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International Standards on Conscientious Objection to Military Service

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Introduction

Conscientious objection to military service is not explicitly recognised in the international human rights treaties. This has led some States to argue that it is not protected by them. However, this is not the case. The Human Rights Committee, the expert body which supervises the implementation of the International Covenant on Civil and Political Rights¹, is clear that conscientious objection to military service is protected under the right to freedom of thought, conscience and religion, and has stated so in Views (decisions) on individual communications,² in its General Comments³ and in Concluding Observations.⁴ In addition, the (former) UN Commission on Human Rights⁵ adopted a series of resolutions on conscientious objection to military service, and the Working Group on Arbitrary Detention and the Special Rapporteur on Freedom of Religion and Belief of the UN Human Rights Council have also addressed the issue. Furthermore, during 2011 the European Court of Human Rights Grand Chamber ruled that conscientious objection to military service is protected under the European Convention of Human Rights.⁶

The right of conscientious objection to military service

The Human Rights Committee has recognised the right of conscientious objection to military service, as part of the right to freedom of thought, conscience and religion enshrined in Article 18 of the International Covenant on Civil and Political Rights. It has addressed the is-

1 As of November 2011, 167 States were parties to the International Covenant on Civil and Political Rights.

2 The First Optional Protocol to the International Covenant on Civil and Political Rights enables individuals within States who are parties to both the Protocol and the Covenant to complain to the Human Rights Committee about alleged violations of the Covenant. As of November 2011, 114 States were parties to this Protocol.

3 General Comments are produced and agreed unanimously by the Committee to interpret the treaty provisions.

4 Concluding Observations are recommendations by the Committee to a State at the end of the Committee's consideration of the State's report on its implementation of the Covenant.

5 In 2006, the Commission on Human Rights was replaced by the Human Rights Council.

6 European Court of Human Rights Grand Chamber *Bayatyan v Armenia*, application no. 23459/03 (20 July 2011).

sue in many of its Concluding Observations on State reports, and in its Views on individual cases, most significantly in *Yoon and Choi v Republic of Korea*,⁷ *Eu-min Jung et al v Republic of Korea*⁸ and *Min-Kyu Jeong et al v Republic of Korea*.⁹ In the last-named case, the Committee held that conscientious objection to military service “inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual’s religion or beliefs. The right must not be impaired by coercion.”¹⁰ In the earlier cases the Committee had identified conscientious objection to military service as a protected form of manifestation of religious belief within Article 18(1) of the Covenant.

The Committee had already definitively laid to rest suggestions that conscientious objection is not recognised in the Covenant either because it was not included specifically (an argument it had addressed in its General Comment 22 on Article 18),¹¹ or because of the reference to conscientious objection which is included in Article 8. Article 8 concerns the prohibition of forced labour; its paragraph 3 states that for these purposes, the term forced or compulsory labour does not include “any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors”. In *Yoon and Choi v Republic of Korea* the Committee stated “article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant”.¹²

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

8 *Eu-min Jung et al v Republic of Korea* (CCPR/C/98/D/1593-1603/2007 of 14 April 2010).

9 *Min-Kyu Jeong et al v Republic of Korea* (CCPR/C/101/D/1642-1741/2007 of 5 April 2011).

10 *Min-Kyu Jeong et al v Republic of Korea* (CCPR/C/101/D/1642-1741/2007 of 5 April 2011), para. 7.3.

11 In 1993, the Human Rights Committee stated in its General Comment 22 on Article 18 that a claim of conscientious objection to military service could derive from the right to freedom of thought, conscience and religion inasmuch as the use of lethal force seriously conflicted with the individual’s convictions.

12 This was an important clarification as in an early case (*L.T.K. v Finland* (Case No. 185/1984)), while ruling the case out at a preliminary stage, the Committee had suggested that the wording of Article 8 precluded a requirement on all States to provide for conscien-

Article 18(1) of the Covenant, which covers both the right to freedom of thought, conscience and religion and to manifest religion or belief, is non-derogable even during times of national emergency threatening the life of the nation.¹³ Although some restrictions are permitted on the right to manifest one's religion or belief, these are only those set out in Article 18(3) of the Covenant, namely those which are "prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." The Human Rights Committee made clear that "such restriction must not impair the very essence of the right in question".¹⁴ Thus even on its earlier case law these possible limitations cannot excuse making no provision at all for conscientious objection to military service. (It is notable that in its General Comment 22, the Human Rights Committee observed that "national security" is not one of the permitted grounds of limitation listed in Article 18, unlike in relation to some other Articles of the Covenant.) However, the question of restrictions no longer arises because of the Committee's recognition in its most recent case that conscientious objection is inherent in the right to freedom of thought, conscience and religion itself and not merely a manifestation of it.

In 2011, the Grand Chamber of the European Court of Human Rights, in *Bayatyan v Armenia*,¹⁵ followed the same logic as the Human Rights Committee in ruling that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience, constitutes a conviction or belief of sufficient importance to attract the guarantees of Article 9 (right to freedom of thought, conscience and religion) of the European Convention on Human Rights, and that the provision on forced labour (Article 4 of the European Convention) is irrelevant. This judgment was followed by the Chamber in *Erçep v Turkey*¹⁶ which made clear that failure to provide for conscientious objectors to military service is a violation of Article 9.

tious objection to military service.

13 International Covenant on Civil and Political Rights, Article 4.

14 *Yoon and Choi v Republic of Korea* (CCPR/C/88/D/1321-1322/2004 of 23 January 2007).

15 European Court of Human Rights Grand Chamber, *Bayatyan v Armenia*, application no. 23459/03 (20 July 2011).

16 European Court of Human Rights Chamber II *Erçep v Turkey*, application no. 43965/04 (22 November 2011).

Who may be a conscientious objector?

Although conscientious objection may be based on a formal religious position, this is not required. The Human Rights Committee has made clear that no discrimination is permitted between the religion or belief on which the objection is based.¹⁷ Indeed, in its General Comment 22 the Human Rights Committee simply referred to situations where “the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief”.¹⁸ Furthermore, the same General Comment gives a broad scope to the terms ‘religion’ and ‘belief’, stating¹⁹ “Article 18 protects theistic, non-theistic and atheistic beliefs, ... Article 18 is not limited in its applications to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.” The Committee has specifically addressed this issue in Concluding Observations on State reports under the Covenant, calling, for example, on a reporting State to “extend the right of conscientious objection against mandatory military service to persons who hold non-religious beliefs grounded in conscience, as well as beliefs grounded in all religions”²⁰ and in *Eu-min Jung et al v Republic of Korea*, the Committee specifically identified that “the authors’ subsequent conviction and sentence amounted to an infringement of their freedom of conscience”, in addition to being a violation of their freedom of religion or belief.²¹

Equally, a person may become a conscientious objector after joining the armed forces, whether as a conscript or as a volunteer. Such a situa-

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

18 Human Rights Committee General Comment 22, para. 11.

19 Human Rights Committee General Comment 22, para. 2.

20 Human Rights Committee, Concluding Observations on the Ukraine, November 2006 (CCPR/C/UKR/CO/6), para. 12.

21 *Eu-min Jung et al v Republic of Korea* (CCPR/C/98/D/1593-1603/2007 of 14 April 2010), para. 7.4.

tion may arise in the context of a change of religion or belief in general, or in relation to the specific issue of military service. The general freedom to change one's religion or belief is recognized in Article 18(1) of the Covenant,²² and Article 18(2) prohibits "coercion which would impair" the individual's freedom to have *or adopt* a religion. The UN Working Group on Arbitrary Detention considers that "repeated incarceration in cases of conscientious objectors is directed towards changing their conviction and opinion, under threat of penalty" and is thus incompatible with Article 18(2) of the Covenant.²³ The Human Rights Committee has specifically applied the possibility of changes in religion or belief in this context, for example, when recommending the adoption of legislation on conscientious objection to military service to a reporting State, "recognizing that conscientious objection can occur at any time, even when a person's military service has already begun".²⁴ Similarly, the UN Commission on Human Rights has stated "that persons performing military service may develop conscientious objections" and affirmed "the importance of the availability of information about the right of conscientious objection to military service, and the means of acquiring conscientious objector status, to all persons affected by military service".²⁵

In 2010, the Committee of Ministers of the Council of Europe explicitly recognised that professional members of the armed forces as well as conscripts should be able to leave the armed forces for reasons of conscience in their *Recommendation on human rights of members of the armed forces*.²⁶

22 The right to change one's religion or belief was also specified in the Human Rights Committee General Comment 22, para. 5.

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

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

25 UN Commission on Human Rights resolution 1998/77.

26 Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces (24 February 2010), Section H, paras 40-46.

Decision-making process

The UN Commission on Human Rights has welcomed “the fact that some States accept claims of conscientious objection as valid without inquiry” and has called for “independent and impartial decision-making bodies” where this is not the case.²⁷ The Human Rights Committee has expressed concern about “determinations ... by military judicial officers in individual cases of conscientious objection”²⁸ and has encouraged “placing the assessment of applications for conscientious objector status under the control of civilian authorities”.²⁹ The European Court of Human Rights found in *Erçep v Turkey* that as a civilian a conscientious objector being tried by an entirely military tribunal called into question the independence and impartiality of the proceedings and was a violation of Article 6 (right to fair trial) of the European Convention of Human Rights. As previously mentioned, whatever the assessment process no discrimination is permitted “among conscientious objectors on the basis of the nature of their particular beliefs”.³⁰

Punishment of unrecognised conscientious objectors

Unrecognised conscientious objectors may not be punished more than once for their continued refusal to undertake, or continue in, military service on grounds of conscience. The Human Rights Committee’s General Comment 32³¹ on Article 14³² of the Covenant specifically addresses the repeated punishment of conscientious objectors:

Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with

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

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

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

30 Human Rights Committee General Comment 22, para. 11.

31 General Comment No. 32, CCPR/C/GC/32, 23 August 2007, IX NE BIS IN IDEM, paras 54-55 (footnote omitted).

32 Article 14 covers the right to equality before courts and tribunals and to a fair trial.

the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. ... Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience.

The UN Working Group on Arbitrary Detention has also addressed the prohibition of repeated punishment of conscientious objectors because of their continued refusal to undertake military service, finding repeated imprisonment to be arbitrary detention.³³ However, following the Human Rights Committee's views in *Yoon and Choi v Republic of Korea*, the Working Group stated³⁴ that the initial imprisonment of a conscientious objector to military service also amounted to arbitrary detention resulting from the exercise of rights or freedoms guaranteed by Article 18 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.³⁵

Alternative Service

Any alternative service required of conscientious objectors *in lieu* of compulsory military service must be compatible with the reasons for the objection, of a civilian character, in the public interest and not of a punitive nature.³⁶ In *Min-Kyu Jeong et al v Republic of Korea* the Human Rights Committee specified that it must be “a civilian alternative to military ser-

33 Opinion No. 36/1999 (TURKEY): United Nations: Working Group on Arbitrary Detention (E/CN.4/2001/14/Add.1); Working Group on Arbitrary Detention Recommendation No. 2 (E/CN.4/2001/14); and Opinion No. 24/2003 (ISRAEL) E/CN.4/2005/6/Add. 1.

34 Opinion No. 16/2008 (TURKEY) of 9 May 2008.

35 Equally UN Commission on Human Rights resolution 1998/77 “Emphasizes that States should take the necessary measures to refrain from subjecting conscientious objectors to imprisonment and to repeated punishment” (OP5).

36 UN Commission on Human Rights resolution 1998/77, OP4.

vice, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights.” The term “punitive” covers not only the duration of alternative service but also the type of service and the conditions under which it is served. In addition to civilian alternative service, unarmed military service may be provided for those whose objection is only to *personally* bearing arms.³⁷

The question of the length of alternative service in comparison to that of military service has been the subject of a number of cases considered by the Human Rights Committee. However, in *Foin v France* the Committee established its now settled position that any difference in length must be “based on reasonable and objective criteria, such as the nature of the specific service concerned, or the need for a special training in order to accomplish that service.”³⁸

Non discrimination

Both in relation to the specific aspects of conscientious objection to military service and alternative service already highlighted, and more generally, it is clear that no discrimination is permitted against or among conscientious objectors. Not only is no discrimination permitted “among conscientious objectors on the basis of the nature of their particular beliefs”,³⁹ equally no discrimination is permitted in law or practice between those who do military service and those who do alternative service as to the terms or conditions of service. Nor may conscientious objectors subsequently be subjected to discrimination in relation to any economic, social, cultural, civil or political rights because they have not done military service.⁴⁰

37 UN Commission on Human Rights resolution 1998/77, OP4.

38 *Foin v France* (Communication No. 666/1995), CCPR/C/D/666/1995, 9 November 1999, para. 10.3.

39 Human Rights Committee General Comment 22, para. 11.

40 Human Rights Committee General Comment 22, para. 11; UN Commission on Human Rights resolution 1998/77, OP6.

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