military service prepared by the Secretary-General pursuant to its Resolution 11 B (XXVII) (E/CN.4/1118 and Corr. 1 and Add. 1–3)’.

Not much progress had been made in the Commission on Human Rights after this resolution in the late 70s. The topic of conscientious objection to military service was regularly postponed. On 11 March 1977, the Commission on Human Rights postponed until 1978 consideration of the issue of conscientious objection to military service as an item on the role of youth in the promotion and protection of human rights (Yearbook of the United Nations 1977, Sales No. E.71.I.1, pp. 732–733). On 14 March 1979, the Commission on Human Rights again postponed until 1980 consideration of its agenda item on the role of youth in the promotion and protection of human rights, including the question of conscientious objection to military service (Yearbook of the United Nations 1979, Sales No. E.82.I.1, p. 864, 983). Nonetheless a significant resolution concerning the right to conscientious objection was adopted by the General Assembly in 1978.

100 UN Doc E/CN.4/1118 (15 December 1972) and Corr. 2 (22 March 1974). See also UN Doc E/CN.4/1118/Add. 1 (5 March 1973), where the Secretary-General added the communication dated 20 January 1973 from the permanent representative of New Zealand to the UN Office at Geneva, noting that: ‘Legislation relating to compulsory military training in New Zealand is under review’; Add. 2 (21 March 1973), adding the fact that Australia abolished the former law and there will be no further call-ups in the country; Add. 3 (12 March 1973), adding the reply from India as of 27 June 1973 that there is no compulsory military service in India, and therefore, the question of furnishing any report on the subject does not arise.

2.1.7 General Assembly Resolution 33/165 of 1978

The General Assembly as one of the principal organs of the United Nations is charged with realising human rights and fundamental freedoms. It has provided significant legal grounds for the crystallisation of the right to conscientious objection to military service. This practice of the General Assembly relates to international condemnation for the apartheid regime in South Africa.

The international criticism of apartheid resulted in its criminalisation. The General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid on 30 November 1973. The Apartheid Convention, like the Nuremberg Charter, imposes individual responsibility in a broad manner (Sunga 1992, p. 77). The Draft Code of Offences against the Peace and Security of Mankind also enumerates the act of apartheid as a crime. Thus it is said that there is not only a right but a duty under international law to refuse to participate in the crime of apartheid (Major 1992, p. 349, 367). Such perception is further strengthened by Resolution 33/165 of the General Assembly.

In 1978, the United Nations General Assembly recognised 'the right of all persons to refuse service in military or police forces which are used to enforce apartheid'. The Resolution is not so much about the right to conscientious objection per se, but more about the recognition and encouragement of asylum status, safe transit and protection similar to that for refugees for persons compelled to leave their country of nationality solely because of conscientious objection to assisting in the enforcement of apartheid. Despite not really being a recognition of the right to conscientious objection and the demands of national sovereignty with regard to military issues, the Resolution can be interpreted as acknowledging that there are certain types of conflicts in which international law recognises the right of individuals to refuse to participate (Lippman 1990/1991, p. 49). At least it is safe to say that a general right of conscientious objection to military service 'had in part been recognised with respect to situations, where the fulfilling of military service would help regimes involved in certain types of gross and consistent violations of human rights' (De Jong 2000, p. 173). In fact, Resolution 33/165 is also recognised as the acceptance of the notion of selective conscientious objection by the United Nations (Major 1992, pp. 354–355).

Interestingly, the preambular paragraph of the Resolution reveals that: ‘Conscious that the Proclamation of Teheran, the Lagos Declaration for Action against Apartheid and other United Nations declarations, conventions and Resolutions have condemned apartheid as a crime against the conscience and dignity of mankind’. It is true that apartheid as a crime against humanity has been described as ‘a crime against the conscience and dignity of mankind’.

The wordings ‘a crime against the conscience and dignity of mankind’ appear in the many Resolutions and declarations concerning apartheid (see Jørgensen 2000, 103 UNGA Res 33/165, 33 UN GAOR Supp. (No. 45) (1978) at 154, UN Doc A/33/45 [1].

102 GA Res 3068 (XXVIII), 1015 UNTS 244 reprinted in 13 ILM 50 (1974).
103 UNGA Res 33/165, 33 UN GAOR Supp. (No. 45) (1978) at 154, UN Doc A/33/45 [1].
104 UN Doc GA/33/165 (20 December 1978) preamble.
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p. 119). For example, in 1970 the General Assembly announced: ‘We strongly condemn the civil policy of apartheid, which is a crime against the conscience and dignity of mankind and, like Nazism, is contrary to the principles of the Charter’.105 This was later affirmed in the Lagos Declaration for Action against Apartheid of 1977.106 Its paragraph 5 recognises that: ‘Apartheid, the policy of institutionalized racist domination and exploitation, imposed by a minority regime in South Africa, is a flagrant violation of the Charter of the United Nations and the Universal Declaration of Human Rights. It rests on the dispossession, plunder, exploitation and social deprivation of the African people since 1652 by colonial settlers and their descendants. It is a crime against the conscience and dignity of mankind...’. In the 1989 Declaration on Apartheid and its Destructive Consequences in South Africa, the General Assembly spelled out that:

apartheid, characterized as a crime against the conscience and dignity of mankind, is responsible for the death of countless numbers of people in South Africa, has sought to dehumanize entire peoples and has imposed a brutal war on the region of Southern Africa, which has resulted in untold loss of life, destruction of property and massive displacement of innocent men, women and children and which is a scourge and affront to humanity that must be fought and eradicated in its totality.107

The call for assisting conscientious objectors against the South African apartheid regime was invoked again by the General Assembly in Resolution 3972A, adopted on 13 December 1984.108 The Resolution has an operative paragraph inviting all governments and organisations to assist conscientious objectors who had refused to serve in the military or police force of the apartheid regime, and were genuinely compelled to leave South Africa.

22. Strongly supports the movement against conscription into the armed forces of the racist regime of South Africa;
23. Invites all Governments and organizations to assist, in consultation with the liberation movements, persons genuinely compelled to leave South Africa because of their objection on the grounds of conscience to serving in the military or police force of the apartheid regime.

After the adoption of this Resolution, the General Assembly, in resolution 35/206B of 16 December 1980, appealed to the youth of South Africa to refrain from enlisting in the South African armed forces and invited all governments and organisations to assist persons compelled to leave South Africa because of their

105 UNGA Resolution 2627(XXV) Declaration on the Occasion of the Twenty-Fifth Anniversary of the UN, 24 October 1970.
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The Commission on Human Rights condemned South Africa for ‘the imposition of military conscription on all Namibian males between 17 and 55 years of age into the occupying colonial army’. This is very important because the international community did not remain silent on the recruitment of adults for the purpose of advancing a situation contrary to international law despite there not existing a prohibition of the system of conscription under international law.

2.1.8 Report on Conscientious Objection Prepared by the Sub-Commission of 1984

Although the discussion of the right to conscientious objection at the United Nations level had become stagnant in the late 1970, the General Assembly decided to designate 1985 as international youth year by Resolution 34/151 in December 1979. In 1980, the Commission sought information from Member States on national legislation relating to conscientious objection to military service in connexion with its examination of the role of youth in the promotion and protection of human rights.

At its Thirty-sixth Session, the Commission on Human Rights requested the Secretary-General to seek from Member States up-to-date information on national legislation and practices relating to conscientious objection to military service and alternative service in Resolution 38 (XXXVI) of 12 March 1980. Through Resolution 40 (XXXVI) of 1981, the Commission welcomed the replies of Member States to the Secretary-General’s requests for information, and requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to study the question of conscientious objection to military service. In accordance with this Resolution, in 1981 the Secretary-General prepared a report on the role of youth in the promotion and protection of human rights, including the

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109 UN Doc A/RES/35/206 B [5] and [6], as proposed by 60 powers, A/35/L.14 and Add. 1, adopted by Assembly on 16 December 1980, meeting 98, by recorded vote of 127 to 4, with 13 abstentions. Against: France, Federal Republic of Germany, United Kingdom, United States. Abstaining: Belgium, Canada, Dominican Republic, Greece, Italy, Japan, Luxembourg, Malawi, Netherlands, New Zealand, Portugal, Spain, Uruguay.


question of conscientious objection to military service. Although the replies of the governments of the States which reported that no compulsory military service existed in their countries were not reproduced in the report prepared by the Secretary-General, the replies of the United Kingdom and the United States were included to show certain information on conscientious objection to service when it occurred after voluntary enlistment.

At its Thirty-fourth Session, in 1981, the Sub-Commission on Prevention of Discrimination and Protection of Minorities requested Asbjørn Eide and Charna L. C. Mubanga-Chipoya to make an analysis of the various dimensions of the question and its interrelationship with the promotion and protection of human rights. The final version of their report on the subject, presented to the Sub-Commission at its Thirty-sixth Session, includes an analysis of the information received from all sources on such matters as the grounds recognised as valid reasons for conscientious objection; procedures for obtaining conscientious objection status, the question of alternative service; the status and experience of conscientious objection in countries which permit it only on limited grounds; and the question of asylum for persons who have fled their country because of their objection to military service. The report also includes a set of recommendations for bringing national law and practice into conformity with international standards. On 24 May 1984, the Economic and Social Council decided to give the widest possible distribution to the report prepared by Eide and Mubanga-Chipoya (see Note 117). The definition used in this report is broader than the definitions adopted later by the Commission on Human Rights. It contains most notably standards of international law as one of the sources of forming one’s genuine ethical convictions. This report resulted in Resolution 1987/46 of the Commission on Human Rights on 10 March 1987, in which the Commission recognised that conscientious objection to military service derives from principles and reasons arising from religious, ethical, moral and similar values.

The report prepared by Eide and Mubanga-Chipoya enumerates seven standards of international law, which are derived from international law, for the purpose of possible grounds of conscientious objection to military service: (1) right to freedom of thought, conscience and religion; (2) right to life; (3) *jus contra bellum*; (4) *jus in bello*; (5) genocide; (6) right to self-determination; and (7) violation of human rights by armed force (Eide and Mubanga-Chipoya 1985, pp. 4–7). Among these grounds, the right to self-determination and the right to life may appear controversial to be named as the relevant international standards which circumscribe the right to use certain means and methods in warfare and thereby influence the conscience of individuals. It is particularly contentious how the right to self-determination of people has something to do with the right to conscientious objection of individuals.

115 The replies from governments received in response to that resolution before 31 January 1981 were considered at the 37th Session and are contained in UN Doc E/CN.4/1419 (20 November 1980), and Add.1–5, and the replies received after 13 March 1981 and the additional replies are contained in E/CN.4/1509 (31 August 1981).


The logic behind listing the right to self-determination as the ground of the right to conscientious objection to military service must be related to the legality of the use of force. The report by Eide and Mubanga-Chipoya describes that: ‘An individual, whose conscience with regard to the taking of the life of others is informed by the normative efforts of the international community, might be considered to be entitled to refuse to participate in action contrary to the above [self-determination] principle (Eide and Mubanga-Chipoya 1985, p. 6[52]).’ Moreover, such an objection to participation in armed repression of self-determination will no doubt be particularly strong in the case of individuals who belong to a people whose self-determination is denied (Eide and Mubanga-Chipoya 1985, p. 6[52]). The resistance of the young people of Namibia and South Africa to military service in the South African-controlled armed forces provides an example of such a case. A few examples of the right to self-determination of people supported by the international community may exemplify instances where individuals are able to see a clear-cut *jus ad bellum* violation on the one hand and justified use of force on the other hand under international law. Although the right to self-determination and the right to conscientious objection to military service are two different rights, it is understandable that the two rights may be invoked by individuals and supported by the international community at the same time.

The following remarks provided by the Eide and Mubanga-Chipoya report support the idea of associating the right to determination with the right to conscientious objection:

the principle of self-determination can be invoked by an objector to argue that he must refuse to participate in any action that tends or would tend to deprive people of their right to self-determination (Major 1992, p. 368).

It may be summarised that the individual basing his conscientious objection to military service on the right to self-determination belong to the people whose self-determination is at stake.

Another controversial point with regard to this report is whether there is a need or a possibility to resort to the right to life as a basis of the right to conscientious objection to military service? In other words, ‘[i]s there a need for the right to refuse to kill to be explicitly recognised in the international standards on conscience?’ (Boyle 1999, p. 373, 389).

The right to conscientious objection on the basis of the right to life of others would most likely be invoked by absolute conscientious objectors instead of selective conscientious objectors. The right to life of others may also be concerned with the notion of pacifism. The provisions of the right to life in international and regional human rights instruments,
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not participate in the taking of life of others unless there exists an extreme situation that is clearly justified" (Eide and Mubanga-Chipoya 1985, p. 5)

Since article 6 of the International Covenant on Civil and Political Rights deals with the deprivation of life, the suggestion was made to include the wording used in that article in the paragraph dealing with conscientious objection in General Comment No. 22 of article 18 of the International Covenant on Civil and Political Rights when it was drafted by the Human Rights Committee. However, such a proposal was rejected by the principal drafter of the paragraph because the right to conscientious objection was formulated on the basis not of article 6 but article 18.118

Still, the right to life of both others and oneself may be regarded as one of the legal bases of the right to conscientious objection to military service in accordance with the practices of the Commission on Human Rights. The Resolutions by the United Nations Commission concerning ‘Conscientious Objection to Military Service’ always advocate the right to life, which is recognised in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, in preambular paragraphs.119

The relevance of the right to life is recognised in the context of the right to asylum of conscientious objectors in the Handbook of the United Nations High Commissioner for Refugees. This Handbook suggests that a conscientious objector who has fled his or her country and claimed asylum should automatically be recognised as a refugee if it can be shown that he or she has a well-founded fear of persecution which may include serious human rights violation and the violation of the right to life of the person concerned (UNHCR 1979, pp. 51–53, 156).

2.1.9 Draft Resolution of 1985 by the Commission on Human Rights

In International Youth Year of 1985, the Netherlands submitted a Resolution to the United Nations Commission on Human Rights in order to promote conscientious objection as a human right. The subject of conscientious objection was discussed under an agenda item entitled: ‘The Role of Youth in the Promotion and Protection of Human Rights, including the Question of Conscientious Objection to Military Service’. Nonetheless, the Spanish delegate pointed out that conscientious objection also affected society in general.120 On 27 February 1985, Austria, Costa Rica, the Netherlands and Spain submitted a draft resolution titled, ‘Conscientious objection to military service’.121 Later, the consideration of the draft resolution

118 Mr. Dimitrijevic, CCPR/C/SR.1237, 6 [33].
was deferred at the request of the representative of the Netherlands at the 51st Meeting.\footnote{122}

On 13 March 1985, the Netherlands introduced a revised draft with the delegates from Austria, Costa Rica, France, Spain and the United Kingdom at the 55th Meeting.\footnote{123} The Netherlands’ delegate, Kooijmans, stressed that: ‘the draft resolution constituted a very modest measure’.\footnote{124}

At the same meeting which saw the introduction of the revised draft sponsored by the Netherlands and others, the representative of Bulgaria introduced amendments to draft resolution E/CN.4/1985/L.33, contained in document E/CN.4/1985/L.60, which was sponsored by Bulgaria and the German Democratic Republic.\footnote{125} Only a few minor amendments suggested by the former proposal were taken into consideration by the latter.

The reason the proposal of Bulgaria and Germany (E/CN.4/1985/L.60) was not accepted fully must have been that the wording of the Bulgarian and East German draft was softer than the original draft proposal by the Netherlands and others overall and appeared to allow authorities of States a more modest approach than the draft sponsored by the Netherlands.\footnote{126} Indeed, the representative of the Netherlands had endeavoured to facilitate an agreement by proposing to accept more of the amendments into the draft resolution (E/CN.4/1985/L.33/Rev.1), but it had unfortunately proved impossible to arrive at a compromise text.\footnote{127}

The amended draft of the Netherlands and others (E/CN.4/1985/L.33/Rev.1) made ‘a considerable concession’ by deleting the words ‘the right to’ from operative paragraph 1.\footnote{128} The original draft resolution of 1985 (E/CN.4/1985/L.33) reads as follows: ‘Considers that the right to conscientious objection to military service is a legitimate exercise of the right to freedom of thought, conscience and religion recognised by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights’.\footnote{129} However, operative paragraph 1 of the amendment proposed by Bulgaria and Germany (E/CN.4/1985/L.66) was shorter and ‘would have deprived the text of its meaning’:\footnote{130} ‘Considers that conscientious objection to military service, when exercised in accordance with national legislation, can be considered as an expression of the right to freedom of thought, conscience and religion’;\footnote{131} Therefore the amended draft by the Netherlands and others (E/CN.4/1985/L.33/Rev.1) retained the words of the original proposal (E/CN.4/1985/L.33) except deleting ‘the right to’.

\footnote{122} UN Doc E/1985/22; E/CN.4/1985/66 [391].


\footnote{124} UN Doc E/CN.4/1985/SR.55 (20 March 1985) [23] and [29].

\footnote{125} UN Doc E/1985/22; E/CN.4/1985/66 [392].


\footnote{127} UN Doc E/CN.4/1985/SR.55 (Kooijmans, the Netherlands) (20 March 1985) [27].

\footnote{128} UN Doc E/CN.4/1985/SR.55 (Kooijmans, the Netherlands) (20 March 1985) [28].

\footnote{129} UN Doc E/CN.4/1985/L.33 (27 February 1985) [1].

\footnote{130} UN Doc E/CN.4/1985/SR.55 (20 March 1985) [28].

\footnote{131} UN Doc E/CN.4/1985/L.60 (7 March 1985) [7].
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Nonetheless, the amendment of Bulgaria and the German Democratic Republic suggested an interesting additional preambular paragraph which related to international peace and an absolute abandonment of national military service: ‘Convinced that consistent and sincere efforts on the part of all States aimed at the threat of war, the preservation of international peace and at the development of international cooperation in accordance with the Charter of the United Nations, would ultimately result in the creation of conditions under which military service would become unnecessary’.  

The 1985 draft includes a strong message to enlighten the right to conscientious objection compared with the following Resolutions of the Commission on Human Rights. For example, the draft even requests States to recognise the right to be released from the obligation to perform military service along with the right to refuse to perform armed service.

After it appeared that the Dutch proposal would be defeated if brought to a vote, it was withdrawn and placed on the Commission’s agenda for 1987. The representative of the Netherlands said that the sponsors concluded that it would not be possible to achieve a consensus and that it would be advisable to defer the remainder of the discussions on the subject to the Forty-third Session, since it was taken up on a biennial basis. Therefore the representative of the Netherlands moved, under rule 49 of the rules of procedure of the functional commissions of the Economic and Social Council, adjournment of debate on the item under discussion on 14 March 1985. The representative of Senegal spoke in favour of the motion. The United Republic of Tanzania held that governments must be allowed more time to give careful study to the subject matter of the draft resolution, which was E/CN.4/1985/L.33/Rev.1 sponsored by the Netherlands and others, in order to be able to formulate appropriate policies. The motion was adopted without a vote. The question of conscientious objection to military service in draft resolution E/CN.4/1985/L.33/Rev.1 would therefore be taken up at the Forty-third Session of the Commission, as the representative of the Netherlands had proposed.

The debates during the drafting of the Resolution of 1985 reveal the lack of consensus among States even within Western countries at this stage. In spite of the unsuccessful outcome of the draft resolution of 1985, the debate by the Commission during 1985 constituted the first substantive discussion of conscientious objection to military service in many years and offered an insight into the attitudes of various delegations of the Commission (see Weissbrodt 1988, p. 53, 55). In addition,

132 UN Doc E/1985/L.60 [3].
135 UN Doc E/CN.4/1985/SR.57 (21 March 1985) [125].
137 UN Doc E/1985/SR.57, [126]: ‘Mr. Sene (Senegal) endorsed the position of the sponsors of the draft’.
138 UN Doc E/1985/SR.57, [128].
the contents of the draft resolution of 1985 were more or less carried over to the coming resolution of the Commission, as described below (see Sect. 2.1.10). The outcome of the debate of the draft resolution of 1985 was regrettable. Nonetheless, the debate itself became an important cornerstone of the right to conscientious objection in international human rights law. In Resolution 1985/13 of the Commission on Human Rights, on 11 March 1985, the Sub-Commission was requested to pay due attention to the role of youth in the field of human rights, particularly in achieving the objectives of the International Youth Year. Following the Commission's Resolution 1985/13, the Sub-Commission, in its Resolution 1985/12, requested Dumitru Mazilu, as Special Rapporteur, to prepare a report on human rights and youth analysing the efforts and measures for securing the implementation and enjoyment by young people of human rights. Four years later, in 1992, the final report was submitted by Mazilu and during these 4 years some developments with regard to Resolutions by the Commission can be seen to have taken place.

2.1.10 Resolution 1987/46 by the Commission on Human Rights

The Commission on Human Rights finally adopted a Resolution recommending that States with a system of compulsory military service consider introducing various forms of alternative service in 1987. It is unclear which government was willing to take an initiative for the proposal of the 1987 Resolution on conscientious objection, since the Netherlands was no longer a member of the Commission on Human Rights (Weissbrodt 1988, p. 55). At least the following fact is clear. One of the then members of the Commission, Austria, had been a supporter of this issue for years and agreed to work with the observer delegation of the Netherlands in drafting a new Resolution less ambitious than the 1985 proposal (Weissbrodt 1988, p. 55). The draft of the 1987 Resolution was first shown to delegates from France, Italy, Spain, the United Kingdom and Costa Rica (Weissbrodt 1988, p. 55). These delegates agreed to co-sponsor the Resolution (Weissbrodt 1988, p. 55). The co-sponsors discovered that many delegations were unfamiliar with the concept of conscientious objection to military service and needed to be reassured that recognition of conscientious objection would not imply the abolition of compulsory military service (Weissbrodt 1988, pp. 55–56).

The 1987 Resolution adheres fundamentally to the 1985 draft in terms of its contents. However, in order to gain wider support, the 1987 Resolution was less ambitious than the 1985 draft resolution on the following three points. Firstly, whereas the preamble of the 1985 draft resolution recognises conscientious objection as ‘a

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legitimate expression of the right to freedom of thought, conscience and religion’, the preamble of the 1987 resolution fails to include such a phrase. Secondly, whereas the 1985 draft resolution considers that conscientious objection to military service is a legitimate exercise of the right to freedom of thought, conscience and religion recognised by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the 1987 Resolution only ‘[a]ppeals to States’ to do so.\textsuperscript{141} Thirdly, the 1987 Resolution does not attempt to embrace conscientious objectors who assert their objection for the first time while already serving in armed forces (Weissbrodt 1988, p. 55). Despite all these compromises, the 1987 draft achieved a successful outcome and became a Resolution. The result of the vote was 26 in favour, 2 against, 14 abstaining.\textsuperscript{142}

Resolution 1987/46 is the first Resolution by the Commission on Human Rights that firmly establishes the right of conscientious objection to military service as part of the right to freedom of thought, conscience and religion (De Jong 2000, p. 170). Moreover, the Resolution can be interpreted as more strongly worded than many of the draft resolutions submitted in the 1970s (De Jong 2000, p. 171). It was an important first clear message by the international community on this subject and became an essential tool for those who tried to claim conscientious objector status. It is now appraised by the United Nations High Commissioner for Human Rights as appealing to States to recognise that conscientious objection to military service should be considered a legitimate exercise of the right to freedom of thought, conscience and religion.\textsuperscript{143}

The positive effect of the 1987 Resolution immediately appeared when the Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a Resolution on El Salvador in the same year.\textsuperscript{144} In Resolution 1987/18, which was adopted by 11 votes to 2, with 6 abstentions, at the 35th Meeting on 2 September 1987,\textsuperscript{145} the Sub-Commission ‘[s]tresses the importance of the recognition of


\textsuperscript{142} UN Doc E/CN.4/1987/SR.54/Add.1, 26 [115]. In favour: Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Columbia, Costa Rica, France, Gambia, Germany, Republic of Ireland, Italy, Japan, Liberia, Norway, Pakistan, Peru, Philippines, Rwanda, Senegal, Somalia, Sri Lanka, Togo, United Kingdom, United States. Against: Iraq, Mozambique. Abstaining: Algeria, Bulgaria, Byelorussian Soviet Socialist Republic, China, Congo, Cyprus, Ethiopia, German Democratic Republic, India, Mexico, Nicaragua, USSR, Venezuela, Yugoslavia.


\textsuperscript{145} A Draft Resolution (E/CN.4/Sub.2/1987/L.37) for this resolution was submitted by the representatives of Cuba, the Netherlands, France, Zambia, Ghana, Yugoslavia and Ethiopia on 27 August 1987. Although a motion was introduced by Mr Whitaker (United Kingdom) to postpone the consideration of the draft resolution until the next session of the Sub-Commission, the motion
conscientious objection to military service as contained in Resolution 1987/46 of the Commission on Human Rights, in view of the massive recruitment policies of the Government of El Salvador.\textsuperscript{146}

\subsection*{2.1.11 Resolution 1989/59 by the Commission on Human Rights}

On 8 March 1989, the Commission on Human Rights, for the first time, ‘recognises the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought, conscience and religion as laid down in article 18 of the Universal Declaration of Human Rights as well as article 18 of the International Covenant on Civil and Political Rights’.\textsuperscript{147} Arguably, the subsequent recognition as opposed to the previous appeal strengthened the normative quality of this Resolution (Van Bueren 1995, p. 154). In Resolution 1989/59, the Commission also appealed to States to enact legislation aimed at exemption from military service on the basis of genuinely held conscientious objection.\textsuperscript{148} This Resolution of 1989 has been praised for ‘taking on board all the missing elements that were mentioned with regard to the 1987 Resolution’ (De Jong 2000, p. 171). In addition, its fourth paragraph is noteworthy since it states that the nature of an alternative service should not be punitive. The rejection of punitive nature means that the length of alternative service ought not to be considerably longer than that of military service and also that the duration of this service should be comparable to that of military service (De Jong 2000, pp. 171–172).

Resolution 1989/59 was adopted without a vote, after the representative of Spain orally revised the last paragraph of the preamble of the draft resolution by deleting the words ‘ethical, moral’ between the words ‘religious’ and ‘or similar motives’.\textsuperscript{149} Accordingly, the motives of conscientious objection, which the Commission recognised at the time, had shrunk through this modification. Those were eventually only religious motives or ‘similar motives’. This defect was slightly cured by the preamble of the next Resolution adopted by the Commission on Human Rights in 1993.

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\textsuperscript{147} The resolution was sponsored by Austria, Canada, Costa Rica, France, Germany, Federal Republic of Hungary, the Netherlands, Spain and Sweden. Portugal and the United Kingdom subsequently joined the sponsors. UN Doc E/CN.4/1989/L.19/Add.15 (9 March 1989) [8].

\textsuperscript{148} UN Doc E/CN.4/2006/51, 6 [14].

\textsuperscript{149} UN Doc E/CN.4/1989/L.19/Add.15 (9 March 1989) [9].
2.1.12 Convention on the Rights of the Child of 1989

The initial standards prohibiting child recruitment were established by the 1977 Additional Protocols to the four Geneva Conventions of 1949\(^{151}\) and by the Convention on the Rights of the Child of 1989,\(^{152}\) which establishes 15 years as the minimum age for recruitment and participation in hostilities.\(^{153}\) The African Charter on the Rights and Welfare of the Child, adopted on 11 July 1990 and entered into force on 29 November 1999, also prohibits the recruitment of children in article 22(2).\(^{154}\)

The international community did put a great deal of effort into protecting the right of youth to conscientious objection to military service from the late 1970s to the 1980s. Youth is the generation moving from childhood to adulthood. If young people are the most likely targets of conscription, the right to conscientious objection as a right of the child may have to be examined. How is the right to conscientious objection as a right of the child promoted? The United Nations Convention on the Rights of the Child was unanimously adopted by the General Assembly as Resolution 44/25 on 20 November 1989 and entered into force on 2 September 1990, in accordance with article 49.

The Polish government, in early 1978, recommended that the United Nations Commission on Human Rights adopt a convention on the rights of the child.\(^{155}\) Poland has often shown its special concern for children in international fora, recalling the past sufferings of its own younger generations. The drafting of the Convention on the Rights of the Child took place within the context of the United Nations, and in particular in a working group set up by the Commission on Human Rights at its Thirty-fifth Session held in 1979 (see Note 156). The drafting body was officially known as ‘the open-ended Working Group on the Question of a Convention on the Rights of the Child’ (see Note 156).

It took the ‘open-ended Working Group’ almost 9 years to finish its work, having completed the first reading of the Convention in March 1988 (see Note 156). Following a review of the draft text of the Convention within the United Nations Secretariat, it completed the second reading in December 1988, and this final text of

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\(^{151}\) Article 77(2) of Protocol Additional to the Geneva Convention, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); Article 4(3) of Additional Protocol to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

\(^{152}\) Article 38 of the Convention on the Rights of the Child, which came into force on 2 September 1998.


the Convention was put forward to the Commission on Human Rights for discussion and approval (see Note 158). In turn, the Commission approved the Convention and sent the finalised text up to the United Nations Economic and Social Council (see Note 158). The Economic and Social Council discussed and approved the draft text and sent it to the General Assembly for its adoption (see Note 158).

The Declaration of the Rights of the Child promulgated by the General Assembly on 20 November 1959 exists as a predecessor of the United Nations Convention on the Rights of the Child. However, the contents of the former leaned heavily towards economic, social and cultural rights (see Note 158, p. 21). The travaux préparatoires of the United Nations Convention on the Rights of the Child also reveal no specific discussion of conscientious objection during the drafting of the Convention. The lack of discussion of the right to conscientious objection to military service may be due to differing limits on the concept of the child in various national legislations. The lack of debate on the right to conscientious objection left the issue of how to treat the claims of conscientious objectors over 15 years old, unsolved, especially because article 1 of the Convention on the Rights of the Child defines a child as anybody below the age of 18 years old. 156

The Convention on the Rights of the Child proscribes any person under the age of 15 from taking a direct part in hostilities.157 It also places a duty on States parties when recruiting those aged between 15 and 18 to endeavour to recruit the oldest first.158 The acts of conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities constitute war crimes under article 8(2)(b)(xxvi) and (2)(e)(vii) of the Rome Statute of the International Criminal Court of 1998 and article 4(c) of the Statute of the Sierra Leone Special Tribunal as seen below.

Recent developments in relation to the definition of children should be noted for updating the standard of the age of conscription. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts was adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 (2000).159 The Optional Protocol raises the standard that previously had been set at 15 years by international law (Vandewiele 2006, p. 30). The compulsory recruitment of ‘persons who have not attained the age of 18 years’ is now prohibited under article 2 of the Optional Protocol. Of course, for those States who have not ratified this protocol, the rule remains that of article 38 of the Convention on the Rights of Child, which prohibits recruitment into the armed forces only under the age of 15 (Brems 2006, p. 14). The issue of conscientious objection of children remains an issue for conscripts aged 15–18 years (Brems 2006, p. 14). The Optional Protocol entered into force on 12 February 2002, after receiving 10 ratifications. The Optional Protocol appears to prohibit a child’s participation in armed forces only in the case of conscription, yet it should

157 Art 38(2) of the Convention on the Rights of the Child.
158 Art 38(3) of the Convention on the Rights of the Child.
159 UN Doc A/RES/54/263 (25 May 2000).
be remembered that while young people may appear to choose military service, the choice may not be necessarily made voluntarily. The Optional Protocol raises the minimum age to at least 16 years to be enlisted voluntarily by governments and includes special safeguards to ensure that the recruitment is not coercive. Thus article 3(3)(a)–(d) of the Optional Protocol sets forth the requirements of proof of age and the consent of both the volunteer and the parents.

Recent developments of international criminal law also reveal great concerns over the involvement of children in armed conflicts. Conscripting or enlisting children under the age of 15 years into national or international armed conflict or using them to participate actively in hostilities is prohibited by articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute of the International Criminal Court. Article 4(c) of Statute of the Special Court for Sierra Leone, annexed to the ‘Agreement between the United Nations and the Government of Sierra Leone on the Establishment for the Special Court for Sierra Leone’, has the same provision prohibiting conscripting and enlisting children as article 8(2) of the Statute of the International Criminal Court.

There have been two international criminal proceedings of note concerning the use of child soldiers by the International Criminal Court and the Special Court for Sierra Leone. A decision on a preliminary motion challenging the legality of a charge, which also includes discussion of the crime of conscripting children, came from the Special Court for Sierra Leone in the case of Prosecutor v Sam Hinga Norman. The Appeals Chamber held that the prohibition on conscripting child soldiers had already become customary international law when the Statute of the Special Court was drafted. The second proceeding is before the International Criminal Court. When the Pre-Trial Chamber I issued a warrant of arrest for Thomas Lubanga Dyilo who was charged with conscripting child soldiers, it considered that any case arising from an investigation before the Court would meet the gravity threshold provided for in article 17(1)(d) including the social alarm caused to the international community by the relevant type of conduct. The Prosecutor applied the warrant of arrest for war crimes of conscripting and enlisting children under 15, and using children under 15 to participate actively in hostilities punishable under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute. The Pre-Trial Chamber I held that it was aware of the social alarm caused to the international community by the extent of the practice of enlisting and conscripting into armed groups

163 Prosecutor v Sam Hinga Norman, Decision on preliminary motion based on lack of jurisdiction (child recruitment) The Appeals Chamber, Case No. SCSL-2004-14-AR72(E) (31 May 2004).
164 Prosecutor v Sam Hinga Norman [17].
165 Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, 10 February 2006, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58 [63].
children under the age of 15 and using them to participate actively in hostilities.\textsuperscript{166} The Chamber confirmed that there were substantial grounds to believe that Lubanga was responsible for the conscription and enlistment of child soldiers and their active use in combat under the age of 15 years old into the \textit{Forces Patriotiques pour la Libération du Congo} (FPLC).\textsuperscript{167}

Security Council Resolutions have also demonstrated that the United Nations is actively involved in this issue of children in armed conflict. In Resolution 1261, the Security Council strongly condemned the abduction and recruitment of children in armed conflict.\textsuperscript{168} In Resolution 1314, the Council urged Member States ‘to sign and ratify the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict’.\textsuperscript{169} Similar Resolutions have subsequently been passed by the Security Council.\textsuperscript{170}

These efforts of rule-making for prohibiting the conscription of children will clearly be an important step for international peace and security. Although the Optional Protocol to the Convention on the Rights of the Child does not deal with the right to conscientious objection \textit{per se}, the prohibition of the conscription of children will enhance ‘their development and education in conditions of peace and security’.\textsuperscript{171} Moreover, in the words of the Pre-Trial Chamber I of the International Criminal Court, ‘social alarm’ is caused to the international community by the extent of the practice of enlisting and conscripting into armed groups and using to participate actively in hostilities children under the age of 15.\textsuperscript{172} Hence, even if international law tolerates the system of conscription, international law does not tolerate the conscription of children.

\textsuperscript{166} \textit{Prosecutor v Thomas Lubanga Dyilo}, Case No. ICC-01/04-01/06, 10 February 2006, Pre-Trial Chamber I, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58 [66].

\textsuperscript{167} \textit{Le Procureur v Thomas Lubanga Dyilo}, Case No. ICC-01/04-01-06, 29 janvier 2007, la Chambre Préliminaire I, Décision sur la Confirmation des Charges: Version Publique avec Annex I [404].


\textsuperscript{172} \textit{Prosecutor v Thomas Lubanga Dyilo} ‘Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58’ Pre-Trial Chamber I, Case No. ICC-01/04-01/06 (10 February 2006) 33 [66].
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2.1.13 Report by Special Rapporteur of 1992

The Persian Gulf War in early had enhanced the political sensitivity of the topic of conscientious objection. The Gulf War overshadowed the forty-seventh Session of the Commission on Human Rights met from January to March 1991. The Commission only managed to adopt a resolution putting off consideration of the issue of conscientious objection until a later session.173

Between the Commission on Human Rights’ Resolution 1989/59 and Resolution 1993/84, a report was issued by the Special Rapporteur on human rights and youth. On 18 June 1992, Mazilu submitted the final report on human rights and youth following the above Sub-Commission’s Resolution 1985/12.174 On the one hand, during the 4 years between 1989 and 1992, some countries, such as Hungary and Poland, had recognised the right of conscientious objection in their rules and regulations.175 On the other hand, recommendations adopted in Commission on Human Rights’ Resolution 1989/59 had not been applied, and conscientious objectors had been imprisoned or forced into military service in many countries.176 This report clearly states that on the basis of Resolution 1989/59 of the Commission on Human Rights ‘all States should take appropriate steps to recognise the right of conscientious objection to military service as a legitimate right.’177 It also makes it clear that the claim for conscientious objector status ‘is an exercise of the fundamental right to freedom of thought, conscience and religion’ (see Note 178). Going one step further, following the fact that many people were compelled to participate in armed conflicts and killed contrary to their convictions, this report warns that: ‘there is an urgent need to recognise the right of everyone to refuse to kill’ (see Note 177). It also states: ‘It is urgent for all States to respect the right to conscientious objection to military service. More than that, States should also recognise the right of individuals to be released from the armed forces on grounds of conscience’.178

2.1.14 Resolution 1993/84 by the Commission on Human Rights

On 10 March 1993, the Commission adopted Resolution 1993/84, by which the Commission referred to three Resolutions of the General Assembly concerned with youth rights, namely 34/51 of 1 December 1979, 2037 (XX) of 7 December 1965 and 2447 (XXIII) of 19 December 1968, and noted the important role of youth in the promotion of international peace and cooperation as well as of human

rights and fundamental freedoms (Angel 1995, p. 27). The draft was introduced by the representative of the Netherlands before the Commission’s 67th Meeting (Angel 1995, p. 381). The draft resolution was co-sponsored by Austria, Costa Rica, Hungary, Portugal and the United Kingdom (Angel 1995, p. 381). Canada, the Russian Federation and the United States of America subsequently joined the sponsors (Angel 1995, p. 381). The Commission, in the Resolution’s preamble, also noted the final report on human rights and youth submitted by Domitru Mazilu, the Special Rapporteur of the Sub-Commission (E/CN.4/Sub.2/1992/36), which draws attention to the continuing need for provision for conscientious objection to military service in many countries. Resolution 1993/84 reminds States with a system of compulsory military service, where such provision has not already been made, of its recommendation that they introduce for conscientious objectors various forms of alternative service which are compatible with the reasons for conscientious objection. It emphasises that such forms of alternative service should be of a non-combatant or civilian character, in the public interest and not of a punitive nature. Resolution 1993/84 includes ethical alongside religious motives as grounds for military conscientious objection, though the Resolution does not mention moral grounds.

2.1.15 General Comment by the Human Rights Committee of 1993

General Comment No. 22 [48] was adopted by the Human Rights Committee on 20 July 1993. Its drafting record shows that the Committee Members faced difficulties reaching a consensus on the issue of conscientious objection. The other side of the coin of this drafting history is that the completed General Comment is a careful consensus on this issue at the time of its drafting. Although general comments tend to be common denominators of the Committee’s jurisprudence rather than embracing lex lata, paragraph 11 of General Comment No. 22 may be evaluated as progressive and has had a significant impact on the later jurisprudence of the Committee. Before dealing with the drafting history, the nature of the ‘general comment’ will be clarified below.

The functions of the Human Rights Committee under article 40(4) of the International Covenant on Civil and Political Rights could be divided into three specific parts: firstly, the study proper; secondly, the submission of reports by the Committee as a result of the study; thirdly, the adoption by the Committee of general comments. The last function is optional whereas the first two are obligatory. Accordingly, the adoption of general comments is a discretionary act.

179 UN Commission on Human Rights, Res 1993/84 [5].
180 UN Commission on Human Rights, Res 1993/84 [6].
182 UN Doc A/35/40, 85 [376].
The purpose of the general comments is to combine an overall study of reports of States parties which might highlight matters of common interest to them. The purpose of the general comments is to make this experience available for the benefit of all States parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure; and to promote and protect human rights. The principles guiding the General Comments are enumerated as follows: (a) They should be addressed to the States parties in conformity with article 40, paragraph 4, of the Covenant; (b) they should promote co-operation between States parties in the implementation of the Covenant; (c) they should summarise the experience the Committee had gained in considering State reports; (d) they should draw the attention of States parties to matters relating to the improvement of the reporting procedure and the implementation of the Covenant; and (e) they should stimulate activities of States parties and international organisations in the promotion and protection of human rights.

The Committee further agreed that the general comments could be related to the following subjects: (a) the implementation of the obligation to submit reports under article 40 of the Covenant; (b) the implementation of the obligation to guarantee the rights set forth in the Covenant; (c) questions related to the application and the content of individual articles of the Covenant; and (d) suggestions concerning co-operation between States parties in applying and developing the provisions of the Covenant.

The timing of drafting a General Comment for article 18 coincides exactly with the changing attitude of the Committee with regard to interpretation of article 18. By the time of drafting the General Comment, the Committee had considered the claims of individuals asserting violations of their Covenant rights in relation to their claims of conscientious objection to military service. In its earliest decision regarding a conscientious objector to military service, the Committee rejected the claim of violations of article 18 on the ground that article 18 could not be construed as implying the right to conscientious objection. However in 1992 the Committee changed its attitude and it held that conscientious objection to military service and expenditures was protected by article 18 in obiter.

The jurisprudence of the Committee was inconsistent at the time.

183 UN Doc A/35/40 at 85, [379].
The issue of conscientious objection was first dealt with in the course of drafting a General Comment by the Human Rights Committee at its Fourty-seventh Session on 12 May 1993. The Draft General Comment on article 18 of the Covenant contained the issue of conscientious objection in paragraph 11:

The Committee is aware that the right to refuse to perform military service (conscientious objection) has been claimed by many individuals on the basis of their freedoms under article 18. In response to such claims, a growing number of State have in their laws exempted from compulsory military service citizens who genuinely held religious and other beliefs that forbid the carrying or use of weapons or the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right of conscientious objection, but the Committee believes that it 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 and express religious or other beliefs. When this right is recognised by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs as well as no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service and on the nature of alternative national service. 190

The first question raised was whether the issue of conscientious objection should be dealt with at all in the General Comment. 190 Higgins (United Kingdom) said: ‘The Committee should definitely deal with conscientious objection, an issue that was the subject of numerous communications under the Optional Protocol and from non-governmental organizations’. 191 Pocar (Italy), Lallah (Mauritius) and El-Shafei (Egypt) agreed to retain the paragraph concerning conscientious objection. 192 Only Evatt (Australia) argued that the issue of conscientious objection should be dealt within a paragraph dealing with state religion. 193 Dimitrijević (Yugoslavia) agreed that the paragraph dealing with conscientious objection should be retained subject to perusal of the Committee’s jurisprudence, but its jurisprudence had never touched on the right of conscientious objection per se. 194

The draft paragraph was provisionally adopted with slight modification as follows:

Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious and other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right of 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.

191 United Nations Human Rights Committee, 47th Session, Summary Record of the First Part of the 1226th Meeting, held at headquarters, New York, on Monday, 5 April 1993 (12 May 1993) UN Doc CCPR/C/SR.1226, 6 [28].
192 UN Doc CCPR/C/SR.1226 [42].
193 UN Doc CCPR/C/SR.1226 [43–44].
194 UN Doc CCPR/C/SR.1226 [46].
and express religious or other beliefs. When this right is recognised by law or practice, there
shall be no differentiation among conscientious objectors on the basis of the nature of their
particular beliefs, likewise, there shall be no discrimination against conscientious objectors
because they have failed to perform military service. The Committee invites States parties
to report on the conditions under which persons can be exempted from military service on
the basis of their rights under article 18 and on the nature of alternative national service. 195

According to Dimitrijević (Yugoslavia), the third sentence of draft paragraph 11
was carefully drafted by the Working Group to make it clear that the Covenant did
not refer explicitly to conscientious objection as a right although the phenomenon
was mentioned under article 8. 196 The first sentence of the General Comment was
suggested by Francis (Jamaica) but subjected to some criticisms. 197 Sadi (Jordan)
and Ndiaye (Senegal) questioned the need for such a lengthy paragraph since it was
not customary to explain the historical background to articles in the Covenant. 198
Evatt (Australia) also agreed to its deletion. 199 Other speakers, El-Shafei (Egypt)
and Aguilar Urbina (Costa Rica), supported the first sentence, recognising the
importance of the introduction to explain the content of the third sentence. 200 Herndl
(Austria) said that the introduction was essential since it indicated that there was a
growing trend to recognise conscientious objection. 201

The reference to the right to life was also discussed in some detail with regard
to the use of lethal force. Evatt (Australia) was of the view that if the paragraph
referred to conscientious objection as a right, then by way of justification it should
also state that the obligation to use lethal force might result in actual violations of
the right to life or the right to liberty or security of other persons. 202 For Wennergren
(Sweden), the central issue raised by the paragraph on conscientious objection was
the right to life, so that he preferred to link the paragraph with the wording used
in article 6. 203 El-Shafei (Egypt) saw no justification when dealing with the very
specific issue of performance of military service under article 18 for attempting to
create a link with the issue of deprivation of life under article 6. 204

The term ‘lethal force’ was also debated. Sadi (Jordan) showed his prefer-
ence for referring to ‘fire arms’ rather than to ‘lethal force’. Herndl (Austria)
expressed a preference for the wording ‘the obligation to serve in armed forces
and consequently to be under the obligation to use arms’, for even killing in self-
defence involved the use of lethal force, which was not intended in that sentence. 205
Ndiaye (Sudan) suggested the wording ‘the bearing or use of weapon or performance

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196 UN Doc CCPR/C/SR.1237 [10].
198 UN Doc CCPR/C/SR. 1237 [12] and [22].
199 UN Doc CCPR/C/SR. 1237 [16].
200 UN Doc CCPR/C/SR. 1237 [13] and [26].
201 UN Doc CCPR/C/SR. 1237 [19].
202 UN Doc CCPR/C/SR. 1237 [18].
203 UN Doc CCPR/C/SR. 1237 [23]. See also [37] (Mr. Wennergren).
204 UN Doc CCPR/C/SR. 1237 [28].
205 UN Doc CCPR/C/SR. 1237 [20].
of military service’ to render the text ‘less clumsy’. Mindful of the fact that the central issue raised by the paragraph on conscientious objection was the right to life, Wennbergren (Sweden) suggested that the wording ‘the obligation to use lethal force’ should be replaced by an appropriate phrase based on article 6 of the right to life along the lines of ‘the obligation to deprive other persons of their lives’. Urbina (Costa Rica) recalled that the matter had been discussed at length by the Working Group, which had finally opted for the former term since it was not the use of arms that the persons in question objected to but rather any act of aggression that might lead to homicide. With regard to Herndl’s remarks, Urbina recalled that the Working Group had chosen that term with certain religious sects in mind such as the Mennonites, who forbade any contact with arms whatsoever, even in the case of self-defence.

Lastly, the most controversial point of the draft of General Comment No. 22 in respect of the issue of conscientious objection was whether the Committee was to refer clearly to article 18 as the basis for a right of conscientious objection. To put it another way, the question was whether the Committee wished to depart from its previous practice by saying that a right to conscientious objection could be derived from article 18. There were arguments on both sides. Therefore the condition of the use of lethal force was introduced as a middle course approach (see Note 112). It was therefore considered that: ‘it would be incorrect to say that it recognised all forms of objection as legitimate. In the third sentence there was simply no better expression than “to use lethal force”’.

In General Comment No. 22 on article 18 of the International Covenant on Civil and Political Rights, adopted on 30 July 1993, the Human Rights Committee eventually stated that it believed that a right to conscientious objection can be derived from article 18, ‘in as much 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’. The Committee ‘seems to limit the right to conscientious objection to a right to refuse to use lethal force, and does not add the conclusion that all States are required to exempt conscientious objectors from military service or the use of lethal force’ (Brems 2006, p. 14).

The wording of the General Comment was the subject of critical comment by one of the Committee Members, Higgins (United Kingdom), at the time of drafting: ‘The paragraph did not seem to provide clear guidelines for States parties on their

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206 UN Doc CCPR/C/SR. 1237 [22].
207 UN Doc CCPR/C/SR. 1237 [23].
208 UN Doc CCPR/C/SR. 1237 [15].
209 UN Doc CCPR/C/SR. 1237 [26].
210 UN Doc CCPR/C/SR. 1237 [38].
211 UN Doc CCPR/C/SR. 1237 [45].
212 UN Doc CCPR/C/SR. 1247 (29 July 1993) 8 [45].
213 UN Doc CCPR/C/SR. 1247 (29 July 1993) 8 [51].
obligation to grant the right of conscientious objection under article 18, but merely indicated that it was possible to derive such a right from that article and invited States parties which did so to inform the Committee accordingly. Nonetheless, she did not stand in the way of a consensus on this paragraph. The issue of conscientious objection in article 18 may be evaluated as well-debated and as the minimum safeguard at the time of drafting it. Despite its weakness in respect of the duty of the States parties to recognise such a right, the adoption of General Comment No. 22 contributed to changing the future attitude of the Committee after its adoption.

2.1.16 Resolutions Following Resolution 1993/84 of the Commission on Human Rights


On 2 March 1995, the Netherlands submitted a draft resolution on the role of youth in the promotion and protection of human rights, including the question of conscientious objection to military service. Afterwards, the representative of the Netherlands introduced a revised draft resolution, sponsored by Austria, Canada, Germany, Hungary and the Netherlands. The Czech Republic, Costa Rica, Sweden, the United Kingdom and the United States subsequently joined the sponsors.

Much progress was made compared to Resolution 1993/84. The first aspect of progress is the reference in the ninth preambular paragraph to General Comment

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215 UN Doc CCPR/C/SR.1247, [74].
No. 22(48) of the Human Rights Committee on article 18 of the International Covenant on Civil and Political Rights. General Comment No. 22(48) is of significance because thereby the Committee of Human Rights clearly recognised that the right to conscientious objection to perform military service can be derived from article 18. The second is that in the penultimate preambular paragraph, humanitarian motives were added to the list of those that formed the basis for conscientious objection. The third is that in paragraph 2 the words ‘compulsory military service’, which had been used in previous Resolutions, were amended to read simply ‘military service’. This change is significant, because while it was recognised that persons who were performing their military service on a compulsory basis should not be excluded from the right to conscientious objection, it should be recognised that persons who served in the military on a voluntary basis had the same right (see Note 227). At paragraph 11, the decision was made to change the title of the agenda item, ‘The role of youth in the promotion and protection of human rights, including the question of conscientious objection to military service’, to a new one, ‘The question of conscientious objection to military service’. This change corresponded to the sponsors’ belief that ‘the Resolution’s focus had always been predominantly on conscientious objection rather than the role of youth in the promotion and protection of human rights’.

The fourth aspect of progress is a reference to article 14 of the Universal Declaration of Human Rights with regard to asylum, which is to serve as a basis for military conscientious objectors facing persecution. The fifth is paragraph 4 which was newly added to urge States not to differentiate in their treatment of military conscientious objectors who maintain different forms of beliefs (see Note 229). The sixth aspect of progress is paragraph 7 where the drafters incorporated an emerging practice among some States that the military conscientious objector’s claim is accepted as ‘valid without inquiry’ by those governments (see Note 229).

On 22 April 1998, the observer for Finland introduced a draft resolution sponsored by Austria, the Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, the Netherlands, Norway, Portugal, Sweden and the United Kingdom. The Commission on Human Rights adopted Resolution 1998/77, entitled ‘Conscientious

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229 For the last preambular paragraph of Resolution 1995/83, see Hammer (2001, p. 201, fn 72).
2.1 United Nations Human Rights Norms

objection to military service’ without a vote at its 58th Meeting.\textsuperscript{232} The observer for Finland, introducing the draft resolution, said that: ‘increasing weight was being attached to the issue of conscientious objection in the efforts of many States to revise and develop their national legislation. The text recognised the right of everyone to have conscientious objection to military service and reminded States with compulsory military service that they should provide for conscientious objectors various forms of alternative service which were not of a punitive nature’.\textsuperscript{233} After voting, while joining the consensus on the draft, the delegation of the Republic of Korea emphasised the Korean government’s basic position on the issue: ‘[t]he government of the Republic of Korea had always attached great importance to the right of freedom of conscience and religion but, at the same time, it recognised its sovereign right and solemn responsibility to defend its territory and maintain public order’.\textsuperscript{234} The Korean delegation continued that: ‘[t]he draft resolution suggested an alternative service system, but it would be impractical and not even feasible for some countries in which the burden of military service was very great and the universality of the application of the law strongly upheld by the people’.\textsuperscript{235}

At the 60th Meeting of the Commission on Human Rights, on 20 April 2000, the observer for Finland introduced a draft resolution,\textsuperscript{236} sponsored by Bulgaria, Canada, the Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, Norway, Portugal, Romania, Sweden and the United Kingdom.\textsuperscript{237} Introducing the draft, the observer for Finland stressed that: ‘the draft resolution did not deal with the right of States to maintain an army, nor did it undermine national values or breach the principle of equal application of law’.\textsuperscript{238} The draft resolution was adopted without a vote. Resolution 2000/34 is a shorter Resolution, with only three preambular paragraphs and two operating paragraphs so that its objectives must be mainly to recall the contents of Resolution 1998/77 and to encourage States to comply with the Resolution’s purpose. The same approach was again taken for a Resolution adopted before the Commission in 2002. At the 51st Meeting of the Commission, the representative of Croatia introduced a draft resolution\textsuperscript{239} concerning conscientious objection to military service.\textsuperscript{240} The draft resolution was


\textsuperscript{233} UN Commission on Human Rights 54th Session, Summary Record of the 58th Meeting (27 April 1998), UN Doc E/CN.4/1998/SR.58, 11 [54].

\textsuperscript{234} UN Commission on Human Rights 54th Session, Summary Record of the 58th Meeting (27 April 1998), UN Doc E/CN.4/1998/SR.58, 12 [57].

\textsuperscript{235} UN Commission on Human Rights 54th Session, Summary Record of the 58th Meeting (27 April 1998), UN Doc E/CN.4/1998/SR.58, 12 [59].

\textsuperscript{236} UN Doc E/CN.4/2000/L.43.

\textsuperscript{237} Austria, Azerbaijan and the Netherlands subsequently joined the sponsors.

sponsored by Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, the Netherlands, Poland, Romania, Slovenia and the United Kingdom (see Note 240). The draft resolution was adopted without a vote on 23 April 2002.\textsuperscript{241}

The Office of the High Commissioner for Human Rights, in its Report of March 2002, clearly stated that it is possible to identify certain trends in the implementation of the right to conscientious objection at the national level.\textsuperscript{242} Firstly, an alternative to military service is provided for by law in many States.\textsuperscript{243} Secondly, in many countries the conscientious objector’s case is examined at some kind of hearing to determine the validity of the claim, though Finland has no individual examination of applications (see Note 243). Thirdly, most NGOs make reference to the fact that a right to conscientious objection is considered by international human rights monitoring bodies as deriving from the fundamental right of freedom of religion and conscience.\textsuperscript{244} However, Sudan and Singapore considered that ‘resolution 2000/34 goes beyond what is prescribed in the international law and the applicable human rights instruments’ (see Note 242).

In 2004, the representative of Croatia introduced a draft resolution\textsuperscript{245} at the 44th Meeting of the Sixtieth Session of the Commission.\textsuperscript{246} It was sponsored by Albania, Armenia, Australia, Austria, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Costa Rica, Croatia, Czech Republic, Denmark, Finland, France, Georgia, Germany, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Switzerland, The Former Yugoslav Republic of Macedonia, United Kingdom. Thus 34 sponsors promoted the draft resolution. Moreover, the Dominican Republic, Latvia, Nicaragua and Sweden subsequently joined the sponsors. The representative of Croatia, introducing the draft, stated that: ‘It called upon States which had not yet done so to review their laws and practices in relation to conscientious objection to military service, taking account of the report [of the Office of High Commissioner for Human Rights]’.\textsuperscript{247}


\textsuperscript{245} UN Doc E/CN.4/2004/L.54 (14 April 2004).


\textsuperscript{247} UN Commission on Human Rights, Summary Record of the 55th Meeting (9 December 2005), UN Doc E/CN.4/2004/SR.55, 10 [55].
States made a statement that the United States joined the consensus on the draft resolution:

[... ] because the United States fully supported the right of everyone to have personal objections to military service as one element of the exercise of freedom of thought, conscience and religion. In countries with military conscription, everyone should have that right in the context of a fair and impartial process established by law. But no one had an absolute right to be granted conscientious objector status, and unsuccessful applicants who refused to perform military service or other alternatives must be prepared to accept the consequences provided by law. 248

For the delegate of the United States, ‘the granting of amnesties and restitution for those who had refused to undertake military service on grounds of conscientious objection [should] be limited to civil war situations and their aftermath’. 249 The draft resolution was adopted without a vote.

The Commission on Human Rights adopted a broader view that the notion of conscientious objection goes beyond pacifism. This more lenient attitude toward conscientious objection might have been affected by the Human Rights Committee’s General Comment No. 22 on article 18 of the International Covenant of Civil and Political Rights in 1993, by which the Human Rights Committee changed its early position and recognised that the right to conscientious objection can be derived from article 18. 250 Hence the right to military conscientious objection is regarded as a right emanating from the freedom of conscience, along with a number of other human rights, by the Commission on Human Rights. The Human Rights Committee stated that it believes that a right to conscientious objection can be derived from article 18, ‘in as much 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’. 251

On the one hand the Commission on Human Rights seems to recognise the right to conscientious objection as a right emanating from the freedom of conscience (Hammar 2001, p. 201). On the other hand the Human Rights Committee seems to limit this right to a right to refuse to use lethal force, and hesitates to recommend that States exempt conscientious objectors from military service in general (Brems 2006, p. 14). The Commission on Human Rights had fostered a consensus on this issue since the 1970s and had passed not a few cumulative Resolutions on the issue of conscientious objection to military service. The Commission may have taken a broader and more comprehensive approach against this backdrop, while the Human Rights Committee had to reach a consensus on this issue in a much shorter period of time to draft the General Comment.

248 UN Doc E/CN.4/2004/SR.55, 10 [56].
249 UN Doc E/CN.4/2004/SR.55, 10 [57].
251 General Comment No. 22 (UN Doc CCPR/C/21/Rev.1/Add.4) (48) [11].
Paragraph 5 of Resolution 2004/35 on conscientious objection requests the Office of the High Commissioner for Human Rights to prepare an analytical report to provide supplementary information on best practices in relation to conscientious objection to military service, drawing on all appropriate sources, and to submit this report to the Commission at its Sixty-second Session under the same agenda item.\footnote{UN Doc E/CN.4/2004/L.11/Add.4, 30.}

\section*{2.1.17 Study of the Issue of the Administration of Justice Through Military Tribunals of 2005}

This study by a working group of Sub-Commission on the Promotion and Protection of Human Rights on the issue of the administration of justice by military tribunals also addressed the issue of conscientious objection to military service. The report submitted on 2 June 2005 by the \textit{Special Rapporteur} on the universal implementation of international human rights treaties, Professor Emmanuel Decaux, devoted a few pages to the issue of conscientious objection to military service.\footnote{UN Doc E/CN.4/Sub.2/2005/9, Administration of Justice, Rules of Law and Democracy: Issue of the Administration of Justice through Military Tribunals, Report submitted by the \textit{Special Rapporteur}, Emmanuel Decaux, original French (2 June 2005).} Professor Decaux clearly acknowledged the legitimacy of exercising conscientious objection to military service under the United Nations legal system, stating that:


He not only underscored a general recognition of the right to conscientious objection to military service but also the right of conscientious objection to military service for those who are in the service with reference to the Observations of the Human Rights Committee.\footnote{UN Doc E/CN.4/Sub.2/2005/9, 9 [18]: Referring to Observations of the Human Rights Committee; France, 4 August 1997, CCPR/C/79/Add.80 [19]; Final Observation of the Human Rights Committee, Spain, 3 April 1996, CCPR/C/79/Add.1 [15].} As for applications lodged in the course of military service, the report ensures military personnel that such an application should not be punished \textit{ipso facto} as an act of insubordination or desertion, independently of any consideration of its substance, but should be examined in a fair manner.\footnote{UN Doc E/CN.4/Sub.2/2005/9, 9 [19].} The \textit{Special Rapporteur} was concerned about conscientious objectors being tried by military
tribunals. In his view conscientious objectors are civilians and so should be tried in civil courts, under the supervision of ordinary judges.  

### 2.2 Enforcement Mechanism

One of the excuses for the UN and the European international human rights enforcement mechanisms not to relates to the articles referring to conscientious objection system. The drafters of article 18 of the International Covenant on Civil and Political Rights did not choose to incorporate the right to military conscientious objection into the provision, though it was proposed by the Philippines. While there is no provision regarding the right to conscientious objection itself in either the International Covenant on Civil and Political Rights or the European Convention on Human Rights, both the International Covenant on Civil and Political Rights and the European Convention on Human Rights refer to ‘conscientious objection’ in the articles specifically dealing with the prohibition of slavery and forced labour. Article 8(3)(c)(ii) and article 4(3)(b) remained an obstacle for both the Human Rights Committee and the European Commission and European Court of Human Rights, which is an enforcement body of the European Convention on Human Rights. Because both provisions contain the wordings ‘in case of conscientious objectors in countries where they are recognised (article 4(3)(b) of the European Convention on Human Rights)’ and ‘in countries where conscientious objection is recognised (article 8(3)(c)(ii) of the International Covenant on Civil and Political Rights)’. These wordings led to the interpretation that these international and regional human rights instruments did not necessarily require State parties to recognise the right to conscientious objection to military service. Therefore it remained debatable whether these instruments guaranteed the right to conscientious objection to military service.

### 2.2.1 Individual Communication and Evolving Interpretation of the Covenant

The Human Rights Committee has addressed the issue of conscientious objection mainly in the context of individual communications by conscientious objectors (Nowak 2005, p. 421), while it is also true that a number of national reports mention the issue of conscientious objectors. A few early cases indicated that article

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257 UN Doc E/CN.4/Sub.2/2005/9, 9 [17].
259 Cf. The Charter of the Fundamental Rights of the European Union does not enumerate the exceptional instances of forced or compulsory labour in its article 5. Nonetheless, in its article concerning freedom of thought, conscience and religion, article 10(2), it says conscientious objection is recognised ‘in accordance with the national law governing the exercise of this right’. C/364/11 (18 December 2000).
18 does not guarantee a right of conscientious objection in a right to freedom from compulsory military service on the basis of one’s conscientious objection to military force by the interpretation of the Committee. The Committee even avoided deciding whether article 18, paragraph 1, guaranteed a right of conscientious objection to military service.

In *Paavo Muhonen v Finland*, the Committee was of the opinion that: “the Question whether article 18, paragraph 1, guaranteed a right of conscientious objection to military service did not have to be determined by the Committee” since the decision handed by Finnish Military Service Examining Board had already provided the opinion on the issue of the compliance with article 18(1) of the Covenant.  

In *L.T.K v Finland*, the Human Rights Committee unequivocally found that the Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant can be construed as implying that right.

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

On this basis, the Committee declared claims based on conscientious objection to be inadmissible. In doing so, the Human Rights Committee put much weight on paragraph 3(c)(ii) of article 8 which excludes any military service and any national service required by law of conscientious objectors from the prohibition against forced or compulsory labour.

In the International Covenant on Civil and Political Rights, the lone article to mention ‘conscientious objection’ is article 8(3)(c)(ii). Article 8 deals with the prohibition of slavery, and its paragraph 3(c)(ii) excludes any service of military character and any national service required by law of conscientious objectors from the use of the term ‘forced or compulsory labour’. However, this article has not been seen as inferring the right of conscientious objection (Nowak 1993, p. 154). On the contrary, the passage ‘in countries where conscientious objection is recognized’ was expressly adopted by the Human Rights Committee at the initiative of France, since the right of conscientious objection was recognised in only a few States (see Sect. 2.1.2. p. 52ff). The phrase has been interpreted by the Committee to indicate that States are free to decide whether they recognise conscientious objection (Alfredsson and Eide 1999, p. 389). It is not entirely clear whether the Human Rights Committee had thought the provision of safeguards for conscientious objection was inappropriate under this particular provision or the entire the International Covenant on Civil and Political Rights. From the earlier negative attitude of the Human Rights Committee towards the right of conscientious objection one can assume that it did not want to go into detail in an area where State practice is not consistent and it touches upon national security issues.


In any case, this limited interpretation of article 8(3)(c) has been criticised. Firstly, the right which is protected and limited in article 8(3)(c) is not freedom of conscience but personal liberty (Eide and Mubanga-Chipoya 1985, p. 5 and Alfredsson and Eide 1999, p. 389). Secondly, the phrase can only be interpreted to indicate that all States where conscription exists are not under all circumstances obliged to recognise the right to object (Alfredsson and Eide 1999, p. 389).

After a large number of individual claims concerning the right to conscientious objection were made based upon article 18 of the Covenant, the Human Rights Committee began to support a wide range of reasons for conscientious objection and recognised article 18 as the legal basis of the right. In the obiter dictum of J.P. v Canada, the Committee for the first time stated that ‘conscientious objection to military service and expenditures’ was ‘certainly’ protected by article 18. More clearly, the Human Rights Committee later in effect overruled the L.T.K. case in the General Comment of article 18, holding that a right to conscientious objection, which is not explicitly referred to by the Covenant, can be derived from article 18.

In this General Comment, the Committee observes that no differentiation should be made between conscientious objectors on the basis of their beliefs (see Note 264).

In 1999, the Human Rights Committee examined an individual complaint of a person whose application for recognition as a conscientious objector had been rejected because the type of (non-religious) objections he advanced did not fall within the criteria of Dutch law, which required ‘an unsurmountable objection of conscience to military service...because of the use of violent means’ (see Brems 2006, p. 15). The Human Rights Committee referred to the statement in its General Comment that the right to conscientious objection to military service can be derived from article 18 (Brems 2006, p. 15). Nonetheless, the Committee regarded Dutch legislation providing for exemptions for conscientious objectors as compatible with article 18 of the International Covenant on Civil and Political Rights, since the Committee found the national authority’s finding reasonable that this case fell outside the scope of this provision and there was no interference with the applicant’s freedom of conscience (Brems 2006, p. 15). Five Committee members appended their Individual (Dissenting) Opinion to this decision. For them, ‘the State party has failed to provide justification for its decision to interfere with the author’s right under article 18 of the Covenant in the form of denial of conscientious objector’s status and imposing a term of imprisonment’. Thus they promoted the principle stipulated by General Comment 22 that there should be no differentiation between conscientious objectors on the basis of the nature of their particular beliefs.

According to Brems, from this case several conclusions may be drawn with regard to the Human Rights Committee’s interpretation of the freedom of conscience.
in article 18 of the International Covenant on Civil and Political Rights. Firstly, the freedom of conscience is no longer seen as a purely private freedom, taking into account the fact that the Human Rights Committee has examined, through individual communications, whether the imposition of sanctions to enforce the performance of military duty constitutes an infringement of one’s freedom of conscience (Brems 2006, pp. 15–16). Secondly, it is not clear at this stage whether the limits of the right to freedom of conscience are determined only by the type of convictions that fall within the scope of the freedom or whether in addition they are also determined by a balancing exercise with other interests (Brems 2006, p. 16).

The Human Rights Committee thus started changing its attitude toward the right to conscientious objection and criticising the excessive period of alternative service,266 in comparison with military service, the lack of alternative assessment of applications other than under the control of the Ministry of Defence267 and of any provision for conscientious objectors to military service. Instead of indicating the authorised conditions under which the right to conscientious objection is allowed, the Human Rights Committee invited States parties to report on the conditions of the right, the nature and the length of alternative national service.268 The refusal to pay taxes on the grounds of conscientious objection has so far been recognised as ‘outside the scope of protection’ of article 18.269

The right to freedom of thought, conscience and religion of article 18 of the International Covenant on Civil and Political Rights is so fundamental that article 4(2) of the International Covenant on Civil and Political Rights states these freedoms cannot be derogated from, even at a time of public emergency. Furthermore, it is noted that article 18 did not occasion any reservations or declaration of interpretation (Nowak 2005, p. 310).

To date, the Human Rights Committee has called for no distinctions to be drawn between conscientious objectors on the basis of their beliefs. Therefore it would amount to discrimination if only certain, i.e., religion-based, objections were recognised (Boyle 1999, pp. 389–390).

### 2.2.2 Yeo-Bum Yoon and Myung-Jin Choi V Republic of Korea

The latest decision by the Committee concerning conscientious objectors relates to South Korean conscientious objectors. South Korea has witnessed a rapidly changing domestic status of the right to conscientious objection. South Korea maintains a compulsory conscription system which requires men aged over 20 to serve in the military for 2 years. To date, there is neither recognition of a conscientious objection

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266 Cyprus (1994) UN Doc CCPR/C/9/Add.39 [10]; see also Concluding Comments on Slovakia (1997) UN Doc CCPR/C/79/Add.79 [12].

267 Greece (2005), UN Doc CCPR/CO/83/GRC [15].


269 J.P. v Canada (446/91); J.v.K. and C.M.G.c.K.-S. v The Netherlands (483/91) and K.V. and C.V. v Germany (560/93).
system nor an alternative service to military service in South Korea. It is reported that every year about 700 conscientious objectors are punished, mostly with gaol terms, and at present there are about 450 young men imprisoned for this offence. Another source reports that 12,324 conscientious objectors have been imprisoned for refusing mandatory military service over the past 66 years. Half of the conscientious objectors among those figures suffered torture, such as standing still, binding hands or beating (see Note 271).

Recently, a new movement regarding conscientious objection emerged in South Korea. On 26 December 2005 the National Human Rights Commission officially recommended that the government recognise conscientious objector status. The Commission recognises it within the protection of the freedom of conscience enshrined in the Constitution. In addition to that, the Commission also suggested providing alternative service in lieu of conscription for the objectors (see Note 272). This recommendation deviates from a Constitutional Court decision rendered in August 2004 that affirmed the current conscription law as constitutional, based on its principle that religious beliefs cannot come before national security (see Note 272). The Constitutional Court decision bolstered the Supreme Court’s opinion that upheld the conviction of a 23-year-old Jehovah’s Witness who refused to obey his draft order (see Note 272).

The Commission is an independent government organ under the South Korean President, established on 25 November 2001 in accordance with the National Human Rights Commission Act. Since the recommendation of the Commission does not have any legally binding force, the government is not required to introduce immediate changes to the current conscription system (see Note 272). Nonetheless, this decision is of importance in that it was the first time that a State institution officially recognised the right to conscientious objection (see Note 272). Although in December 2005 the Defence Ministry expressed regret over the Commission’s decision and stated that it would be unrealistic at this time to offer alternative civil service for regular military service without compromising military preparedness (see Note 272), in January 2006 the Korean Defence Ministry revealed that it plans to launch a pan-governmental committee to study alternative military services for conscientious objectors (see Note 270). It was estimated that the decision on whether to implement the conscientious objection system will be made after the committee finishes its analysis of a system offering alternate forms of service for objectors in 2006 (see Note 281).

271 This is according to an association of family members of conscientious objectors to military service. The research was conducted from March to April 2006. This is the first report to calculate the number of conscientious objectors for a period, though it is not of an official character. See P Chung-a, ‘Conscientious Military Objectors Surpass 12,000’, The Korea Times (21 March 2007).
Due to no system of conscientious objection in South Korea, two South Korean Jehovah’s Witnesses filed communications to the Human Rights Committee to accuse South Korea of violation of article 18(1) of the Covenant. In complaints under the Optional Protocol Procedure to the International Covenant on Civil and Political Rights, in the case of *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, the Human Rights Committee found that the imprisonment of two conscientious objectors to compulsory military service was a violation of article 18 paragraph 1 of the Covenant. At the same time it found that the Republic of Korea had not demonstrated that in this case the restriction on the freedom of conscience and religion justifiable under article 18, paragraph 3, of the Covenant, was necessary.

There were two dissenting opinions by members of the Committee in *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*. The Argentine member, Hipólito Solari-Yrigoyen, argued that since Korea does not recognise the fundamental right to conscientious objection, the communication should have been considered solely under paragraph 1 of article 18, not paragraph 3. According to this dissenting opinion, ‘The mention of freedom to manifest one’s religion or belief in article 18, paragraph 3, is a reference to the freedom to manifest that religion or belief in public, not to recognition of the right itself, which is protected by paragraph 1’. Even though the communication was supposed not to deal with recognition of the objector’s right itself, article 18, paragraph 3, of the International Covenant on Civil and Political Rights by no means implies that ‘the existence of the right itself is a matter for the discretion of States parties’ (see Note 279).

The majority’s opinion makes it clear that the lone article touching upon the issue of conscientious objection, article 8, itself neither recognises nor excludes a right of conscientious objection (see Note 279). Yet the majority opinion appears silent on the issue whether recognition of the right to conscientious objection itself may be at the discretion of States parties. While the majority opinion ‘concludes that the facts as found by the Committee reveal, in respect of each author violations by the Republic of Korea of article 18, paragraph 1, of the Covenant’, the concrete violation recognised by the Committee seemed to be rather one of article 18, paragraph 3 of the Covenant as stated above.

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277 Dissenting Opinion by Committee member Hipólito Solari-Yrigoyen and Dissenting Opinion by Committee member Ruth Wedgwood, see Appendix of UN Doc CCPR/C/88/D/1321–1322/2004.

278 Dissenting Opinion by Committee member Hipólito Solari-Yrigoyen, see Appendix of UN Doc CCPR/C/88/D/1321–1322/2004) [8.2].

279 Dissenting Opinion by Committee member Hipólito Solari-Yrigoyen, see Appendix of UN Doc CCPR/C/88/D/1321–1322/2004) [8.3].

280 Dissenting Opinion by Committee member Hipólito Solari-Yrigoyen, see Appendix of UN Doc CCPR/C/88/D/1321–1322/2004) [8.4].
may be summarised as follows. Firstly, the claim of conscientious objection to military service as a protected form of manifestation of religious belief may be assessed under article 18 of paragraph 1 as the authors assert (see Note 280). Secondly, the limitation on the right to manifest one’s religion or belief shall be consistent with and justified by article 18, paragraph 3 (see Note 280). Finally, the Committee considers that the State party has failed to show in the meaning of article 18, paragraph 3, what special disadvantage would be involved for it if the rights of the authors under article 18, paragraph 1, were fully respected (see Note 280). In so doing, the Committee notes in relation to relevant State practice that: ‘an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory service’ (see Note 280). There is no statement of recognition of violation of article 18, paragraph 1, for failing to provide a procedure for conscientious objection to military service.

The reasoning shown by the dissenting opinion of Solari-Yrigoyen should be evaluated as clearer with respect to logic. Solari-Yrigoyen first of all admits that the prosecution, conviction and prison term imposed on the authors directly violated the authors’ right to religious beliefs, established in article 18, paragraph 1 (see Note 280). The recognition of the human right to conscientious objection may have been first of all dealt with by consulting article 18, paragraph 1. Instead of doing this, the majority embarked upon examination of the restriction of this right by referring to article 18, paragraph 3. The majority opinion may for some reflect a leap in logic. Nonetheless, both the majority opinion and the dissenting opinion by Solari-Yrigoyen admitted the violation of article 18, paragraph 1 as the authors originally claimed.

The other dissenting opinion, written by Professor Ruth Wedgwood, takes the very formalistic approach which had been taken by the Committee itself a decade ago. The opinion concludes that: ‘the right to refrain from mandatory military service is strictly required by the terms of the Covenant, as a matter of law’.281 It further interprets article 18 as not suggesting that: ‘a person motivated by religious belief has a protected right to withdraw from the otherwise legitimate requirements of a shared society’ (see Note 281). Without referring to any resource, the dissenting opinion holds that a number of parties to the Covenant still rely upon military conscription without providing de jure for a right to conscientious objection. Additionally, this opinion criticises that the majority opinion fails to provide evidence of travaux préparatoires and state practices establishing that article 18 may be interpreted to differentiate military service from other state obligations. Further, Professor Wedgwood notes that in the interval of more than a decade since the Committee adopted General Comment No. 22, the Committee has never suggested in its jurisprudence under the Optional Protocol that such a ‘derivation’ is in fact required by the Covenant. In addition to that, for this member, the language of article 8, paragraph 3(c) is an obstacle to the conclusion of the majority opinion.

281 Dissenting Opinion by Committee Member Ms Ruth Wedgwood, see Appendix of UN Doc CCPR/C/98/D/1321–1322/2004.
2.2.3 Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant

The Committee recently raised appropriate national legislation on the right to conscientious objection in its observations on reports submitted by State parties. For instance, the Committee recommends that: ‘a law exempting conscientious objectors from compulsory military service and providing for alternative civil service of equivalent length be passed at an early date in compliance with article 18 of the Covenant and the Committee’s General Comment No. 22 (48)’ as the observations on a national report by Belarus in November 1997.\(^{282}\) In April 2001, the Committee takes ‘note of the fact that the law makes no provision for the status of conscientious objector to military service, which may legitimately be claimed under article 18 of the Covenant’ in the concluding observations on the report submitted by the Dominican Republic.\(^{283}\) Furthermore, the Committee requires a national law which recognises conscientious objection to military service ‘without restrictions (article 18)’.\(^{284}\) The Committee also requests Israel to ‘review the law, criteria and practice governing the determination of conscientious objection, in order to ensure compliance with article 18 of the Covenant’.\(^{285}\) According to the interpretation of article 18 by the Committee, establishing the conscientious objection system itself does not appear to be enough; instead, what is required are the equal application and non-discriminatory nature of the conscientious objector assessment procedure.

References to the issue of conscientious objection in concluding observations by the Committee are becoming more precise each year. In the 1990s, the concluding observations of the Committee merely made cursory remarks where the absence of the right to conscientious objection is listed among other absences of the rights protected by the Covenant.\(^{286}\) In recent years the Committee in its observations has unequivocally urged State parties that do not recognise the right to conscientious objection to compulsory military service to take all necessary measures to recognise it, as well as to introduce alternative service without discrimination.\(^{287}\) For example, the concluding observations of the Human Rights Committee on the fifth report

\(^{282}\) Concluding observations of the Human Rights Committee on the fourth periodic report of Belarus, CCPR/C/79/Add.86 (19 November 1997).

\(^{283}\) Concluding observations of the Human Rights Committee on the fourth periodic report of the Dominican Republic, CCPR/CO/71/DOM (26 April 2001) [21].

\(^{284}\) Concluding observations on the initial report by Serbia and Montenegro, CCPR/CO/81/SEM0 (8 December 2004) [21].

\(^{285}\) Concluding observations of the Human Rights Committee on the second report of Israel, CCPR/CO/78/ISR (21 August 2003) [24].

\(^{286}\) Concluding observations of the Human Rights Committee on the initial report by Slovakia, CCPR/C/79/Add.79 (4 August 1997) [12]. See also Concluding observations of the Human Rights Committee on the second report of the Libyan Arab Jamahiriya, CCPR/C/79/Add.45 (23 November 1994) [13].

\(^{287}\) For example, see concluding observations on the second report by the Azerbaijan Republic, CCPR/C/73/AZE (12 November 2001) [21]; concluding observations on the initial report of Tajikistan, CCPR/C/SR.2299 (22 July 2004) [20].
by Colombia holds that the State party should guarantee that conscientious objectors are able to opt for alternative service whose duration would not have punitive effects. The concluding remarks on the third report by Venezuela put emphasis on the availability of procedures for conscientious objection and alternative service without discrimination.

The Committee is also concerned with the condition of alternative service and the eligibility criteria for the application of conscientious objection. For those States having compulsory military service, such as Kuwait, the Committee notes the existence of compulsory military service and that Kuwait law does not contain any provision on conscientious objection. In order to implement article 18 of the Covenant, the State party should reflect in its legislation the situation of persons who believe that the use of armed force conflicts with their convictions, and establish for these cases an alternative civilian service.

The Committee seeks for the entire populations of State parties to enjoy the right to conscientious objection. With regard to Paraguay, while the Committee welcomes the recognition in Paraguay’s Constitution of conscientious objection to military service and the provisional measures passed by the Chamber of Deputies to guarantee respect for conscientious objection, given the lack of specific regulations governing this right, the Committee regrets that access to information on conscientious objection appears to be unavailable in rural areas by referring to article 18 of the Covenant. The Committee also takes note of and deplors ‘the instances of reprisals against...family members’ of conscientious objectors. In November 1998, the Committee, in the concluding observations on the initial report of

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288 Concluding observations of the Human Rights Committee on the fifth report by Colombia, CCPR/CO/80/COL (26 May 2004) [17]. See also concluding observations of the Human Rights Committee on the second report of Viet Nam, CCPR/CO/75/VNM (26 July 2002) [17]; concluding observations of the Human Rights Committee on the fourth report by Mexico, CCPR/C/79/Add.109 (27 July 1999) [20].

289 ‘The State party should see to it that individuals required to perform military service can plead conscientious objection and perform alternative service without discrimination’. Concluding observations of the Human Rights Committee on the third report by Venezuela, CCPR/CO/71/VEN (26 April 2001) [26]. See also concluding observations of the Human Rights Committee on the initial report of Lithuania, CCPR/C/79/Add.87 (19 November 1997) [19]: “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 religion is respected”.

290 ‘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 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)’. Concluding observations of the Human Rights Committee on the second report of Lithuania, CCPR/CO/80/LTU (4 May 2004) [17].

291 Concluding observations of the Human Rights Committee on the initial report by Kuwait, CCPR/CO/69/RWT/A/55/40 (27 July 2000) [43]–[44].

292 Concluding observations of the Human Rights Committee on the second report of Paraguay, CCPR/C/PRY/CO/2 (24 April 2006) 4 [18].

293 Concluding observations of the Human Rights Committee on the initial report of Armenia, CCPR/C/79/Add.100 (19 November 1998) [18].
Armenia, markedly stated that: ‘[t]he Committee regrets the lack of legal provision for alternatives to military service in case of conscientious objection. The Committee deplores the conscription of conscientious objectors by force and their punishment by military courts, and the instances of reprisals against their family members’ (see Note 293).

A country might not recognise the right to conscientious objection but permit some of those who do not wish to perform such service to pay a certain sum in order not to do so. This is the case of Syria. Nonetheless, in such a case, the Committee reminded that: ‘[t]he 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’. 294

The right to conscientious objection should be acknowledged both in wartime and peace time according to the Committee. It recommended that: ‘[t]he State party should fully acknowledge the right to conscientious objection and, accordingly, guarantee it both in wartime and in peacetime, it should also end the discrimination inherent in the duration of alternative civilian service and the categories that can benefit from it [arts 18 and 26 of the Covenant]’ (emphasis added). 295

The timing of the claim of conscientious objection should also be flexible. The Committee is concerned that: ‘the application must be made in advance of the conscript’s entry into military service and that the right cannot be exercised thereafter’ in the context of the concluding observations for France in 1997. 296 Its concern is also described in the concluding observations for Spain: ‘the Committee 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 (48)’. 297 To those States which do not recognise the right to conscientious objection, the Committee sends a clear message, urging them to recognise the right of conscientious objectors to be exempted from military service. 298 Along with the concerns of the availability of conscientious objection to military service, the Committee sometimes shows its concerns over ‘the allegation of widespread cruelty and ill-treatment of young conscript-soldiers’. 299 Nowadays numerous States no longer have compulsory military service. However, some States seem to be in between compulsory and voluntary military service and for such a

295 Concluding observations for the fifth report of Finland, CCPR/CO/82/FIN (2 December 2004) [14].
296 Concluding observations of the Human Rights Committee on the third report of France, CCPR/C/79/Add.80 (4 August 1997) [19].
297 Concluding observations of the Human Rights Committee for the fourth report of Spain, CCPR/C/79/Add.16 (3 April 1996) [15].
298 Concluding observations of the Human Rights Committee for the initial report of Tajikistan, CCPR/CO/84/TJK (18 July 2005) 4 [20].
299 Concluding observations of the Human Rights Committee for the fourth report of the Russian Federation, CCPR/C/79/Add.54 (26 July 1995) [21].
2.2 Enforcement Mechanism

country the Committee is inclined to advise the establishment of a conscientious objection procedure. For instance, ‘compulsory military service is a fallback applicable only when not enough professional soldiers can be recruited’ in Morocco.\(^{300}\) Therefore the Committee finds it necessary to urge the State party to ‘fully recognize the right to conscientious objection in times of compulsory military service’ (see Note 300) and to ‘establish an alternative form of service, the terms of which should be non-discriminatory (Covenant, arts 18 and 26)’ (see Note 300).

The Human Rights Committee’s concluding observations following examination of the various States parties’ reports submitted especially after 2000 show that the Committee’s interests are extending to the treatment of conscientious objectors and the qualities of alternative service, especially in light of article 26, demanding equality before the law, of the International Covenant on Civil and Political Rights. Concerns about the lack of an independent decision-making process\(^{301}\) and disproportionately lengthy alternative service continue to be raised.\(^{302}\) The Human Rights Committee has recommended that States parties recognise the right of conscientious objection without discrimination,\(^{303}\) recalling that ‘conscientious objectors can opt for civilian service the duration of which is not discriminatory in relation to military service, in accordance with articles 18 and 26 of the Covenant’.\(^{304}\)

The Committee is anxious about the length of alternative service for conscientious objectors, which may be much longer than military service.\(^{305}\) The Committee is thus of the opinion that: ‘[t]he State party should ensure that the length of service alternative to military service does not have a punitive character, and should consider placing the assessment of applications for conscientious objector status under the control of civilian authorities’ (see Note 305). The Committee refers not only to article 18 but also to article 26 with regard to the duration of alternative service.

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\(^{300}\) Concluding observations for the fifth report of Morocco, CCPR/CO/82/MAR (1 December 2004) [22].


\(^{305}\) See Concluding observations of the Human Rights Committee on the initial report of Greece, CCPR/CO/83/GRC (25 April 2005) 4 [15].
for conscientious objectors.\footnote{326,327} Especially with respect to article 26, the Committee states in the observations for the report prepared by Finland that Jehovah’s Witnesses are granted preferential treatment by domestic law compared with other groups of conscientious objectors, and recommends that Finland review the law to bring it into full conformity with article 26 of the Covenant.\footnote{328}

With respect to the alternative service, the Committee also urges States parties to eradicate lengthy imprisonment ‘as a form of punishment’.\footnote{329} This represents the trend of the concluding observations by the Committee of the late 1990s and the first decade of the twenty-first century. For example, the concluding observations on the initial report of Greece recommends that: ‘[t]he State party should ensure that the length of service alternative to military service does not have a punitive character’.\footnote{330} In another case it notes that while Russia had introduced alternative service for military service, its enforcement Act seemed to be punitive in nature by prescribing civil service of a length 1.7 times that of normal military service.\footnote{331} For Estonia, where the duration of alternative service for conscientious objectors may be up to twice as long as the duration of regular military service, the Committee also requests it to ‘ensure that conscientious objectors can opt for alternative service, the duration of which is without punitive effect’.\footnote{332} Georgia also has double-length alternative service and the Committee expresses its concern at the discrimination suffered by conscientious objectors owing to the fact that non-military alternative

\footnote{326}‘The Committee is concerned over the unfair treatment accorded to conscientious objectors in Cyprus, who are subject to an excessive period of alternative service lasting 42 months, which is not compatible with the provisions of article 18 and 26 of the Covenant, and that persons may also be subject to punishment on one or more occasion for failure to perform military service’. Concluding observations of the Human Rights Committee on the second report by Cyprus, CCPR/C/79/Add.39 (3 August 1994) 3 \[10\] and see also Concluding observations of the Human Rights Committee, CCPR/C/79/Add.39; A/49/40 [312]–[333] (21 September 1994). See also Concluding observations of the Human Rights Committee on the fifth report of Columbia, CCPR/CO/80/COL (26 May 2004) \[17\].

\footnote{327}‘The Committee is concerned that the duration of alternative service for conscientious objectors may be up to twice as long as the duration of regular military service. The State party is under an obligation to ensure that conscientious objectors can opt for alternative service, the duration of which is without punitive effect (articles 18 and 26 of the Covenant)’. Concluding observations of the Human Rights Committee on the second periodic report of Estonia (15 April 2003) 4 \[15\].

\footnote{328}Concluding observations of the Human Rights Committee on the fourth report of Finland, CCPR/C/79/Add.91 (8 April 1998) \[21\].

\footnote{329}Concluding observations of the Human Rights Committee on the third report of Cyprus, CCPR/C/79/Add.88 (6 August 1998) \[17\].

\footnote{330}Concluding observations of the Human Rights Committee on the first report of Greece, CCPR/C/O/83/GRC (25 April 2005) \[15\]. See also Concluding observations of the Human Rights Committee on the fourth report of Yemen, CCPR/CO/84/YEM (9 August 2005) 5 \[19\].

\footnote{331}Concluding observations of the Human Rights Committee on the fifth report of the Russian Federation, CCPR/CO/79/RUS (6 November 2003) \[17\].

\footnote{332}Concluding observations of the Human Rights Committee on the second report of Estonia, CCPR/CO/77 (15 April 2003) \[15\].
2.2 Enforcement Mechanism

Service lasts for 36 months compared with 18 months for military service. For Belarus, the Committee recommends that: 'a law exempting conscientious objectors from compulsory military service and providing for alternative civil service of equivalent length be passed at an early date in compliance with article 18 of the Covenant and the Committee’s General Comment No. 22(48)'.

In the concluding observations for Greece, the Committee has its say on the assessment of applications for alternative service as well. Thus the Committee recommended that Greece should consider placing the assessment of applications for conscientious objector status under the control of civilian authorities.

The grounds for conscientious objection in law also gain the attention of the Committee. Thus, for Ukraine, the Committee observes that: '[t]he 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 they any alternative service required for conscientious objectors be performed in a non-discriminatory character'.

The Committee argues that conscientious objection should be applied without discrimination among the grounds of conscience. Hence conscientious objection should be open to non-believers as well. For Kyrgyzstan it says that:

- The Committee takes note that conscientious objection to military service is allowed only to members of a registered religious organization whose teachings prohibit the use of arms.
- The Committee regrets that the State party has not sought to justify why the provision on alternative service entails a period of service twice as long as that required of military conscripts, and why persons of higher education serve for a considerably lesser period in the military and in alternative service (articles 18 and 26).
- Conscientious objection should be provided for in law, in a manner that is consistent with articles 18 and 26 of the Covenant, bearing in mind that article 18 also protects freedom of conscience of non-believers. The State party should fix the periods of military service and alternative service on a non-discriminatory basis (see Note 337).

As of September 2006, Kyrgyzstan still appeared to have such a system of alternative military service according to the United States’ Report on International Religious Freedom for 2006. In short, the right to conscientious objection should

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333 Concluding observations of the Human Rights Committee on the second report of Georgia, CCPR/C/74/GEO (19 April 2002) [18].
334 Concluding observations of the Human Rights Committee on the fourth report of Belarus, CCPR/C/79/Add.86 (19 November 1997) [16].
335 Concluding observations of the Human Rights Committee on the first report of Greece, CCPR/CO/83/GRC (25 April 2005) [15].
336 Concluding observations of the Human Rights Committee on the fifth report of Ukraine, CCPR/CO/73/UKR (12 November 2001) [20].
337 According to the International Religious Freedom Report prepared by the Bureau of Democracy, Human Rights and Labor of the United States Department of State, as of 2005 Kyrgyzstan still has the system of alternative military service for registered religious groups and 3,000 people annually apply.
be provided for without discrimination by a national law in accordance with articles 18 and 26 of the Covenant. The fair treatment of conscientious objectors under the law must be the key.

2.3 Concluding Remarks

Article 8 has constituted interpretative impediment for the Human Rights Committee even though the travaux préparatoires do not support the construction deterring the Committee from recognising the right to conscientious objection. However the situation is gradually changing. Most significantly, the Committee now does not hesitate to urge States to recognise the right to conscientious objection at domestic level.

United Nations human rights law has been the best source of the right to conscientious objection to military service as an international human right. Not only has the United Nations produced a number of resolutions on the right to conscientious objection, but its enforcement mechanism has also produced international practices supporting the existence of such a right under international law. The Human Rights Committee has changed its attitude toward and interpretation of the right to conscientious objection to military service, unlike the invariant interpretation adopted by the European Court of Human Rights as we will see in the next chapter.

It is true that at the time of drafting the International Covenant on Civil and Political Rights there was no consensus on the right to conscientious objection under international law. However, the mere fact that the drafters of the Covenant do not seem to have contemplated the Covenant as giving rise to a generalised right to assert an objection to the performance of military service does not preclude the establishment of such a right for all time. Therefore, at the very least international law recognises that treaty provisions such as article 18 of the Covenant can have a norm creating function informing the development of binding rules of customary international law. One can see that this development in United Nations human rights law has great importance for the future development of international law on the issue of the right to conscientious objection as an international human right.

339 Concluding observations of the Human Rights Committee on the fourth report of Romania, CCPR/C/79/Add.111 (28 July 1999) [17].
340 Concluding observations of the Human Rights Committee on the third report of Cyprus, CCPR/C/79/Add.88 (6 August 1998) [17].
341 New Zealand Refugee Status Appeals Authority, Refugee Appeal No. 75378/05 (19 October 2005) [3].
342 New Zealand Refugee Status Appeals Authority, Refugee Appeal No. 75378/05 (19 October 2005) [3], citing the ICJ Judgment, North Sea Continental Shelf Case, (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Rep 3 [70]–[71].
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