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International Standards on Conscientious Objection to Military Service

by Rachel Brett



Introduction

The issue of conscientious objection to military service has been addressed within the United Nations (UN) human rights system in a number of ways.¹ Most notable is the Human Rights Committee² in both individual cases and when considering State reports under the International Covenant on Civil and Political Rights, as well as in its General Comments No. 22 on Article 18 and No. 32 on Article 14 of the Covenant.³ The UN Human Rights Council⁴ and (former) UN Commission on Human Rights have adopted resolutions on the subject. The Special Procedures of the Human Rights Council have taken up the issue, and it has also arisen in the Universal Periodic Review (UPR) system. Furthermore, the European Court of Human Rights Grand Chamber has ruled that conscientious objection to military service is protected under the European Convention of Human Rights.⁵ In 2013, the Office of the UN High Commissioner for Refugees issued Guidelines on Claims to Refugee Status related to Military Service.⁶

1 Two useful resources are UN Office of the High Commissioner for Human Rights: *Conscientious Objection to Military Service* (UN, Geneva, February 2013), and War Resisters' International, Quaker United Nations Office, Geneva, Conscience and Peace Tax International and Centre for Civil and Political Rights: *A Conscientious Objector's Guide to the International Human Rights System* – a regularly updated on-line guide available at <http://www.co-guide.info>

2 The Human Rights Committee is the body of independent experts which oversees the implementation of the International Covenant on Civil and Political Rights. All States parties to the Covenant are required to report to the Committee on a regular basis. The Committee examines the report in a public dialogue with representatives of the State and adopts Concluding Observations highlighting improvements needed as well as progress made. The Committee also produces General Comments clarifying and interpreting the Covenant's provisions. In those States which are also parties to the First Optional Protocol, individuals can send the Committee complaints alleging violations of the Covenant.

3 Human Rights Committee General Comment No. 22 (CCPR/C/21/Rev.1/Add.4 of 30 July 1993), 'The right to freedom of thought, conscience and religion (Article 18)' and General Comment No. 32 (CCPR/C/GC/32 of 23 August 2007), Article 14 'Right to Equality before Courts and Tribunals and to Fair Trial'.

4 The UN Human Rights Council replaced the UN Commission on Human Rights in 2006. It is the main UN intergovernmental human rights body, as the Commission was before it.

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

6 United Nations High Commissioner for Human Rights: Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (HCR/GIP/13/10, 3 December 2013. In 1978, UN General Assembly resolution

The right of conscientious objection to military service:

Both the Human Rights Committee and the UN Human Rights Council have 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 both the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

The Human Rights Committee considers that “the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to exemption from compulsory military service if the latter cannot be reconciled with the individual’s religion or beliefs. The right must not be impaired by coercion.”⁷ In the Committee’s most recent cases⁸ on the subject, it held that the Republic of Korea and Turkey had violated Article 18 by not providing for conscientious objection to military service.

The Committee has definitively laid to rest suggestions that conscientious objection is not protected under the Covenant either because it was not recognised specifically (an argument it had already addressed in its General Comment 22 on Article 18),⁹ 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”. Since 2007, the

33/165 had called for international protection for those required to leave their country because of their refusal to serve in military or police forces used to enforce apartheid. See also the Opinion of Advocate General Sharpston of the Court of Justice of the European Union in the case of Andre Lawrence Shepherd (Case C-472/13) in relation to Article 9(2)(e) of the EU Qualification Directive 2004/83/E (delivered on 11 November 2014).

7 *Jong-nam Kim et al. v. The Republic of Korea* (CCPR/C/106/D/1786/2008 Communication No. 1786/2008 of 1 February 2013), para. 7.4

8 *Young-kwan Kim et al. v Rep. of Korea* (CCPR/C/112/D/2179/2012 Communication No. 2179/2012 of 14 January 2015) and *Atasoy and Sarkui v Turkey* (CCPR/C/104/D/1853-1854/2008 of 19 June 2012).

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

Committee has consistently stated in its case law that “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”.¹⁰

Under the Covenant, Article 18(1), which covers both the right to freedom of thought, conscience and religion and the right to manifest one’s religion or belief, is non-derogable even during times of national emergency threatening the life of the nation.¹¹ Some restrictions on the right to manifest one’s religion or belief are permitted by Article 18(3) of the Covenant, but these are not relevant to the question of conscientious objection to military service because of the Committee’s position that this is inherent in the right rather than a manifestation of it. In any case, these restrictions are only 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” and any “such restriction must not impair the very essence of the right in question”.¹² Thus these possible limitations cannot be used to justify or excuse making no provision for conscientious objection.¹³

In September 2013, the UN Human Rights Council adopted (without a vote), resolution 24/17 which “Recognizes that the right to conscientious objection to military service can be derived from the right to freedom of thought, conscience and

10 *Yoon and Choi v Republic of Korea* (CCPR/C/88/D/1321-1322/2004 of 23 January 2007) and all its subsequent cases concerning conscientious objection to military service. 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 conscientious objection to military service. In 2011, the European Court of Human Rights (Grand Chamber) in *Bayatyan v Armenia* followed the same line as the Human Rights Committee in resolving the similar argument which had arisen under the European Human Rights Convention Article 4(3)(b) which is almost identical to Article 8(3)(c)(ii) of the Covenant. The Inter-American Commission on Human Rights has not addressed the issue of conscientious objection to military service since these developments in the Human Rights Committee and European Court of Human Rights but has a similar provision, Article 6(3)(b) of the American Convention on Human Rights to that of the Covenant and European Human Rights Convention.

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

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

13 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.

religion”, and re-stated and developed the provisions of the former UN Commission on Human Rights resolutions going back to 1989.¹⁴

Scope/extent of the right of conscientious objection:

The identification of conscientious objection to military service as inherent in the right to freedom of thought, conscience and religion makes clear that it can be based on a religious or other belief or on conscience. The Human Rights Committee in General Comment 22 had given a broad scope to the terms religion and belief, stating:

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.¹⁵

The Committee has specifically addressed this issue in Concluding Observations on State reports under the Covenant, for example:

The Committee therefore expresses its concern that no measures appear to have been taken 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 (art. 18). The Committee reiterates its previous recommendation (CCPR/C/UKR/CO/6, para. 12) and stresses that alternative service arrangements should be accessible to all conscientious objectors without discrimination as to the nature of the beliefs (religious or non-religious beliefs grounded in conscience) justifying the objection.¹⁶

Similarly, in the case of *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.¹⁷

14 Human Rights Council resolution 24/17 (A/HRC/24/17) of 27 September 2013.

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

16 Human Rights Committee, Concluding Observations on Ukraine (CCPR/C/UKR/CO/7 of 26 July 2013), para.19.

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

This broad definition ties in with Human Rights Council resolution 24/17 which recognises “that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, ethical, humanitarian or similar motives”.

In other words, it is clear that although conscientious objection may be based on a formal religious position, this is not required. Indeed, both the Committee and the Council have made clear that no discrimination is permitted between the religion or belief on which the objection is based.¹⁸

Equally, a person may become a conscientious objector after joining the armed forces, whether as a conscript or as a volunteer. Such a situation 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.¹⁹ 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”.²⁰ This is also explicitly recognized in UN Human Rights Council resolution 24/17 which states “persons performing military service may develop conscientious objections”. Thus, any arrangements for conscientious objectors cannot be such as to prevent applications after joining the armed forces, or even after completion of military service, for example by those listed as reservists or subject to further call-up or training.

18 Human Rights Committee General Comment 22, para 11; Human Rights Council Resolution 24/17.

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

20 Human Rights Committee, Concluding Observations on Chile (CCPR/C/CHL/CO/5 of 18 April 2007), para. 13.

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”.²¹

Equally, any payment in lieu of military service is not the same as, nor a substitute for, recognition of conscientious objection.²²

Decision-making process:

Trying to judge another person’s conscience or the sincerity of their belief is an inherently difficult task. The UN Human Rights Council has welcomed “the fact that some States accept claims of conscientious objection as valid without inquiry” (Resolution 24/17), but if there is to be an inquiry then it must be undertaken by an “independent and impartial decision-making” body. The Human Rights Committee has expressed concern about “determinations... by military judicial officers in individual cases of conscientious objection”²³ and has encouraged “placing the assessment of applications for conscientious objector status under the control of civilian authorities”.²⁴ 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”.²⁵

21 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.

22 Human Rights Committee, Concluding Observations on Syria (CCPR/CO/84/SYR of 9 August 2005), para. 11.

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

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

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

Alternative service:

Alternative Service in lieu of compulsory military service is not required²⁶ but is not prohibited, provided that it is compatible with the reasons for the conscientious objection, of a civilian character, in the public interest and not of a punitive nature. In addition to civilian alternative service, unarmed military service may be provided for those whose objection is only to *personally* bearing arms²⁷. The Human Rights Committee has consistently stated that it must be a civilian alternative to military service “outside of the military sphere and not under military command. The alternative service must not be of a punitive nature, but must rather be of a real service to the community and compatible with respect for human rights.”²⁸ 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.

Duration of alternative service:

The question of the length of alternative service in comparison to the length of military service has been the subject of a number of cases considered by the Human Rights Committee. However, in 1999 the Committee settled on the test which it has subsequently applied. This starts from the requirement that the alternative service must not be discriminatory. This does not preclude a different duration to that of military service but any difference in length in a particular case 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.”²⁹

Non discrimination:

As already mentioned, no discrimination is permitted “among conscientious objectors on the basis of the nature of their particular beliefs.”³⁰

26 See, for example, Friendly Settlement in *Alfredo Diaz Bustos v Bolivia*, Case 14/04, Report No. 97/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005).

27 UN Human Rights Council resolution 24/17.

28 *Atasoy and Sarkut v Turkey* (CCPR/C/104/D/1853-1854/2008 of 19 June 2012), para. 10.4 and *Jong-nam Kim et al v Republic of Korea* (CCPR/C/101/D/1786/2008 of 1 February 2012), para. 7.4.

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

30 Human Rights Committee General Comment 22, para. 11; UN Human Rights Council resolution 24/17.

Equally no discrimination as to the terms or conditions of service is permitted in law or practice between those who do military service and those who do alternative 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.³¹

Access to information about conscientious objection:

The importance of making information available to all affected by military service (not only to first time conscripts) is stressed by UN Human Rights Council resolution 24/17, and has also been taken up by the Human Rights Committee in Concluding Observations, to ensure that people know about the right of conscientious objection and also how to acquire conscientious objector status.³²

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 32 on Article 14³³ 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 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

31 Human Rights Committee General Comment 22, para. 11; UN Human Rights Council resolution 24/17.

32 Human Rights Committee Concluding Observations on Paraguay (CCPR/C/PRY/CO/2 of 24 April 2006, para 18.

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

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.³⁴

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.³⁵

Moreover, in January 2015, the Human Rights Committee found that imprisonment, and not just repeat imprisonment, of conscientious objectors was a violation of Article 9 of the Covenant, stating:

Just as detention as punishment for the legitimate exercise of the right to freedom of expression, as guaranteed by article 19 of the Covenant is arbitrary,³⁶ so is detention as punishment for legitimate exercise of freedom of religion and conscience, as guaranteed by article 18 of the Covenant.³⁷

Following the Human Rights Committee's views in *Yoon and Choi v Republic of Korea*, the Working Group had reached the same position.³⁸ In any event, conscientious objectors should not be subjected to the death penalty for their refusal to undertake military service or for desertion resulting from their conscientious objection.³⁹

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

35 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.

36 See communication No. 328/1988, *Zelaya Blanco v. Nicaragua*, Views adopted on 20 July 1994, para. 10.3.

37 *Young-kwan Kim et al. v Rep. of Korea* (CCPR/C/112/D/2179/2012 Communication No. 2179/2012 of 14 January 2015), para. 7.5

38 Opinion No. 16/2008 (TURKEY) of 9 May 2008. Equally UN Human Rights Council resolution 24/17.

39 UN Sub-Commission on the Promotion and Protection of Human Rights resolution 1994/4.

Conclusion

Conscientious objection to military service is recognised in international law as inherent in the right to freedom of thought, conscience and religion enshrined in Article 18 of the Universal Declaration of Human Rights as well as Article 18 of the International Covenant on Civil and Political Rights. States are, therefore, under an obligation to make provision for conscientious objection to military service in their domestic law and implement it in practice. Implementation in practice also requires that information about conscientious objector status and how to apply for it is available to (potential) conscripts and those already in the armed forces, whether conscripts or volunteers/professionals, and that recruitment methods⁴⁰ and decision making processes permit such applications to be made and acted on.

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⁴⁰ The Inter-American Commission on Human Rights (*Piché Cuca v Guatemala*, Report No. 36/93, Case 10.975, and Fourth Report on the Situation of Human Rights in Guatemala, QEA, Ser.L/V/II,83; Doc. 16 rev.; June 1, 1993, chapter III) has found that forced recruitment is a violation of the rights of personal liberty, human dignity and freedom of movement under the American Convention on Human Rights, and has noted that the conscription process must enable the individual to challenge the legality of their recruitment. See also the UN Working Group on Arbitrary Detention (above).



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