

# **THE RIGHT TO CONSCIENTIOUS OBJECTION TO MILITARY SERVICE**

**AMICUS CURIAE OPINION SUBMITTED TO  
THE CONSTITUTIONAL COURT OF KOREA**

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## CONSTITUTIONAL COURT OF KOREA

Cases Nos: 2013HunGa5, submitted to the Constitutional Court by Seoul Northern District Court; 2014HunGa8, submitted to the Constitutional Court by Seoul Eastern District Court; 2012HunGa17, submitted to the Constitutional Court by Masan Branch of Changwon District Court; 2013HunGa23, submitted to the Constitutional Court by Seoul Southern District Court; 2013HunGa27, submitted to the Constitutional Court by Ulsan District Court; 2013HunGa13, submitted to the Constitutional Court by Suwon District Court

Amicus Curiae opinion by Amnesty International, Friends World Committee for Consultation (Quakers), the International Commission of Jurists, the International Fellowship of Reconciliation, and War Resisters' International

30 August 2014

## INTRODUCTION

1. Amnesty International, Friends World Committee for Consultation (Quakers), the International Commission of Jurists, the International Fellowship of Reconciliation, and War Resisters' International ("the authors")<sup>1</sup> have extensive knowledge and experience of international and regional human rights law and standards with regard to the right to conscientious objection to military service, as well as of relevant laws and practice of states throughout the world.<sup>2</sup>

2. The authors welcome this opportunity to address the Court in connection with the present case, to draw its attention to developments in international law and jurisprudence and in other national jurisdictions related to conscientious objection to military service since the Court considered the issue in *Case No. 2007HunKa12 and others on Article 15(8) of the Establishment of Homeland Reserve Force Act* and *Case No. 2008HunKa22 and others on Article 88(1)-1 of the Military Service Act*. In particular, since 2011, the UN Human Rights Committee has adopted Views on three cases of conscientious objectors, covering almost 500 individuals, including two relating to a total of 488 applicants from the Republic of Korea (see para. 16 below),<sup>3</sup> and the Grand Chamber of the

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<sup>1</sup> See Annex 1 for brief details about the authors.

<sup>2</sup> Amnesty International made representations to this Court in November 2010 on similar issues as they arose in *Case No. 2007HunKa12 and others on Article 15(8) of the Establishment of Homeland Reserve Force Act*, and *Case No. 2008HunKa22 and others on Article 88(1)-1 of the Military Service Act*, decided by the Court on 30 August 2011. See Amnesty International, Amicus Brief, Case No. 2007HunKa12 and others on Article 15(8) of the Establishment of Homeland Reserve Force Act and Case No. 2008HunKa22 and others on Article 88(1)-1 of the Military Service Act (AI Index ASA 25/003/2010), November 2010.

<sup>3</sup> The UN Human Rights Committee has, since November 2006, adopted Views on a total of five communications in relation to conscientious objection, four of them in relation to the Republic of Korea: *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Views adopted 3 November 2006 (Communications Nos. 1321/2004 and 1322/2004), UN Doc. CCPR/C/88/1321-1322/2004; *Eu-min Jung, Tae-Yang Oh, Chang-Geun Yeom*,

European Court of Human Rights has issued its judgment in the case of *Bayatyan v. Armenia* (see para. 23 below).<sup>4</sup>

## ISSUES ADDRESSED IN THIS SUBMISSION

3. The present submission addresses the right to conscientious objection to military service as derived from the right to freedom of thought, conscience and religion guaranteed in international human rights law and standards. It draws substantially on the authoritative interpretation of the right to freedom of thought, conscience and religion, and in particular the right to conscientious objection to military service, under Article 18 of the International Covenant on Civil and Political Rights<sup>5</sup> (ICCPR) by the UN Human Rights Committee, the expert body established by that treaty to monitor its implementation by States parties. The Republic of Korea is a State party to the ICCPR.<sup>6</sup> The submission also refers to interpretations of this right by other international and regional human rights bodies.<sup>7</sup> It then outlines law and practice with regard to conscientious objectors in States which impose military service obligations.

4. The present submission does not discuss the laws of the Republic of Korea *per se*, but is based on the well-established principle of the applicability in domestic law of the provisions of international treaties to which the Republic of Korea is a State party. In particular, in accordance

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*Dong-hyuk Nah, Ho-Gun Yu, Chiyun Lim, Choi Jin, Tae-hoon Lim, Sung-hwan Lim, Jae-sung Lim, and Dong-ju Goh v. Republic of Korea*, Views adopted 23 March 2010 (Communications Nos. 1593–1603/2007), UN Doc. CCPR/C/98/D/1593-1603/2007; *Min-Kyu Jeong et al. v. Republic of Korea*, Views adopted 24 March 2011 (Communications Nos. 1642–1741/2007), UN Doc. CCPR/C/101/D/1642-1741/2007; *Cenk Atasoy and Arda Sarkut v. Turkey*, Views adopted 29 March 2012 (Communications Nos. 1853/2008 and 1854/2008), UN Doc. CCPR/C/104/D/1853-1854/2008; and *Jong-nam Kim et al. v. Republic of Korea*, Views adopted 25 October 2012 (Communication No. 1786/2008), UN Doc. CCPR/C/106/D/1786/2008.

<sup>4</sup> *Bayatyan v. Armenia* (Application no. 23459/03), Grand Chamber judgment of 7 July 2011, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105611>.

<sup>5</sup> International Covenant on Civil and Political Rights, 99 UNTS 171, adopted 16 December 1966, entered into force 23 March 1976.

<sup>6</sup> The Republic of Korea acceded to the ICCPR on 10 April 1990.

<sup>7</sup> The International Court of Justice has expressly stated that it ascribes great weight to the interpretations of the ICCPR adopted by the UN Human Rights Committee as expressed in its body of interpretative case law built up in particular through the Committee's Views on individual communications and in its General Comments. In this connection the Court referred to the necessity for clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled. Similarly, the Court has stated that, when applying a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created to monitor their application. *Republic of Guinea v. Democratic Republic of the Congo*, ICJ (2010), paras 66–7, <http://www.icj-cij.org/docket/files/103/16244.pdf>.

with Article 26 of the Vienna Convention on the Law of Treaties,<sup>8</sup> to which the Republic of Korea is a State party,<sup>9</sup> the authorities and courts of the State are bound to implement in good faith international treaties to which it is a party, including the ICCPR.<sup>10</sup> In addition, under Article 2 of the ICCPR, the Republic of Korea has undertaken to respect and ensure the rights set out in the ICCPR to all within its territory and subject to its jurisdiction without discrimination. These obligations are binding on the state as a whole, including on all branches of government – the executive, the legislative and judiciary.<sup>11</sup>

5. Furthermore, under Article 6(1) of the Constitution of the Republic of Korea, international law has the same effect as the domestic laws:

Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.

This provision creates a presumption that relevant provisions of the Constitution of the Republic of Korea are to be interpreted in line with those of international treaties to which the Republic of Korea is a State party including international human rights treaties in particular. This has indeed been the consistent practice of courts in the Republic of Korea generally and the Constitutional Court in particular, and in this connection the Supreme Court and Constitutional Court have, on several occasions, referred to the State's obligations under the ICCPR.

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<sup>8</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, adopted 23 May 1969, entered into force 27 January 1980.

<sup>9</sup> The Republic of Korea ratified the Vienna Convention on the Law of Treaties on 27 April 1977.

<sup>10</sup> Article 26 of the Vienna Convention on the Law of Treaties states: "Every treaty in force is binding on the parties to it and must be performed by them in good faith". Article 27 underlines that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

<sup>11</sup> UN Human Rights Committee, General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 4, [http://www.un.org/ga/search/view\\_doc.asp?symbol=CCPR/C/2021/Rev.1/Add.13](http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/2021/Rev.1/Add.13).

## OVERVIEW

6. The authors submit, consistent with the comments and jurisprudence of the UN Human Rights Committee and other international human rights bodies and mechanisms, referred to below, that compulsion to engage in military service contrary to an individual's conscience or religion or belief is in itself a violation of the individual's freedom of conscience. In addition, a system of compulsory military service without special accommodation for those who are conscientious objectors because of their religious or other convictions or beliefs amounts to an unjustified interference with the right to freedom of thought, conscience, and religion or belief and is not compatible with international human rights law.

7. Conscientious objection to military service has been recognized by the UN Human Rights Committee as deriving from the right to freedom of thought, conscience and religion under Article 18 of the ICCPR. The right to freedom of thought, conscience and religion as set out in Article 18 of the ICCPR comprises two elements: the right to hold convictions or beliefs, and the right to manifest one's religion or beliefs in worship, observance, practice and teaching. The rights to freedom of conscience and freedom of religion are enshrined also in Articles 19 and 20 respectively of the Constitution of the Republic of Korea.

8. In its most recent Views on an individual petition in relation to conscientious objection to military service, directly addressing the relevant laws of the Republic of Korea, the UN Human Rights Committee found that "Repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibit the use of arms, is incompatible with article 18, paragraph 1, of the Covenant". The Committee thus concluded that the individuals' conviction and sentence amounted to a violation of their rights to freedom of conscience in breach of Article 18(1) of the ICCPR.<sup>12</sup> The Committee's Views on that case in effect reiterated Views it had expressed on three previous very similar cases of conscientious objectors in the Republic of Korea;<sup>13</sup> in all four petitions the Committee's Views focused on the relevant legislation rather than the applicants' individual circumstances. The authors submit that this clearly indicates that the breach of Article 18 of the ICCPR by the Republic of Korea is attributable to its laws and their interpretation or implementation, rather than to the circumstances of individuals in specific cases.

9. Other international human rights bodies have likewise addressed the question of conscientious objection to military service. A recent resolution of the UN Human Rights Council

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<sup>12</sup> *Jong-nam Kim et al. v. Republic of Korea*, Views adopted 25 October 2012 (Communication No. 1786/2008), UN Doc. CCPR/C/106/D/1786/2008, para. 7.5.

<sup>13</sup> *Min-Kyu Jeong et al. v. Republic of Korea*, Views adopted 24 March 2011 (Communications Nos. 1642–1741/2007), UN Doc. CCPR/C/101/D/1642–1741/2007, para. 7.4; *Eu-min Jung, Tae-Yang Oh, Chang-Geun Yeom, Dong-hyuk Nah, Ho-Gun Yu, Chiyun Lim, Choi Jin, Tae-hoon Lim, Sung-hwan Lim, Jae-sung Lim, and Dong-ju Goh v. Republic of Korea*, Views adopted 23 March 2010 (Communications Nos. 1593–1603/2007), UN Doc. CCPR/C/98/D/1593–1603/2007, para. 7.4; *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Views adopted 3 November 2006 (Communications Nos. 1321/2004 and 1322/2004), UN Doc. CCPR/C/88/1321–1322/2004, paras 8.3, 8.4, and 9.



(see para. 19 below)<sup>14</sup> and repeated resolutions of the former UN Commission on Human Rights since 1989 have also recognized that conscientious objection to military service is a legitimate exercise of the right to freedom of thought, conscience and religion as laid down in Article 18 of the ICCPR.<sup>15</sup> Special procedures mandated by the UN Human Rights Council have similarly addressed the question. The UN Special Rapporteur on freedom of religion or belief has repeatedly called on governments to recognize the right to conscientious objection in law and in practice<sup>16</sup> and taken up individual cases.<sup>17</sup> The UN Working Group on Arbitrary Detention has ruled that imprisonment of conscientious objectors to military service is a form of arbitrary detention.<sup>18</sup>

10. At the regional level, the right to conscientious objection is also explicitly recognized in the European Union (EU) Charter of Fundamental Rights<sup>19</sup> and in the Ibero-American Convention on Young People's Rights.<sup>20</sup> The Grand Chamber of the European Court of Human Rights has affirmed that conscientious objection to military service is protected under Article 9 of the European

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<sup>14</sup> UN Human Rights Council Resolution 24/17 (A/HRC/24/17), adopted without a vote on 27 September 2013. The Republic of Korea is a member of the Council.

<sup>15</sup> UN Commission on Human Rights Resolutions 1989/59, 1993/84, 1995/83, 1998/77, 2002/45, and 2004/35, adopted without a vote. (The UN General Assembly established the Human Rights Council on 16 June 2006 (A/RES/60/251), to replace the Commission on Human Rights.)

<sup>16</sup> For example, Report of the Special Rapporteur on freedom of religion or belief, Mission to Turkmenistan, UN Doc. A/HRC/10/8/Add.4, 12 January 2009, para. 68, <http://www2.ohchr.org/english/bodies/hrcouncil/10session/reports.htm>; Report of the Special Rapporteur, Mission to Paraguay, UN Doc. A/19/60/Add.1, 26 January 2012, para. 64(g), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/102/44/PDF/G1210244.pdf?OpenElement>.

<sup>17</sup> For example, Summary of cases transmitted to Governments and replies received, UN Doc. A/HRC/16/53/Add.1, 14 February 2011, paras 384–91 (Turkmenistan); Summary of cases transmitted to Governments and replies received, UN Doc. A/HRC/7/10/Add.1, 28 February 2008, paras 93–5 (Eritrea); paras 148–54 (regarding Eritreans who had fled to Libya), paras 250–4 (Turkmenistan); Summary of cases transmitted to Governments and replies received, UN Doc. E/CN.4/2006/5/Add.1, 27 March 2006, paras 3–11 (Armenia), paras 12–26 (Azerbaijan), paras 136–9 (Greece), paras 292–305 (Republic of Korea), paras 355–64 (Turkey), paras 380–9 (Turkmenistan). Reports available at <http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx>.

<sup>18</sup> Opinion No. 8/2008 (Colombia) adopted 8 May 2008 and Opinion No. 16/2008 (Turkey) adopted 9 May 2008, in Opinions adopted by the Working Group on Arbitrary Detention, UN Doc. A/HRC/10/21/Add.1, pp. 110–14 and pp. 139–47, respectively; <http://www2.ohchr.org/english/bodies/hrcouncil/10session/reports.htm>; also available on the Working Group's online database <http://www.unwgadatabase.org/un>.

<sup>19</sup> Charter of Fundamental Rights of the European Union, 2010 O.J. (C83) 389, 30 March 2010, published in the Official Journal of the European Communities, 18 December 2000; the Charter became legally binding when the Treaty of Lisbon entered into force on 1 December 2009.

<sup>20</sup> The Ibero-American Convention on Young People's Rights was adopted in October 2005 at a summit of the Organization of Ibero-American States in Salamanca, Spain, and entered into force on 1 March 2008,

Convention on Human Rights,<sup>21</sup> which guarantees the right to freedom of thought, conscience and religion.<sup>22</sup>

## CONSCIENTIOUS OBJECTION TO MILITARY SERVICE AND THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

11. While the ICCPR, adopted in 1966, unlike the Charter of Fundamental Rights of the European Union adopted over 30 years later in 2000, does not explicitly refer to a right to conscientious objection, the UN Human Rights Committee has explicitly stated that such a right is protected as part of the right to freedom of thought, conscience and religion under the ICCPR. In its General Comment No. 22 on the right to freedom of thought, conscience and religion, adopted in 1993,<sup>23</sup> the Committee stated:

"The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."<sup>24</sup>

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<sup>21</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, ETS 5, signed 4 November 1950, entered into force 3 September 1953,

<sup>22</sup> *Bayatyan v. Armenia* (Application no. 23459/03), Grand Chamber judgment of 7 July 2011, para. 110 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105611>. See also *Erçep v. Turkey* (Application no. 43965/04), Judgment of 22 November 2011 (available in French only), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107532>; *Savda v. Turkey* (Application no. 42730/05), Judgment of 12 June 2012 (available in French only), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111414>; *Tarhan v. Turkey* (Application no. 9078/06), Judgment of 17 July 2012 (available in French only), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112199>; and *Buldu and Others v. Turkey* (Application no. 14017/08), Judgment of 3 June 2014 (available in French only), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144352>.

<sup>23</sup> UN Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, [http://www.un.org/ga/search/view\\_doc.asp?symbol=CCPR/C/21/Rev.1/Add.4](http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/21/Rev.1/Add.4). The Committee adopts its General Comments unanimously.

<sup>24</sup> UN Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 11.

It also noted that “a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service”.<sup>25</sup>

12. Under Article 18 of the ICCPR, no limitations whatsoever are permitted on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice (Article 18(2)). Article 18(3) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

13. The UN Human Rights Committee has clarified that the terms “belief” and “religion” in Article 18 of the ICCPR are to be broadly construed and apply to theistic, non-theistic and atheistic beliefs, traditional and non-traditional, as well as the right not to profess any religion or belief.<sup>26</sup> It has underlined that any restrictions on the manifestation of beliefs must be directly related and proportionate to the specific need on which they are predicated and must not be applied in a manner that would vitiate the rights guaranteed in Article 18.<sup>27</sup> It has further underlined that restrictions are not allowed on grounds not specified in Article 18(3), even if those grounds would be permitted as a basis for restrictions on other rights in the ICCPR, such as national security.<sup>28</sup>

14. Following the adoption in 1993 of its General Comment No. 22, and using the procedure which it started in 1991 of unanimously adopting Concluding Observations when considering States parties’ reports on their implementation of the ICCPR,<sup>29</sup> the Committee has addressed the issue of conscientious objection on numerous occasions, in some instances on the basis of Article 18 alone, and in other instances on the basis of Article 18 in conjunction with Article 26 (non-discrimination) or other provisions of the ICCPR. Its Concluding Observations on States’ implementation of the ICCPR have included specific recommendations to States to introduce legislation to provide for conscientious objection in States which fail to provide for recognition of such status, as well as to address discriminatory and unsatisfactory provisions where some recognition exists. In particular, with regard to the Republic of Korea the Committee stated:

“The State party should take all necessary measures to recognize the right of conscientious objectors to be exempted from military service. It is encouraged to bring legislation into line with article 18 of the Covenant. In this regard, the Committee draws

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<sup>25</sup> UN Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 11.

<sup>26</sup> UN Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 2.

<sup>27</sup> UN Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 8.

<sup>28</sup> UN Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 8.

<sup>29</sup> Originally the Committee members expressed individual comments on States’ reports; it was only in 1991 that the Committee as a whole started adopting Concluding Observations which are agreed unanimously.

the attention of the State party to the paragraph 11 of its general comment No. 22 (1993) on article 18 (freedom of thought, conscience and religion)."<sup>30</sup>

15. With regard to individual cases, it was not until 2004 that the Committee received an individual petition from conscientious objectors in a conscripting State that had no legislative provision for conscientious objection and who were, therefore, sentenced to prison for their religiously based objection. It was the Committee's first opportunity to address the precise question of the protection of conscientious objection to military service under the ICCPR in an individual case. In November 2006, adopting its Views on that case, *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*,<sup>31</sup> the Committee reviewed its earlier case law and the relevance of the ICCPR provision concerning forced labour (Article 8).<sup>32</sup> It concluded that this article "neither recognizes nor excludes a right of conscientious objection", that "the present claim is to be assessed solely in the light of article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose",<sup>33</sup> and that conscientious objection to military service is protected under Article 18. It noted that the applicants' conviction and sentence for refusal of military service was a restriction on their ability to manifest their religion or belief, and that any such restrictions must, among other things, not impair the very essence of the right in question. The Committee considered that the State had not demonstrated that the restriction was necessary within the meaning of Article 18(3) of the ICCPR, and found a violation of Article 18(1).<sup>34</sup>

16. In three subsequent petitions from conscientious objectors the Committee has found a violation of Article 18 of the ICCPR, while applying a different emphasis in its reasoning.<sup>35</sup> In 2011, in the case of *Min-Kyu Jeong et al. v. Republic of Korea*, the Committee emphasized that "the right to

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<sup>30</sup> UN Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the ICCPR, Concluding Observations: Republic of Korea, 26 November 2006, UN Doc. CCPR/C/KOR/CO/3, para. 17.

<sup>31</sup> *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Views adopted 3 November 2006 (Communications Nos. 1321/2004 and 1322/2004), UN Doc. CCPR/C/88/1321-1322/2004.

<sup>32</sup> Initially, in 1987, the Committee had declared inadmissible its first case concerning a conscientious objector to military service, noting the reference to conscientious objection in Article 8(3) of the ICCPR, relating to forced labour (*L.T.K. v. Finland*, Admissibility decision of 9 July 1985 (Communication No. 185/1984), UN Doc. CCPR/C/OP/2).

<sup>33</sup> *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Views adopted 3 November 2006 (Communications Nos. 1321/2004 and 1322/2004), UN Doc. CCPR/C/88/1321-1322/2004, para. 8.2.

<sup>34</sup> *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Views adopted 3 November 2006 (Communications Nos. 1321/2004 and 1322/2004), UN Doc. CCPR/C/88/1321-1322/2004, paras 8.3, 8.4 and 9. The Committee reached similar conclusions in the case of *Eu-min Jung, Tae-Yang Oh, Chang-Geun Yeom, Dong-hyuk Nah, Ho-Gun Yu, Chiyun Lim, Choi Jin, Tae-hoon Lim, Sung-hwan Lim, Jae-sung Lim, and Dong-ju Goh v. Republic of Korea*, Views adopted 23 March 2010 (Communications Nos. 1593-1603/2007), UN Doc. CCPR/C/98/D/1593-1603/2007.

<sup>35</sup> *Min-Kyu Jeong et al. v. Republic of Korea*, Views adopted 24 March 2011 (Communications Nos. 1642-1741/2007), UN Doc. CCPR/C/101/D/1642-1741/2007; *Cenk Atasoy and Arda Sarkut v. Turkey*, Views adopted 29 March 2012 (Communications Nos. 1853/2008 and 1854/2008), UN Doc. CCPR/C/104/D/1853-1854/2008; *Jong-nam Kim et al. v. Republic of Korea*, Views adopted 25 October 2012 (Communication No. 1786/2008), UN Doc. CCPR/C/106/D/1786/2008.

conscientious objection to military service inheres in 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."<sup>36</sup> The significance of this approach is that in so far as conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion, no restrictions on it are permissible, as could be the case with regard to some restrictions on the right to manifest one's religion or belief under Article 18(3) of the ICCPR.

17. Some individual members of the Committee, while concurring with the majority's findings in these cases of a violation of Article 18(1) of the ICCPR, reached that conclusion on the same basis as the Committee's earlier reasoning.<sup>37</sup> One member in particular recalled the Committee's position set out in General Comment No. 22 that conscientious objection is based on two elements: a conviction that performing military service is incompatible with the demands of conscience, and the manifestation of this conviction by refusing to join the armed forces.<sup>38</sup> Others focused on the particular context key to conscientious objection to military service, that the individual is refusing to act against their beliefs within a context in which it may be necessary for them to deprive another human being of life; they stressed that Article 18 of the ICCPR together with the value of the sanctity of human life underlying Article 6 of the ICCPR leads to the conclusion that the right to refuse to kill must be accepted completely.<sup>39</sup>

18. Whatever the precise reasoning used, bearing in mind the Committee's interpretation that conscientious objection is based on two elements – a conviction that performing military service is incompatible with the demands of conscience and the manifestation of this conviction by refusing to join the armed forces – the authors submit that special accommodation for conscientious objectors is required, since any restriction on the manifestation of conscientious objection which would force a conscientious objector to join the armed forces, or punish them for refusing to do so, would never be a permissible restriction under Article 18(3) of the ICCPR, because it would vitiate

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<sup>36</sup> *Min-Kyu Jeong et al. v. Republic of Korea*, Views adopted 24 March 2011 (Communications Nos. 1642–1741/2007), UN Doc. CCPR/C/101/D/1642-1741/2007, para. 7.3.

<sup>37</sup> *Min-Kyu Jeong et al. v. Republic of Korea*, Views adopted 24 March 2011 (Communications Nos. 1642–1741/2007), UN Doc. CCPR/C/101/D/1642-1741/2007, Individual opinion by Committee members Mr Yuji Iwasawa, Mr Gerald L. Neuman, and Mr Michael O'Flaherty; *Cenk Atasoy and Arda Sarkut v. Turkey*, Views adopted 29 March 2012 (Communications Nos. 1853/2008 and 1854/2008), UN Doc. CCPR/C/104/D/1853-1854/2008, Individual opinion of Committee members Mr Gerald L. Neuman, jointly with members Mr Yuji Iwasawa, Mr Michael O'Flaherty and Mr Walter Kälin; *Jong-nam Kim et al. v. Republic of Korea*, Views adopted 25 October 2012 (Communication No. 1786/2008), UN Doc. CCPR/C/106/D/1786/2008, Individual opinion of Committee member Mr Michael O'Flaherty, Individual opinion of Committee member Mr Walter Kälin, Individual opinion of Committee members Mr Gerald L. Neumann and Mr Yuji Iwasawa.

<sup>38</sup> *Jong-nam Kim et al. v. Republic of Korea*, Views adopted 25 October 2012 (Communication No. 1786/2008), UN Doc. CCPR/C/106/D/1786/2008, Individual opinion of Committee member Mr Walter Kälin.

<sup>39</sup> *Cenk Atasoy and Arda Sarkut v. Turkey*, Views adopted 29 March 2012 (Communications Nos. 1853/2008 and 1854/2008), UN Doc. CCPR/C/104/D/1853-1854/2008, Individual opinion of Committee member Sir Nigel Rodley, jointly with member Mr Krister Thelin and Mr Cornelis Flinterman.

the rights guaranteed in Article 18, contrary to the UN Human Rights Committee's interpretation in General Comment No. 22.<sup>40</sup>

19. Aside from the UN Human Rights Committee which has examined these questions precisely in terms of Article 18 of the ICCPR, the UN Human Rights Council in September 2013 adopted 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 religion or belief",<sup>41</sup> and re-stated and developed the provisions of the former UN Commission on Human Rights resolutions going back to 1989,<sup>42</sup> which have called on States not to imprison conscientious objectors, to take measures aimed at exemption from military service on the basis of a genuinely held conscientious objection, and to make appropriate provisions for conscientious objectors which are compatible with their reasons for conscientious objection. The Republic of Korea was a member of the UN Human Rights Council in 2013 when resolution 24/17 was adopted without a vote, meaning that it was adopted without objection. Similarly, the resolutions on conscientious objection of the UN Commission on Human Rights, which date back to 1989, were adopted without a vote, including those adopted after the Republic of Korea became a member of the Commission in 1993.

20. In the context of the 2012 Universal Periodic Review (UPR) of the Republic of Korea,<sup>43</sup> several State delegations addressed the issue of conscientious objection during the interactive dialogue, variously recommending that the Republic of Korea recognize the right to conscientious objection to military service, abolish imprisonment and free all conscientious objectors currently imprisoned, and introduce an alternative civilian non-punitive service for conscientious objectors in line with international standards.<sup>44</sup> In response, the Republic of Korea commented that, taking account of a

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<sup>40</sup> UN Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 8.

<sup>41</sup> UN Human Rights Council Resolution 24/17 (A/HRC/24/17), adopted without a vote on 27 September 2013, para. 1.

<sup>42</sup> UN Commission on Human Rights Resolutions 1989/59, 1993/84, 1995/83, 1998/77, 2002/45, and 2004/35.

<sup>43</sup> The Universal Periodic Review (UPR) is a State-driven process, under the auspices of the Human Rights Council, that reviews the human rights records of each of the UN Member States. It was created by UN General Assembly resolution 60/251 of March 2006 which established the Council. The reviews are based on information provided by the State under review; information contained in the reports of independent human rights experts and groups (Special Procedures), human rights treaty bodies, and other UN entities; and information from other stakeholders including national human rights institutions and non-governmental organizations (NGOs). Reviews take place through an interactive discussion between the State under review and other UN Member States. During this discussion any UN Member State can pose questions, comments and/or make recommendations to the State under review.

<sup>44</sup> Report of the Working Group on the Universal Periodic Review, Republic of Korea, UN Doc. A/HRC/22/10, 12 December 2012, para. 124.53.

number of factors, the introduction of alternative service was difficult, but that the Government would examine the issue.<sup>45</sup> It made no comment on the other recommendations.

## REGIONAL STANDARDS, INTERPRETATION AND PRACTICE

21. In Europe, at the level of the European Union (EU), resolutions of the European Parliament since 1983 have recognized the right to conscientious objection to military service,<sup>46</sup> and the protection of conscientious objection as derived from the right to freedom of thought, conscience and religion is guaranteed in the EU Charter of Fundamental Rights, which in Article 10 provides:

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

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

22. In the Council of Europe,<sup>47</sup> the Committee of Ministers<sup>48</sup> and the Parliamentary Assembly of the Council of Europe (PACE)<sup>49</sup> have also recognized the right to conscientious objection to military service, and promulgation of legislation in accordance with international standards on

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<sup>45</sup> Report of the Working Group on the Universal Periodic Review, Republic of Korea. Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, UN Doc. A/HRC/22/10/Add.1, 16 January 2013, para. 30.

<sup>46</sup> Resolution of 7 February 1983 (Macciocchi resolution) on conscientious objection (OJ C 068, 14/03/1983 P. 0014); Resolution of 13 October 1989 (Schmidbauer resolution) on conscientious objection and alternative civilian service (OJ C 291, 20/11/1989 P. 0122); and Resolution of 19 January 1994 (Bandres, Molet and Bindi resolution) on conscientious objection in the member states of the Community (OJ C 044, 14/02/1994 P. 0103); see also European Bureau for Conscientious Objection, <http://www.ebco-beoc.org/eu>.

<sup>47</sup> The Council of Europe comprises 47 member states, 28 of which are members of the European Union. The Committee of Ministers, its decision-making body, comprises the Foreign Affairs Ministers of all the member states. It monitors member states' compliance with their undertakings, and in particular supervises the implementation of judgments of the European Court of Human Rights. The Parliamentary Assembly of the Council of Europe (PACE), comprising members of parliament from all 47 member states and representing 800 million Europeans, makes recommendations to which the 47 governments of the Council of Europe, represented in the Committee of Ministers, are obliged to respond. The PACE also issues resolutions and elects the judges of the European Court of Human Rights.

<sup>48</sup> Recommendations R(87)8 regarding conscientious objection to compulsory military service (9 April 1987) and CM/Rec(2010)4 on human rights of members of the armed forces (24 February 2010).

<sup>49</sup> Resolution 337 (1967) and Recommendations 478 (1967), 816 (1977) and 1518 (2001).

conscientious objection to military service has been included in the accession criteria for new members of the Council of Europe where compulsory military service has applied.<sup>50</sup>

23. In 2011, following the UN Human Rights Committee's adoption of its Views in *Yoon and Choi v. Republic of Korea*, the case of *Bayatyan v. Armenia* was considered by the Grand Chamber of the European Court of Human Rights,<sup>51</sup> which adopted the same position as the UN Human Rights Committee. The Court stated 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 or deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 of the European Convention, protecting the right to freedom of thought, conscience and religion. In that case it found that the conviction of a conscientious objector for refusal to perform military service in circumstances where no allowances were made for his conscience and beliefs was a violation of that provision of the European Convention. This is the position that has been applied by the European Court of Human Rights in all subsequent cases on the subject.<sup>52</sup>

24. There are no judgments of the Inter-American Court on Human Rights about conscientious objection to military service and only one decision of the Inter-American Commission on Human Rights, in 2005.<sup>53</sup> That decision, too, preceded the UN Human Rights Committee's Views in *Yoon and Choi v. Republic of Korea* and in interpreting the equivalent provisions of the American Convention on Human Rights<sup>54</sup> followed the earlier case law of the UN Human Rights Committee.<sup>55</sup> However, later in the same year, in approving a friendly settlement, the Inter-American Commission recognized the evolving nature of the right to conscientious objection and made an

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<sup>50</sup> PACE: Opinion No. 193 (1996) on Russia's request for membership of the Council of Europe; Opinion No. 221 (2000), Armenia's application for membership of the Council of Europe; Opinion No. 222 (2000), Azerbaijan's application for membership of the Council of Europe; Opinion No. 234 (2002) Bosnia and Herzegovina's application for membership of the Council of Europe; Opinion No. 239 (2002), The Federal Republic of Yugoslavia's application for membership of the Council of Europe.

<sup>51</sup> *Bayatyan v. Armenia* (Application no. 23459/03), Grand Chamber judgment of 7 July 2011, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105611>.

<sup>52</sup> *Erçep v. Turkey* (Application no. 43965/04), Judgment of 22 November 2011 (available in French only) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107532>; *Savda v. Turkey* (Application no. 42730/05) Judgment of 12 June 2012 (available in French only), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111414>; *Tarhan v. Turkey* (Application no. 9078/06) Judgment of 17 July 2012 (available in French only), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112199>; *Buldu and Others v. Turkey* (Application no. 14017/08), Judgment of 3 June 2014 (available in French only), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144352>.

<sup>53</sup> *Cristián Daniel Sahli Vera et al. v. Chile*, Case 12.219, Decision of 10 March 2005, Report No. 43/05.

<sup>54</sup> American Convention on Human Rights (Pact of San José), 1144 UNTS 123, OASTS 36, signed 22 November 1969, entered into force 18 July 1978.

<sup>55</sup> American Convention on Human Rights Articles 12 and 6(3)(b) are similar to Articles 18 and 8(3)(c)(ii) of the ICCPR.



explicit reference to General Comment No. 22 of the UN Human Rights Committee.<sup>56</sup> In that case, the Bolivian State, represented by the Ministry of Defence, agreed, despite the absence of legislation to that effect, to provide a conscientious objector, who had refused to perform military service, with a document of completed military service without levying on him the military tax normally imposed on those declared exempt, and also to issue a Ministerial Resolution stipulating that in the event of an armed conflict he would not be called up. The State also undertook “in accordance with international human rights law, to include the right to conscientious objection to military service in the preliminary draft of the amended regulations for military law currently under consideration by the Ministry of Defense and the armed forces”, and “to encourage congressional approval of military legislation that would include the right to conscientious objection to military service”. In approving the terms of the friendly settlement as being compatible with the American Convention,<sup>57</sup> the Inter-American Commission reiterated that the purpose of the friendly settlement procedure was to reach a settlement on the basis of respect for the human rights recognized in the American Convention on Human Rights, and that the State’s acceptance of it was an expression of its good faith to comply with its obligations under the Convention.<sup>58</sup>

25. The Ibero-American Convention on Young People’s Rights, Article 12, provides:

“Young people have the right to form a conscientious objection against compulsory military service.”

Bolivia, Costa Rica, the Dominican Republic, Ecuador, Honduras, Spain and Uruguay are States parties to the Convention.

## PUNISHMENT OF CONSCIENTIOUS OBJECTORS VIOLATES HUMAN RIGHTS

26. In *Yoon and Choi v. Republic of Korea* and subsequent individual petitions on which the UN Human Rights Committee has adopted Views, the Committee has concluded that the prosecution,

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<sup>56</sup> *Alfredo Diaz Bustos v. Bolivia*, Report No. 97/05, 27 October 2005.

<sup>57</sup> As provided under the American Convention on Human Rights, the main function of the Inter-American Commission on Human Rights is to promote respect for and defence of human rights (Article 41). Its powers include taking action on petitions and other communications submitted to it alleging violations of rights protected by the American Convention (Articles 41(f) and 44). In dealing with such petitions its procedures include placing itself at the disposal of the parties with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the Convention (Article 48(1)(f)).

<sup>58</sup> The settlement has been implemented in part but as of the end of 2013 the last-mentioned two measures were pending full compliance, and the Inter-American Commission stated its intention to continue to monitor the state’s compliance with its undertakings. Inter-American Commission on Human Rights, Annual Report 2013, II.D, Status of compliance with the recommendations of the IACHR: Case 12.475, Report No. 97/05, Alfredo Díaz Bustos (Bolivia), paras 277–93, <http://www.oas.org/en/iachr/docs/annual/2013/docs-en/AnnualReport-Chap2-D.pdf>.

conviction and sentencing of conscientious objectors as a result of a system of compulsory military service which provides no special accommodation for conscientious objectors violates Article 18 of the ICCPR.<sup>59</sup> Similarly, the UN Working Group on Arbitrary Detention has ruled that imprisonment of conscientious objectors to military service is a form of arbitrary detention, resulting from the exercise of rights and freedoms guaranteed by Article 18 of the Universal Declaration of Human Rights and the ICCPR.<sup>60</sup> The most recent resolution on conscientious objection by the UN Human Rights Council, resolution 24/17 adopted in September 2013, emphasized that “States should take the necessary measures to refrain from subjecting individuals to imprisonment solely on the basis of their conscientious objection to military service and to repeated punishment for refusing to perform military service, and recalls that repeated punishment of conscientious objectors for refusing a renewed order to serve in the military may amount to punishment in breach of the legal principle *ne bis in idem*”.<sup>61</sup>

27. The repeated punishment of conscientious objectors to military service is specifically addressed in the UN Human Rights Committee’s General Comment No. 32 on Article 14 of the ICCPR:<sup>62</sup>

“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 a military or special tribunal. ... Repeated punishment of conscientious objectors for not having obeyed a renewed order

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<sup>59</sup> *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Views adopted 3 November 2006 (Communications Nos. 1321/2004 and 1322/2004), UN Doc. CCPR/C/88/1321-1322/2004; *Eu-min Jung, Tae-Yang Oh, Chang-Geun Yeom, Dong-hyuk Nah, Ho-Gun Yu, Chiyun Lim, Choi Jin, Tae-hoon Lim, Sung-hwan Lim, Jae-sung Lim, and Dong-ju Goh v. Republic of Korea*, Views adopted 23 March 2010 (Communications Nos. 1593–1603/2007), UN Doc. CCPR/C/98/D/1593-1603/2007; *Min-Kyu Jeong et al. v. Republic of Korea*, Views adopted 24 March 2011 (Communications Nos. 1642–1741/2007), UN Doc. CCPR/C/101/D/1642-1741/2007; *Cenk Atasoy and Arda Sarkut v. Turkey*, Views adopted 29 March 2012 (Communications Nos. 1853/2008 and 1854/2008), UN Doc. CCPR/C/104/D/1853-1854/2008; *Jong-nam Kim et al. v. Republic of Korea*, Views adopted 25 October 2012 (Communication No. 1786/2008), UN Doc. CCPR/C/106/D/1786/2008.

<sup>60</sup> Opinion No. 8/2008 (Colombia) adopted 8 May 2008 and Opinion No. 16/2008 (Turkey) adopted 9 May 2008, in Opinions adopted by the Working Group on Arbitrary Detention, UN Doc. A/HRC/10/21/Add.1, pp. 110–14 and pp. 139–47, respectively; <http://www2.ohchr.org/english/bodies/hrcouncil/10session/reports.htm>; also available on the Working Group’s online database <http://www.unwgadatabase.org/un>.

<sup>61</sup> UN Human Rights Council Resolution 24/17 (A/HRC/24/17), adopted without a vote on 27 September 2013, para.10.

<sup>62</sup> Article 14 covers the right to equality before courts and tribunals and to a fair trial.

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.”<sup>63</sup>

## STATE PRACTICE

28. Although exemptions to military service in States which imposed conscription had, at various times in previous centuries, been granted to specific religious groups on the basis of their pacifist belief, legal provisions explicitly exempting individuals from military service on the basis of their conscientious objection were in fact first implemented during the First World War when States with a long tradition of purely voluntary military service felt obliged to introduce conscription. Subsequently a number of States applied the principle to obligatory military service in peacetime, making an alternative civilian service available. Within the last 50 years, as shown in Annex 2, the number of States where conscientious objection to military service has been acknowledged in law has increased to such a point that the number of States recognizing conscientious objection to military service greatly exceeds those which continue to impose obligatory military service with no allowance for conscientious objectors.

29. Pre-First World War legislation enabling conscription in Australia and New Zealand was the first to include provisions regarding conscientious objectors; but conscription was not fully enforced in New Zealand until 1969 and in Australia not until 1939.

30. The provisions in the United Kingdom's Military Service Act of 27 January 1916, which in certain circumstances exempted individuals from the newly-imposed conscription on grounds of conscience, were the first to take effect in practice. The following year, Canada and the United States of America adopted similar provisions. One of the arguments used to justify making provision for conscientious objection was the belief of some military officers that the deployment of conscripts who had profound objections to what they were doing would have a negative effect on the morale and efficiency of the armed forces.

31. Following the developing trend of recognizing conscientious objection, a number of European States which conscripted in time of peace as well as war enacted provisions which introduced an unarmed “alternative service” for conscientious objectors: Denmark in December 1917, Sweden in 1920, the Netherlands and Norway in 1922, and Finland in 1931.

32. In a decree of January 1919, signed by Vladimir Ilyich Lenin, the Soviet Union, too, exempted conscientious objectors from military service. Although never formally repealed, this decree, however, ceased to be applied under Joseph Stalin. This is the only instance where a State which had recognized conscientious objection to military service subsequently reversed the policy. (It will be noted that since the breakup of the Soviet Union in the early 1990s, legislative or constitutional

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<sup>63</sup> UN Human Rights Committee, General Comment No. 32, Article 14: The right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, paras 54–5 (footnote omitted), [http://www.un.org/ga/search/view\\_doc.asp?symbol=CCPR/C/GC/32](http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/GC/32).

provisions for conscientious objection have been introduced in all of its former republics except Tajikistan and Turkmenistan.)

33. In 1940, Uruguay brought in legislation permitting conscription which allowed for the exemption of conscientious objectors. It was the first State outside Europe to do so, and brought the number of States with legislative provision for conscientious objection to eleven.

34. After the Second World War, the defeated powers were encouraged formally to eschew militarism. Article 4.3 of the 1949 *Grundgesetz* (Basic Law) of the German Federal Republic, explicitly recognized the right of conscientious objection to military service. Article 9 of the 1947 Japanese Constitution stated that Japan would not maintain military forces. Although over time this provision has been interpreted to allow for a "Self-Defence Force", which is military in all but name, this force has remained voluntary in nature, thus the question of conscientious objection has not arisen.

35. Between 1949 and 2006, legislative or constitutional provisions which recognized conscientious objection to military service (either explicitly, or implicitly by instituting alternative service for conscientious objectors) were promulgated in a further 45 of the current Member States of the United Nations, bringing the total to 57, including members of all regional groups (see Annex 2).

36. Such provisions have also been promulgated in jurisdictions which are not UN Member States, including Taiwan, and the secessionist republics of Abkhazia (Georgia) and Transdniestria (Moldova).

37. In addition, Constitutional Courts of States where there is no legislation expressly addressing conscientious objection to military service have nevertheless ruled that the right is protected by constitutional provisions guaranteeing freedom of conscience.

38. For example, in a landmark decision in 2009,<sup>64</sup> the Constitutional Court of Colombia overturned its previous jurisprudence. The Court had been asked to declare unconstitutional Article 27 of the Military Recruitment Act, which gives total exemption from military service to indigenous and disabled persons, on the grounds that by not granting similar exemption to conscientious objectors it was in breach of constitutional guarantees of freedom of conscience and religion and prohibiting discrimination. While finding that it had no bearing on the enforceability of the specific article in question, the Court nonetheless ruled that the absence of procedures whereby the right of conscientious objection to military service could be exercised was a serious omission, and called upon the Congress to adopt legislation to this end. The Court considered that, given the fundamental nature of the right to conscientious objection, the right of an individual facing imminent conscription could be enforced by means of a "*tutela*" action that indicated the incompatibility of certain activities inherent to military service with proven, serious and real conscientious objections. Although, as of early 2014, the legislative provisions called for by the

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<sup>64</sup> *Comunicado No.43 – Expediente D7685 Sentencia C-728/09*, 14 October 2009, <http://www.corteconstitucional.gov.co/relatoria/2009/C-728-09.htm>.

Constitutional Court had not been drafted, some conscientious objectors have, by means of *tutelas*, indeed succeeded in obtaining release from military service.<sup>65</sup>

39. On 10 October 2013, the Constitutional Court in the “Turkish Republic of Northern Cyprus” (TRNC) issued its judgment on the case of conscientious objector Murat Kanatlı,<sup>66</sup> which had been referred to it by the Military Court. The Court held that the unavailability of alternative service constitutes an interference with the rights safeguarded by Article 23 of the Constitution of the TRNC. It also added that the legislature has a duty to adopt laws and regulations establishing alternative service to military service and, when doing so, it should review the constitutional provision that relates to the duty of armed service. In its ruling, the Constitutional Court cited jurisprudence of the European Court of Human Rights<sup>67</sup> and of the UN Human Rights Committee<sup>68</sup> which recognizes that, although the right of conscientious objection is not explicitly referred to in the European Convention on Human Rights or the International Covenant on Civil and Political Rights, 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 or deeply and genuinely held religious or other beliefs, is protected under the guarantees of the right to freedom of thought, conscience, and religion enshrined in both treaties.

40. In Kyrgyzstan also, on 19 November 2013, the Constitutional Chamber of the Supreme Court ruled that the existing provisions of the Military Service Law that established alternative service for conscientious objectors did not offer a truly civilian alternative service, as guaranteed by Article 56(2) of the Constitution, especially because they required an individual performing alternative service to make monetary contributions to a special account of the Ministry of Defence, and also because alternative service was supervised by military personnel, and that those who performed it were automatically entered into the military reserves.

41. Apart from the Republic of Korea, only in Chile,<sup>69</sup> where recruitment to military service has in practice been voluntary since 2005, and Turkey<sup>70</sup> does the latest jurisprudence from the highest

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<sup>65</sup> Most recently, on 17 June 2014, a *tutela* was granted to conscientious objector Mario Andrés Hurtado Cardozo by *Magistrada* Sandra Patricia Salazar Cuéllar of the *Sala de Casación Penal* of the Supreme Court, who ordered military district 59, located in the municipality of Soacha, to take the necessary action to regularize his situation within two months.

<sup>66</sup> Constitutional Court of the TRNC, D2.2013, Case No. 13/2011, 10 October, 2013. (The reporting of this decision, including its references to the “Constitution of the TRNC” does not imply any position on the part of the authors on the legal status of the northern part of Cyprus or of its de facto administration.)

<sup>67</sup> Cases of the European Court of Human Rights cited in the judgment of the TRNC Constitutional Court included *Bayatyan v. Armenia* (Application no. 23459/03), Grand Chamber judgment of 7 July 2011; *Erçep v. Turkey* (Application no. 43965/04), Judgment of 22 November 2011; and, in particular, *Savda v. Turkey* (Application no. 42730/05), Judgment of 12 June 2012, where the objection was not based on religious grounds.

<sup>68</sup> The TRNC Court’s judgment also cited the UN Human Rights Committee case of *Cenk Atasoy and Arda Sarkut v. Turkey*, Views adopted 29 March 2012 (Communications Nos. 1853/2008 and 1854/2008), UN Doc. CCPR/C/104/D/1853-1854/2008.

<sup>69</sup> See Inter-American Commission on Human Rights, *Cristián Daniel Sahli Vera et al. v. Chile*, Case 12.219, Decision of 10 March 2005, Report No. 43/05.

domestic courts continue to insist that no right of conscientious objection to military service can be claimed.<sup>71</sup>

42. Four of the States parties to the Ibero-American Convention on Young People's Rights, namely Bolivia, Costa Rica, the Dominican Republic and Honduras, are not among the 57 States which have domestic legislative or constitutional provisions regarding conscientious objection to military service. Costa Rica had, however, abolished its own armed forces in 1949, and was a lead sponsor of Human Rights Council Resolution 24/17 on conscientious objection to military service (see para. 19 above). Honduras co-sponsored that resolution; in both Honduras and the Dominican Republic all military recruitment is currently voluntary. The position of Bolivia is somewhat more ambiguous; it continues to conscript with no provisions for conscientious objection, and entered a reservation to the relevant article of the Ibero-American Convention. Nevertheless, in 2003 a Constitutional Court decision had indicated that it was open to individual conscientious objectors to petition the armed forces authorities citing freedom of conscience.<sup>72</sup> And two years later, in a Friendly Settlement before the Inter-American Commission on Human Rights, Bolivia made a (still unimplemented) pledge "to encourage congressional approval of military legislation that would include the right to conscientious objection to military service" (see para. 24 above).

43. Mexico, which has signed but not ratified the Ibero-American Convention on Young People's Rights, has indicated that in the event that a person did declare a conscientious objection to the not particularly onerous obligatory military training requirement, he might by citing freedom of conscience be permitted to substitute a civilian alternative.<sup>73</sup> This assertion has however not yet been tested in practice.

44. Although the Charter of Fundamental Rights of the European Union guarantees the right of conscientious objection to military service (see para. 21 above), two of the 28 EU Member States, namely Ireland and Malta, are not included in the list of States which have constitutional or legislative provision for conscientious objection. In both of these States, however, military recruitment has always been on a voluntary basis. Ireland was a co-sponsor of UN Human Rights Council Resolution 24/17 on conscientious objection to military service (see para. 19 above).

45. In addition to Costa Rica, Honduras and Ireland, three other States which have never had domestic provisions on conscientious objection to military service, but where military recruitment is

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<sup>70</sup> See UN Human Rights Committee, *Cenk Atasoy and Arda Sarkut v. Turkey*, Views adopted 29 March 2012 (Communications Nos. 1853/2008 and 1854/2008), UN Doc. CCPR/C/104/D/1853-1854/2008.

<sup>71</sup> By the time the European Court of Human Rights considered the case of *Bayatyan v. Armenia* (see para. 23 above) Armenia had introduced an Alternative Service Law.

<sup>72</sup> See Replies to the list of issues to be taken up in connection with the third periodic report of the Plurinational State of Bolivia (CCPR/C/BOL/3), 23 September 2013, UN Doc. CCPR/C/BOL/Q3/Add.1, paras 226-8 (available in Spanish only).

<sup>73</sup> See Replies to the list of issues to be taken up in connection with the consideration of the fifth periodic report of Mexico (CCPR/C/MEX/5), 18 January 2010, UN Doc. CCPR/C/MEX/Q5/Add.1 para. 233 (available in Spanish only).

on a voluntary basis, namely Nicaragua, Panama and San Marino, also co-sponsored UN Human Rights Council Resolution 24/17.

46. Finally, although Israel has no constitutional or legislative provisions recognizing conscientious objection to military service, the Minister of Defence has in the past exempted a small minority of conscientious objectors from military service on the advice of an internal committee of the Israeli Defence Force.

47. Thus, to the 57 Member States of the United Nations listed in Annex 2 as having made legislative or constitutional provision for conscientious objection to military service, should be added a further 12,<sup>74</sup> where the right has been confirmed judicially, or through the ratification of an international instrument which expressly includes it, or promoted at the international level, or the concept has been acknowledged in practice.

48. While the resultant total of 69 still represents a minority of the 193 UN Member States, of the remaining 124 UN Member States, 21 have no armed forces,<sup>75</sup> and in 67 all military service is presently voluntary,<sup>76</sup> so that the question of conscientious objection to obligatory military service does not arise in practice in 88 of them.

49. Of the remaining 36 UN Member States which still formally impose obligatory military service and have never in any way acknowledged conscientious objection to military service, the majority have never been faced with an instance of a person liable to military service claiming conscientious objections (see Annex 3). There are various different explanations for this. The requirement to perform military service may not be in fact imposed systematically, or universally. In Peru, for instance, as in Chile, the conscription provisions are now simply held in reserve against the possibility that in a particular year fewer volunteers come forward to perform military service than are required by the armed forces. Elsewhere, those who might have been conscientious objectors may not be motivated to declare themselves as such where no provisions exist, instead seeking simply to avoid or evade military service. Sometimes, as in the Democratic People's Republic of Korea, the overall level of repression of dissent is such that there is no record of it being expressed narrowly with regard to the military service requirement. Likewise, although conscientious objection has been given as a reason for persons fleeing Syria and Iran, there is no record that anyone has attempted, while within the country, to refuse to perform military service. Of the 36,

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<sup>74</sup> Bolivia, Colombia, Costa Rica, the Dominican Republic, Honduras, Ireland, Israel, Malta, Mexico, Nicaragua, Panama, and San Marino.

<sup>75</sup> Andorra, Dominica, Grenada, Haiti, Iceland, Kiribati, Liechtenstein, Maldives, Mauritius, Micronesia, Monaco, Nauru, Palau, Samoa, Solomon Islands, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Tonga, Tuvalu, and Vanuatu.

<sup>76</sup> Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Bhutan, Botswana, Brunei, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Djibouti, El Salvador, Ethiopia, Fiji, Gabon, Gambia, Ghana, Guyana, India, Iraq, Jamaica, Japan, Jordan, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Libya, Malawi, Malaysia, Mali, Myanmar, Namibia, Nepal, Niger, Nigeria, Oman, Pakistan, Papua New Guinea, Philippines, Qatar, Rwanda, Saudi Arabia, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sri Lanka, Suriname, Swaziland, Timor Leste, Trinidad and Tobago, Uganda, United Arab Emirates, United Republic of Tanzania, Zambia, and Zimbabwe.

only Eritrea, the Republic of Korea, Singapore, Turkey and Turkmenistan are believed in 2013 to have held conscientious objectors in prison for their refusal of military service.

50. Although, as noted in para. 28 above, provisions allowing the exemption of conscientious objectors from military service were first implemented in the context of wartime conscription, most States which currently apply conscientious objection provisions are not engaged in an armed conflict. Two States where political tensions with a neighbour are perceived as constituting a major security threat have nevertheless made provision for conscientious objection to military service, despite the fact that the adversary in question has no such provision: Taiwan has implemented an Alternative Service Law since 15 January 2000, and on 8 June 2013 Armenia introduced legal amendments which finally established a truly civilian alternative service independent of the control of the military.



## CONCLUSION

51. The authors submit that compulsion to engage in military service contrary to an individual's conscience or religion or belief, and punishment of such individuals for their refusal to perform such service, is a violation of their right to freedom of thought, conscience and religion or belief. Moreover, a system of compulsory military service without special accommodation for those who are conscientious objectors because of their religious or other convictions or beliefs amounts to an unjustified interference with the right to freedom of thought, conscience, and religion or belief and is not compatible with international human rights law. This is clear from the comments and jurisprudence of the UN Human Rights Committee and other international human rights bodies and mechanisms set out in this submission, and has been reflected in the legislation of the majority of states affected.



## **ANNEX 1. DESCRIPTION OF THE AUTHORS**

### **Amnesty International**

Amnesty International is a global movement of more than three million supporters, members and activists in over 150 countries who campaign to secure the observance of the Universal Declaration of Human Rights and other international human rights standards throughout the world. It monitors law and practices in countries throughout the world in the light of international human rights and humanitarian law and standards. Its mission includes undertaking research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination, within the context of its work to promote all human rights. It is concerned solely with the impartial protection of internationally recognized human rights; it does not take a position on the views of those whose rights it seeks to protect. It is independent of any government, political ideology, economic interest or religion, and is financially autonomous, funded mainly by its membership and supporters. It has Special Consultative Status to the Economic and Social Council of the United Nations. Amnesty International's global movement is made up of national membership organizations in countries throughout the world (including in the Republic of Korea) and an International Secretariat (which is registered in England and Wales as a not for profit company, company registration 606776, and based in London, United Kingdom).

### **Friends World Committee for Consultation (Quakers)**

Friends World Committee for Consultation (Quakers) is the body which links the Religious Society of Friends (Quakers) around the world. It was set up in 1937 and has its headquarters in London (United Kingdom). Since 1948 it has enjoyed Consultative Status to the Economic and Social Council of the United Nations as an international non-governmental organization. Since 2002, this has been General Consultative Status. Since the founding of the United Nations in 1945, Quakers have shared that organization's aims and supported its efforts to abolish war and promote peaceful resolution of conflicts, human rights, economic justice and good governance. Its work at the United Nations is primarily carried out through the Quaker United Nations Offices in Geneva and New York, and annual representation at the United Nations Commission on Crime Prevention and Criminal Justice in Vienna.

### **The International Commission of Jurists**

The International Commission of Jurists (the ICJ), composed of 60 eminent judges and lawyers from all regions of the world, promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. It was set up in 1952; it has its headquarters in Geneva (Switzerland) and is active on the five continents; it has more than 60 national sections and affiliated organizations. The ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession. The International Commission of Jurists has consultative status to the United Nations Economic and Social Council, and the United Nations Organization for Education, Science and Culture (UNESCO), participatory status with the Council of Europe and observer status with the

African Commission on Human and Peoples' Rights. The organization also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union.

#### **The International Fellowship of Reconciliation**

The International Fellowship of Reconciliation (IFOR) is an international non-governmental organization founded in 1919 as an umbrella organization for the Fellowships of Reconciliation established in various European and North American countries as a result of a Christian pacifist conference held in Constance, southern Germany on the eve of the First World War. Today it connects organizations in more than 50 countries worldwide, all of which are united in their opposition to war and preparation for war, and which work in various ways to promote the peaceful resolution of conflicts. Since 1979, IFOR has been in Special Consultative Status with the Economic and Social Council of the United Nations. Support for conscientious objectors to military service has from the beginning been one of IFOR's fields of action; in recent years it has made regular submissions to the Universal Periodic Review process of the UN Human Rights Council and to the Human Rights Committee set up under the International Covenant on Civil and Political Rights regarding military service, conscientious objection and related issues in reporting states.

#### **War Resisters' International**

War Resisters' International is an international non-governmental organization with more than 80 affiliated organizations in more than 40 countries. It enjoys Special Consultative Status to the Economic and Social Council of the United Nations. War Resisters' International has been working for the right to conscientious objection to military service since its foundation in 1921. The right to conscientious objection is also the focus of many of its affiliated organizations. Its work at the United Nations has focused on the Human Rights Committee. War Resisters' International has also presented cases of conscientious objectors to the UN Working Group on Arbitrary Detention. War Resisters' International has published global and regional studies on the right to conscientious objection in 1967, 1990, 1998, and 2008, and in 2013 created a new interactive online "Conscientious objectors' guide to the international human rights system". It maintains a global overview on recruitment and the right to conscientious objection, in close cooperation with its affiliated organizations and other partners.

## ANNEX 2. FIRST LEGISLATIVE OR CONSTITUTIONAL RECOGNITION OF CONSCIENTIOUS OBJECTION TO MILITARY SERVICE

The dates given are of the first explicit reference, in either legislation or a constitutional document, applicable in a current member state of the United Nations, either to conscientious objection to military service or to an alternative service for conscientious objectors.

1903	Australia	Defence Act
1912	New Zealand	Defence Amendment Act, Article 65.2
1916	United Kingdom	Military Service Act, 27 January
1917	Canada	act introducing conscription
	United States of America	Act of 18 May
	Denmark	Alternative Service Act, 13 December
1920	Sweden	Alternative Service Schemes Act, 21 May
1922	Netherlands	Constitutional amendment
	Norway	Civilian Conscript Workers Act, 24 March
1931	Finland	Alternative Service Act, 4 June
1940	Uruguay	Compulsory Military Service Act, Article 14.1
1949	Germany	Grundgesetz ("Basic Law") of the Federal Republic of Germany, Article 4.3 (the first provisions in the German Democratic Republic dated from 1964)
1955	Austria	National Service Act
1963	France	Act No. 1255/63, 21 December
	Luxembourg	Act of 23 July, Article 8
1964	Belgium	Act of 3 June
1972	Italy	Act No. 772/1972
1976	Portugal	Constitution, Article 41
1978	Spain	Constitution

1988	Brazil	Constitution, Article 143.1
	Marshall Islands	Constitution, Article 11
	Poland	Constitution, Article 85
1989	Hungary	Constitution, Article 70
1990	Croatia	Constitution, Article 47.2
	Latvia	Law on Substitute Service (of the Latvian Soviet Socialist Republic)
	Lithuania	Law on Alternative Service (of the Lithuanian Soviet Socialist Republic)
1991	Bulgaria	Constitution, Article 59.2
	Czechoslovakia (now the Czech Republic and Slovakia)	Civilian Service Act, No.18/1992
	Estonia	Constitution, Article 124
	Moldova	Alternative Service Act, No. 633/91
1992	Cape Verde	Constitution, Article 271
	Cyprus	National Guard Act, No. 2/1992, 9 January
	Georgia	Military Service Act, Article 12
	Paraguay	Constitution, Article 129
	Slovenia	Constitution
	Uzbekistan	Universal Military Service Act, Article 52
1993	Angola	Act No. 1/93, Article 10
	Russian Federation	Constitution, Article 59.3
1994	Belarus	Constitution, Article 57
	Kyrgyzstan	Alternative (Non-military) Service Act
1995	Argentina	Act 24429/95, 5 January, Article 20

	Azerbaijan	Constitution, Article 76
1996	Bosnia-Herzegovina	parallel Defence Acts in the Federation and in the Republika Srpska
	Romania	Act No. 46/1996, Article 4
	Switzerland	Civilian Service Act
	Ukraine	Constitution, Article 35.3
1997	Greece	Act No. 2510/97
	Mozambique	Obligatory Military Service Act
1998	Albania	Constitution, Article 166
	Ecuador	Constitution, Article 161
2001	The FYR of Macedonia	Defence Act, Article 8
2002	Mongolia	Act "On Military Service Duties of Citizens and on the Legal Status of Military Personnel"
2003	Armenia	Alternative Service Act
	Guatemala	National Civic Service Act, No. 20/2003
	Serbia and Montenegro (Montenegro gained independence in 2006)	Constitution, Article 58





### ANNEX 3. UN MEMBER STATES WHICH CONSCRIPT BUT HAVE NEVER RECOGNIZED CONSCIENTIOUS OBJECTION TO MILITARY SERVICE

	Normal duration of obligatory military service (in months)	Conscripts as a proportion of the armed forces (if known)	Approx. size of annual "conscript pool" (male population born in 1994)	Total armed forces strength (both expressed as a percentage of the "conscript pool")	Number of conscripts	Documented cases of conscientious objectors imprisoned since 2000
Algeria	18	57.7	342,895	37.9	21.9	1
Benin	18		108,496	6.4		–
Chile	12	19.2	141,500	43.4	8.3	–
China	24	36.5	10,406,544	22	8	–
Cuba	24		72,823	67.3		–
DPR Korea	60		207,737	572.8		–
Egypt	12	68.4	738,405	56	38.3	1
Eritrea	16		66,829	301.9		16
Eq. Guinea	24		1,320	17.8		–
Guinea	24		118,443	8.2		–
Guinea-Bissau	24		17,639	25.2		–
Iran	24	42	715,111	73.1	30.8	–
Kazakhstan	12		125,332	31.1		–
Madagascar	18		248,184	5.4		–
Mali	24		158,031	4.7		–
Morocco	18	51	300,327	65.2	33.3	–
<b>Rep. of Korea</b>	<b>21</b>		<b>365,760</b>	<b>179.1</b>		<b>10,000 (approx.)</b>
Senegal	24		145,509	9.3		–
Singapore	24	58.6	27,098	267.5	156.8	52
Sudan	24		532,030	45.9		–
Syria	30		256,698	69.3		–

Tajikistan	24		76,430	21.3		–
Thailand	24	39	533,424	70.4	26.4	–
Togo	24		74,036	11.5		–
Tunisia	12	70.4	90,436	72.9	51.3	–
Turkey	15	70.4	700,079	72.9	51.4	13
Turkmenistan	24		53,829	40.9		37
Venezuela	30	2.8	277,210	41.5	1.2	–
Vietnam	24		847,743	56.9		–
Yemen	24		287,141	23.2		–

In Sao Tome e Principe there is reportedly provision for obligatory military service, but no details can be traced. The army is described by the CIA World Factbook as “tiny”. In five other states, Cambodia, Cote d’Ivoire, Indonesia, Mauritania, and Peru, there is legislative provision for conscription but this has not been implemented in recent years. In none of the five have any cases of conscientious objection been recorded.

## Notes

### Principal Sources:

International Institute for Strategic Studies, *The Military Balance 2014* (Routledge, London, February 2014).

Central Intelligence Agency, USA, *CIA World Factbook*, at [www.cia.gov](http://www.cia.gov), consulted August 2014.

War Resisters’ International, London, *World survey of conscription and conscientious objection to military service*, at [www.wri-irg.org/co/rtba/index.html](http://www.wri-irg.org/co/rtba/index.html), consulted August 2014.

Forum 18 News Service archives ([www.forum18.org](http://www.forum18.org))

Submissions in 2003 and 2005 by the Jehovah’s Witnesses to the Office of the UN High Commissioner for Human Rights.

Where there are varying durations of military service, that quoted is for service in the army before any reduction (e.g. reflecting educational qualifications). In some cases conscription is imposed only intermittently, or selectively, hence the number of conscripts is only a small proportion of the “conscript pool”, the CIA’s estimate from 2010 of the annual number of males reaching the age of 16. It should be noted that in Eritrea women as well as men are liable for conscription.

The number of conscientious objectors imprisoned in each State is a minimum figure, reflecting the number of clearly documented cases of the detention of identifiable individuals who refused the initial call-up to military service citing conscientious objections. Care has been taken, particularly when dealing with figures quoting the total numbers imprisoned at different times, to

avoid double-counting. Sometimes the detention took the form of forced recruitment, but persons who declared themselves as conscientious objectors only after some time in military service are not included, nor are any who were not (or have not yet been) sentenced to imprisonment.

**Eritrea.** The figure given represents the conscientious objectors named in War Resisters' International's "Prisoners for Peace" database (<http://wri-irg.org/node/4718>), including some detained since before the year 2000.

**Republic of Korea.** According to the Jehovah's Witnesses official website, 17,840 of their members have been imprisoned as conscientious objectors since 1950. In February 2004, a joint submission to the UN Human Rights Committee by MINBYUN—Lawyers for a Democratic Society, Korea Solidarity for Conscientious Objection, and War Resisters' International reported that the cumulative total had reached "about 10,000". This estimate included 2,719 conscientious objectors who had been imprisoned in the four-year period 2000–2003, and therefore rather fewer than 7,500 imprisoned before 2000. If this is accurate, the number of Jehovah's Witness conscientious objectors imprisoned since 2000 would alone exceed 10,000. Although Jehovah's Witnesses are the overwhelming majority, the 2004 report referred to a "handful" of "Seventh Day Adventists and others". Seventeen individual cases of conscientious objectors imprisoned since 2000 who were neither Jehovah's Witnesses nor Seventh Day Adventists are clearly documented in the sources.

**Singapore.** The Jehovah's Witnesses indicated that 26 conscientious objectors were imprisoned as of the end of 2002; Amnesty International's 2007 Report indicates that at least eight new imprisonments took place in 2006; Fautré, W. (ed.), *Freedom of Religion or Belief and Blasphemy: Prisoners List: World Report 2013* (Human Rights Without Frontiers International, Brussels, December 2013) indicates that 18 conscientious objectors were currently imprisoned. Precise information for intervening dates has not been traced.

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