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THE INVENTION OF A HUMAN RIGHT: CONSCIENTIOUS OBJECTION AT THE UNITED NATIONS, 1947–2011

Jeremy K. Kessler*

The right of conscientious objection to military service is the most startling of human rights. While human rights generally seek to protect individuals from state power, the right of conscientious objection radically alters the citizen-state relationship, subordinating a state's decisions about national security to the beliefs of the individual citizen. In a world of nation-states jealous of their sovereignty, how did the human right of conscientious objection become an international legal doctrine? By answering that question, this Article both clarifies the legal pedigree of the human right of conscientious objection and sheds new light on the relationship between international human rights law and national sovereignty.

In 2006, the United Nations Human Rights Committee ("HRC"), for the first time in its history, found that a member state had violated its citizen's right of conscientious objection to military service under Article 18 of the International Covenant on Civil and Political Rights ("ICCPR").¹ Yet the dissent of the Committee's American member, Ruth Wedgwood, cast a shadow over the proceedings. Wedgwood noted that the Committee offered "no evidence from the Covenant's negotiating history to suggest" that such a specific right was meant to be contained in Article 18.² While this Article affirms Wedgwood's reading of the ICCPR's negotiating

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1. *Yoon & Choi v. Republic of Korea*, Comm. No. 1321-1322/2004, Rep. of the Human Rights Comm., Nov. 3, 2006, U.N. Doc. A/62/40; GAOR, 62nd Sess., Supp. No. 40, vol. II, annex VII, § 5, at 195 (Nov. 3, 2006).

2. *Id.* at app. (Dissenting Opinion by Committee Member Ms. Ruth Wedgwood).

history, it unearths the later political and legal processes by which the anti-war and anti-colonial movements successfully lobbied several UN bodies—not just the HRC—to identify Article 18 with a human right of conscientious objection.³ In telling this neglected story, the Article provides what John Witt has called a “social history of international law.”⁴ This kind of social history has contemporary legal relevance, as it can identify the multiple sources of a doctrine’s legitimacy, sources that international lawyers risk discounting when they rely on a textualist reading of particular legal instruments.

Beyond its practical significance, the history of the human right of conscientious objection also contributes to our understanding of the fraught relationship between international human rights law and national sovereignty.⁵ Recently, Samuel Moyn’s path-breaking history of human rights has given vivid expression to the tensions

3. Previous histories of the human right of conscientious objection neglect important elements of the story. The two most complete and current works are Hitomi Takemura, *International Human Right of Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders* 83–110 (2009) and Michael Hovey, *Interceding at the United Nations: The Human Right of Conscientious Objection*, in *Transnational Social Movements and Global Politics* 214–24 (Jackie Smith, Charles Chatfield & Ron Pagnucco eds., 1997). The former is a largely doctrinal treatment while the latter slights the pre-1970 history, the crucial role played by anti-colonial politics, and the jurisprudence of the Human Rights Committee. For earlier treatments, see J.M. Engram, *Conscientious Objection to Military Service: A Report to the United Nations Division of Human Rights*, 12 Ga. J. Int’l & Comp. L. 359 (1982); Matthew Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Right*, 21 Cal. W. Int’l L.J. 31 (1990–91); Marie-France Major, *Conscientious Objection to Military Service: The European Commission on Human Rights and the Human Rights Committee*, 32 Cal. W. Int’l L.J. 1 (2001); Patricia Schaffer & David Weissbrodt, *Conscientious Objection to Military Service as a Human Right*, 9 Rev. Int’l Commission Jurists 33 (1972); and David Weissbrodt, *The United Nations Commission on Human Rights Confirms Conscientious Objection to Military Service as a Human Right*, 35 Netherlands Int’l L. Rev. 53 (1988).

4. John Fabian Witt, *A Social History of International Law: Historical Commentary, 1861–1900*, in *International Law in the U.S. Supreme Court: Continuity and Change* 164, 179 (David Sloss, Michael Ramsey & William Dodge eds., 2011).

5. For a review of how, in practice, “human rights litigation has challenged the sovereignty norm,” see William J. Aceves, *Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation*, 25 Hastings Int’l & Comp. L. Rev. 261, 263 (2002); see also Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 Fordham L. Rev. 1, 4 (1999) (characterizing international human rights law as a “significant erosion of state sovereignty,” a “major rent . . . in the cloak of sovereignty”).

inherent in this relationship.⁶ In Moyn's account, human rights, which protect individuals by limiting the sovereign power of nation-states, are the conceptual and historical antagonists of rights to self-determination, which authorize groups of people to establish nation-states and wield sovereign power. Moyn argues that the modern field of international human rights law could only flourish in the 1970s after the international legal community grew skeptical of the anti-colonial movement's focus on the self-determination and sovereignty of new African nations.⁷ Supporting Moyn's thesis, Jan Eckel has argued that in those unusual cases where anti-colonial activists "did base their claims on human rights," the activists "did not so much express their commitment to universal norms as appropriate them for their specific anticolonial policies."⁸

On the one hand, the case of conscientious objection confirms Moyn and Eckel's theoretical and historical analysis. African nations at the General Assembly and the Commission of Human Rights supported a limited, anti-colonial form of conscientious objection, but resisted the formulation of a universal human right, precisely because such a right would undermine their own hard-won sovereignty and endanger their national defense. On the other hand, the anti-colonial movement and its nationalist outlook played an essential role in laying the legal groundwork for the universal right of conscientious objection, good against all nations. In the short term, then, anti-colonial support for a limited form of conscientious objection looked like an obstacle to the formulation of a universal

6. Samuel Moyn, *The Last Utopia: Human Rights in History* (2010); Samuel Moyn, *Imperialism, Self-Determination, and the Rise of Human Rights, in The Human Rights Revolution: An International History* 159–78 (Akira Iriye, Petra Goedde, & William I. Hitchcock eds., 2012).

7. Moyn, *The Last Utopia*, *supra* note 6, at 107, 116–19. For scholarship supporting Moyn's conclusions, see Jan Eckel, *Human Rights and Decolonization: New Perspectives and Open Questions*, 1 *Humanity* 111 (2010); Brian Simpson, "The First Right": *The Carter Administration, Indonesia and the Transnational Human Rights Politics of the 1970s*, in *The Human Rights Revolution: An International History*, *supra* note 6, at 179–200.

8. Eckel, *supra* note 7, at 113. For recent scholarship positing a more harmonious relationship between decolonization and human rights, see Roland Burke, *Decolonization and the Evolution of International Human Rights* (2010); Fabian Klose, *Menschenrechte im Schatten kolonialer Gewalt: Die Dekolonisierungskriege in Kenia und Algerien 1945–1962* (2009). For a thoughtful review of the entire historiographical debate, see Frederick Cooper, *Afterword: Social Rights and Human Rights in the Time of Decolonization*, 3 *Humanity* 473 (2012).

right; in the long term, however, such support became a crucial source of legitimacy for the universal right.

This process by which the human right of conscientious objection emerged from the *intersection* of universalist and nationalist political projects challenges any sharp opposition between international law and national sovereignty, human rights and rights of self-determination. While anti-war activists drew mainly on the language of individual human rights and anti-colonial activists drew mainly on the language of national self-determination, *both* languages enabled activists—and the conscientious objectors they championed—to criticize national policies in the name of an international legal order. Both anti-colonial activists and anti-war activists wagered that the conscientious objector could become a vehicle of national transformation, introducing international legal norms—against militarism and colonialism—into the “national frame,” the national legal order that often resists but also channels international reform movements.⁹ The function of the conscientious objector was not so much to supplant the national legal order, but to reform it through appeal to emerging international norms. The human right of conscientious objection does not then signify the victory of the international over the national frame, international law over national sovereignty, but an ongoing negotiation between these two political and legal orders.¹⁰

The Article is organized as follows: Part I recounts the rejection of a right of conscientious objection during the drafting of the ICCPR. Part II traces the growth of anti-war advocacy for a right of conscientious objection. Part III describes the failure of this advocacy at the Commission of Human Rights in the 1970s and the emergence of an alternative account of conscientious objection at the Commission and the General Assembly: conscientious objection as a

9. See John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* 283–84 (2007). For further analysis of how transnational activists often “internalize international issues and conflicts into domestic politics,” see Sidney G. Tarrow’s recent discussion of “rooted cosmopolitanism.” Sidney G. Tarrow, *Strangers at the Gates: Movements and States in Contentious Politics* 181–99 (2012).

10. Tarrow describes these transnational and national frames as two co-existing and overlapping societies, “global civil society” and the “society of states.” Tarrow, *supra* note 9, at 199. He criticizes studies of transnational activism that “posit a ‘global civil society’ on the march” without reckoning with the persistence of “state power.” *Id.* This Article locates the formation of international law precisely at the intersection of global civil society and the society of states.

tool for resisting putatively illegitimate colonial regimes. Part IV charts the series of resolutions that, building on this narrow, anti-colonial conception of conscientious objection, finally came to identify conscientious objection as a universal right, good against all nations, during the late Cold War. As these resolutions made their way through the Commission on Human Rights in the 1980s and 1990s, a parallel process took place in the jurisprudence of the Human Rights Committee, a treaty body created by the ICCPR to monitor member states' implementation of human rights. Part V tracks the doctrinal path that led the Human Rights Committee to find—for the first time—that a nation had violated an individual's right of conscientious objection. Part VI concludes.

I. THE ABSENCE OF A RIGHT

In December 1947, a sub-committee of the UN Commission on Human Rights¹¹ began to draft a bill of rights for the world. Over the next seven years, this "Drafting Committee" would take up the question of conscientious objection twice, as social movements in the United States and Europe reacted to the horrors of the past war and the possibility of a future, nuclear confrontation. Such mobilization was far from decisive, however, and conscientious objection failed to find a place among the hallowed list of human rights.

At its inception, the "Drafting Committee" split into three separate groups. One group, chaired by Eleanor Roosevelt, dedicated itself to drafting a declaration of rights; the second focused on a legally binding Covenant; the third studied possible methods of implementing the Covenant once drafted.¹² Although the Universal Declaration of Human Rights ("UDHR") passed the General Assembly ("GA") a year later, on December 10, 1948, another six years elapsed before the Commission on Human Rights submitted a draft International Covenant on Civil and Political Rights and a separate International Covenant on Economic, Social, and Cultural Rights to the GA in April 1954.¹³

Over the course of these seven years, conscientious objection became a subject of debate twice during the drafting of what would

11. In 2006, the Commission on Human Rights was replaced by the Human Rights Council. See G.A. Res. 60/251, UN Doc. A/RES/60/251 (Apr. 3, 2006).

12. See Marc J. Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant of Civil and Political Rights xix (1987); Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* 87 (2002);

13. Bossuyt, *supra* note 12, at xix.

become Articles 8 and 18 of the ICCPR. Article 8 dealt with slavery (paragraph 1), servitude (paragraph 2), and other "forced or compulsory labor" (paragraph 3). The delegates of the Commission on Human Rights felt that the prohibition on forced or compulsory labor merited several exceptions. Paragraph 3(c)(ii) treated the exception of compulsory military service. The initial draft submitted to the third session of the Commission on Human Rights in 1948 read:

For the purposes of the Article, the term "forced or compulsory labour" shall not include: (a) Any service of a purely military character, or service in the case of conscientious objectors, enacted in virtue of compulsory military service laws, provided that the service of conscientious objectors be compensated with maintenance and pay not inferior to what a soldier of the lowest rank receives.¹⁴

This language assured that neither compulsory military service nor the alternative service provided by nations to conscientious objectors would count as prohibited "forced or compulsory service." The reference to conscientious objectors, however, caused displeasure among several delegates, and the following year changes were made. First, since many countries did not recognize conscientious objectors at all, the French representative successfully proposed to add the phrase "in countries where they are recognized."¹⁵ The Chilean, Egyptian, and Iranian delegates explained that this amendment was essential; Iran wanted any mention of conscientious objectors removed.¹⁶

Both Eleanor Roosevelt and Charles Malik, the Lebanese delegate, supported retaining some mention of conscientious objection. In her comments, Roosevelt suggested that even if a state did not presently recognize conscientious objectors, it might one day have to due to changing mores.¹⁷ Malik, in turn, warned that "the concept of the conscientious objector was not a dying tradition but the beginning of a growing movement."¹⁸ Indeed, as early as July 1947,

14. U.N. Comm'n on Human Rights, 3d Sess., May 24–June 18, 1948, Annex B: Draft International Covenant on Human Rights, art. 8, § 3, U.N. Doc. E/800 (June 28, 1948).

15. U.N. Comm'n on Human Rights, 5th Sess., 104th mtg. at 8, U.N. Doc. E/CN.4/SR.104 (May 31, 1949).

16. See Takemura, *supra* note 3, at 24.

17. U.N. Comm'n on Human Rights, 5th Sess., 104th mtg, *supra* note 15, at 7.

18. U.N. Comm'n on Human Rights, Compilation of Comments on the Draft International Covenant on Human Rights and the Proposed Additional Articles, 6th Sess., U.N. Doc. E/CN.4/365, at 29 (Mar. 22, 1950).

Roosevelt had noted throughout the world “a growing feeling of sympathy towards conscientious objectors.”¹⁹

Roosevelt and Malik did not have to be the keenest observers to notice an increasingly vocal culture of conscientious objection. Months before Roosevelt mentioned “a growing feeling of sympathy towards conscientious objectors,” the United States experienced a nationwide protest against the coming Cold War draft, which would go into effect in 1948. In New York City, members of the War Resisters League and allied pacifist organizations burned their draft cards.²⁰ That same year, the War Resisters International lobbied the Commission to include a right of conscientious objection in what would become the Universal Declaration of Human Rights.²¹ While a relatively secular, and counter-cultural, anti-war movement developed in the United States, the resurgence of the Christian ecumenical movement in Europe created a prestigious platform from which church leaders called for increased recognition of conscientious objectors. In the summer of 1948, for instance, the First Assembly of the World Council of Churches “issued a provisional statement of principles with respect to conscientious objection.”²² Three years later, the World Council’s Central Committee would recommend that “[a] conscientious objector . . . be entitled to exemption from the normal requirements of the laws of military training and service” and suggested modes of alternative service.²³

Yet the Commission on Human Rights was far from ready to affirm the goals of this emerging social movement. Although the Commission did retain a mention of conscientious objection in Article 8, as a non-prohibited mode of compulsory service, it voted down all of Charles Malik’s further attempts to ensure that those countries that recognized conscientious objectors treated them “honestly and sincerely.”²⁴ As Malik’s amendments went down to defeat, however, Mr. Mendez, the Philippine representative, suggested that

19. U.N. Comm’n on Human Rights, Drafting Committee on the International Bill, 1st Sess., 9th mtg. at 3, U.N. Doc. E/CN.4/AC.1/SR.9 (June 18, 1947).

20. See Scott H. Bennett, *Radical Pacifism: The War Resisters League and Gandhian Nonviolence in America, 1915–1963*, at 178–79 (2003); Joseph Kip Kosek, *Acts of Conscience: Christian Nonviolence and Modern American Democracy* 197 (2009).

21. Kosek, *supra* note 20, at 180.

22. Schaffer & Weissbrodt, *supra* note 3, at 36.

23. *Id.*

24. U.N. Comm’n on Human Rights, Drafting Comm. on the Int’l Bill, 2d Sess., 24th mtg. at 6, U.N. Doc. E/CN.4/AC.1/SR.24 (May 14, 1948).

protections "concerning conscientious objectors might be taken up in conne[ction] with article 16 [later article 18], which dealt with the freedom of thought, conscience and religion."²⁵ Mendez followed his own advice later in the spring. During discussion of what was then labeled Article 16 ("Everyone has the right to freedom of thought, conscience and religion"²⁶), Mendez introduced an amendment: "Persons who conscientiously object to war as being contrary to their religion shall be exempt from military service."²⁷

Confronted by a total lack of support for this proposal, however, Mendez would quickly withdraw his conscientious objection amendment. The Chilean representative was first to comment, explaining that while he "appreciated the respectful sentiments for freedom of conscience which had prompted the Philippine Government to propose" the amendment, he "found it impossible to accept."²⁸ "It was inadmissible," the Chilean explained, "that anyone, albeit with the highest intentions, should fail to participate in the duties to be performed for the community."²⁹ Though Eleanor Roosevelt "expressed the complete sympathy of her delegation" with the amendment, she explained that such a provision was "outside the scope of article 16," and, furthermore, that it was "questionable whether a specific provision of that nature should be included in a general convention of fundamental human rights."³⁰ Both the representatives of the United Kingdom and Australia, while emphasizing that their countries did recognize conscientious objectors, agreed with Roosevelt that the amendment was "out of place."³¹

The drafting history of Articles 8 and 18 of the ICCPR leave little doubt that most Commission delegates were strongly opposed to creating a right of conscientious objection. It would be nearly two decades before the United Nations would reconsider the right, when a groundswell of protest against the Vietnam War coincided with new efforts to instantiate an international human rights regime.

25. U.N. Comm'n on Human Rights, 6th Sess., 142nd mtg. at 8, U.N. Doc. E/CN.4/SR.142 (Mar. 31, 1950).

26. Bossuyt, *supra* note 12, at 356.

27. U.N. Comm'n on Human Rights, 6th Sess., 161st mtg. at 11, U.N. Doc. E/CN.4/SR.161 (Apr. 28, 1950).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 12.

II. CONSCIENTIOUS OBJECTION AND THE ANTI-WAR MOVEMENT

In the wake of World War II, the major pre-war peace organizations lay in tatters.³² While during the early ICCPR drafting sessions, Roosevelt and Malik had noticed growing sympathy for conscientious objection, international activism was impeded both by residual wartime suspicions and new Cold War tensions.³³ Nonetheless, in 1949, the International Liaison Committee of Organizations for Peace ("ILCOP") formed as an umbrella organization that included most of the major anti-war groups, including the International Fellowship of Reconciliation, the Friends World Committee for Consultation, and War Resisters International.³⁴ Between the late 1940s and 1963, the focus of ILCOP and other anti-war organizations was the pursuit of "nuclear peace."³⁵ However, after the ratification of the Partial Test Ban Treaty between the USA, the Soviet Union, and the United Kingdom, attention shifted to Vietnam as Lyndon Johnson, the former "peace candidate," pursued a strategy of escalation.³⁶ The peace movement's increasingly bold denunciations of American strategy in Vietnam coincided with a renewed emphasis on human rights at the United Nations, as the organization declared 1968 to be the "Year of Human Rights." In this international climate, the peace movement brought to the United Nations its vision of a human right of conscientious objection—a right grounded in the individual conscience that gave each citizen the authority to judge the legality of his nation's foreign policy and to decide whether or not to serve in his nation's military. In 1964, ILCOP became the International Peace Bureau ("IPB") and, in 1965, the IPB's first annual conference called upon the United States "to stop immediately bombing and other military action in North Vietnam" and "to declare publicly its willingness to enter into negotiations with all parties concerned, including the National Liberation Front, and for the withdrawal of all foreign military forces from Vietnam."³⁷ Two years later, the 1967 annual conference was

32. See Elise Boulding, *Cultures of Peace: The Hidden Side of History* 64–65 (2001).

33. See Hovey, *supra* note 3, at 220–21, for a discussion of the obstacle that "East/West" rivalries posed for conscientious objection advocates.

34. See Rainer Santi, *100 Years of Peace Making: A History of the International Peace Bureau and Other International Peace Movement Organisations and Networks* 36–37 (1991).

35. See Lawrence Wittner, *Rebels Against War: The American Peace Movement, 1933–1984*, at 133 (1984).

36. *Id.* at 280–82.

37. Santi, *supra* note 34, at 48–49.

dedicated to Vietnam, and 430 delegates from sixty-three countries came together to discuss the ongoing war.

Meanwhile, the IPB's Executive Committee decided that the 1968 annual conference should focus on a more tactical topic, the "Right to Refuse Military Service and Orders." This "Right to Refuse" conference would coincide with the United Nations' declared International Year of Human Rights,³⁸ and would follow on the heels of the International Conference on Human Rights in Tehran, which was scheduled for late April. Whereas the 1967 IPB conference took the form of a protest against Vietnam, the United Nations' 1968 focus on human rights offered a more concrete direction for the IPB's own work. The conference topic, a right to refuse military service, articulated the peace movement's goal—an end to war—in the burgeoning language of international legal rights.

The IPB delegates met at Reutlingen, Federal Republic of Germany in August 1968. A working paper produced in preparation for the conference, *The Right to Refuse Military Service and Orders* ("The Right to Refuse"), profoundly influenced their talks.³⁹ Ulrich Herz, the IPB's Secretary General, had himself edited *The Right to Refuse*, which was written mainly in Geneva in March 1968.⁴⁰ Members of Amnesty International, the War Resisters League, and the Friends World Committee for Consultation all participated in the drafting process. *The Right to Refuse* described itself not as a protest against state power but as the beginning of a dialogue about international human rights:

The International Peace Burea[u] has initiated this Study as its contribution to the International Human Rights Year. . . . The Study, therefore, should not be considered as a political programme for Pacifists to put before their Governments. The main intention is, rather to stimulate further discussion on the implementation of Human Rights regarding conscientious objection.⁴¹

38. See G.A. Res. 2217, U.N. Doc. A/RES/21/2217 (Dec. 19, 1966).

39. See International Peace Bureau, *The Right to Refuse Military Service and Orders: A Working Paper Prepared for the International Peace Bureau Conference in Reutlingen/Stuttgart, Germany, 25th–30th August 1968* [hereinafter International Peace Bureau, *The Right to Refuse Military Service*].

40. International Peace Bureau, *The Right to Refuse to Kill: A New Guide to Conscientious Objection and Service Refusal*, in 1 Human Rights: International Documents, at 1681 (James Avery Joyce ed. 1978).

41. International Peace Bureau, *The Right to Refuse Military Service*, *supra* note 39, at 4–5.

By focusing on implementation and legalization “within the ideological framework” of the Universal Declaration of Human Rights, the IPB acknowledged that it was breaking with certain constituencies within the peace moment: “That the Study is concentrated on the *legal* aspect of the problem of conscientious objection, especially on the ‘technical’ question of *recognition*, may seem unsatisfactory to some individual conscientious objectors, who consider their objection primarily as a personal testimony. . . .”⁴² The working paper also emphasized that its commitment to international legal recognition of conscientious objection was not meant to antagonize national legal and political stability. International recognition of conscientious objection would mediate “the conflict between the individual conscience and the claim of the State,” not simply render the State a vassal to the individual conscience or its international protectors.⁴³ The authors went on to contrast their vision of the conscientious objector, who balanced national interests with international ones, with the traditional conscientious objector, who subordinated political interests to divine ones. While the traditional objector rejected all wars because of his allegiance to the “Kingdom of God,” the modern objector recognized that the “kingdom of men” is “a complex and relative order which in itself contains a plurality of loyalties. . . .”⁴⁴ The authors’ prime example of the “complex and relative order” of the “Kingdom of Men” was the Charter of the United Nations and its qualified condemnation of war:

[W]ar is condemned in principle as a means of solving international conflicts. According to the same Charter, however, the United Nations itself is entitled to secure peace. . . . In line with the spirit and the letter of the Charter an individual conscientious reaction could be envisaged, involving a refusal of military *in the specific conditions* of national or allied contingents, but at the same time expressing a willingness to serve, if required, in military forces under the authority of the United Nations.⁴⁵

According to the IPB, then, a selective conscientious objector—one who objected to some, not all wars—might be the *perfect* individual embodiment of the Charter’s distinction between wars of national interest and wars to keep the peace. Yet, the authors had to note that “the United Nations has not, so far, taken

42. *Id.* at 5.

43. *Id.* at 5–6.

44. *Id.* at 38.

45. *Id.* at 39.

any decision which expressly promotes the idea of conscientious objection."⁴⁶

At the Reutlingen Conference, committees drew on *The Right to Refuse* working paper to produce materials for a potential international convention on conscientious objection. The next summer, at Kungälv, Sweden, the annual 1969 IPB conference focused on turning those committee reports into a draft "Convention on the Right to Refuse to Participate in Armed Conflicts" and a draft UN resolution calling for the UN Secretary-General to conduct further research into the question of a right of conscientious objection.⁴⁷ These documents also reflected the vision of conscientious objection first developed in *Right to Refuse*.⁴⁸ They only awaited adoption by IPB's member organizations, which would meet again in August 1970 at Driebergen, Holland.

The year 1970 was a bonanza for international conscientious conversation. On March 16, 1970, Eileen Egan, a representative of the Catholic peace organization Pax Christi, called on the Commission of Human Rights to take up the topic of conscientious objection. Pax Christi, which held consultative status at the Commission, had begun a "Right of Conscience" campaign to protest the Vietnam War in 1968 and now, two years later, it was setting its sights on the United Nations.⁴⁹ While the Commission took no action on Egan's statement, Saudi Arabia's ambassador, Jamal Barood, was moved by her presentation, and would introduce the topic of conscientious objection at the Third Committee of the GA later that year.⁵⁰

Before he could do so, however, the United Nations organized a June conference in Belgrade, Yugoslavia on the role of youth in human rights.⁵¹ Here, divisions began to appear between anti-war

46. *Id.* at 53.

47. International Peace Bureau, *The Right to Refuse Military Service*, *supra* note 39, at 1681-82.

48. *See id.*; Santi, *supra* note 34, at 41.

49. *See* Eileen Egan, *The Struggle of the Small Vehicle*, Pax, in American Catholic Pacifism: The Influence of Dorothy Day and the Catholic Worker Movement 123, 138-43 (Annie Klejment & Nancy L. Roberts eds., 1996).

50. The most likely reason for Saudi Arabia's favorable stance on conscientious objection is that it was the only major country in its region not to have a policy of compulsory military service. The armies of Egypt, Iran, Iraq, and Israel were all raised by conscription. *See* Robert Sullivan, *Saudi Arabia in International Politics*, 32 Rev. Pol. 436, 449-51 (1970).

51. *See* The Role of Youth in the Promotion and Protection of Human Rights, Seminar Organized by the United Nations Division of Human Rights in Co-operation with the Government of Yugoslavia at Belgrade Yugoslavia, 2-12

and anti-colonial activists. While “[s]ome participants vigorously advocated for the recognition of th[e] right [of conscientious objection],” others insisted upon a distinction between refusal to serve “in aggressive or imperialist wars” and the refusal to “bear arms and fight for just causes, including in particular the defence of their country.”⁵²

This division between peace and anti-colonial activism grew more visible at the inaugural UN World Youth Assembly, held the next month in New York City. The Assembly’s final report stated that “[c]onscientious objection should be treated as a human right” and placed the subject “on the agenda of the next . . . session of the UN Commission on Human Rights.”⁵³ Yet the Assembly’s “Message” did not itself call for such a right. Indeed, the “Message” affirmed both the Assembly’s “decision . . . to fight for the elimination of the danger of a third world war and to safeguard world peace,” and its “full solidarity with the struggle of the peoples of Asia, Africa and Latin America and with all the people which fight against imperialism, colonialism, neo-colonialism, and for liberty and independence.”⁵⁴ The Message also announced the Assembly’s “solidarity with the people and youth of Vietnam, Cambodia and Laos in demanding immediate cessation of American aggression . . . and the recognition of the right of the peoples of the Indo-Chinese peninsula to decide their own destiny without foreign interference.”⁵⁵ The relationship between world peace and armed, anti-colonial resistance that structured the 1970 World Youth Assembly Message would become increasingly complex over the next decade, as anti-Vietnam outrage mingled with post-colonial ambition.

In August 1970, a month after the World Youth Assembly, the IPB met in Driebergen. There, the organization finally adopted a Draft Convention and Resolution on conscientious objection and called on “national peace organizations to urge their governments to submit the . . . draft resolution to the forthcoming General Assembly of the United Nations.”⁵⁶ Seán MacBride, the new IPB chairman,

June 1970, U.N. Doc. ST/TAO/HR/39 (1970), in *The International Law of Youth Rights: Source Documents and Commentary* 266 (William D. Angel ed., 1995) [hereinafter *International Law of Youth Rights*].

52. *Id.* at 281.

53. Schaffer and Weissbrodt, *supra* note 3, at 34.

54. World Youth Assembly, United Nations Headquarters, New York, July 9–17, 1970, WYA Doc. No. 56/WYA/P/10 (1970), in *International Law of Youth Rights*, *supra* note 51, at 609–10.

55. *Id.*

56. International Peace Bureau, *supra* note 40, at 1681–82.

former Irish Foreign Minister, and soon-to-be Nobel Peace Prize Winner, introduced the draft Resolution and Convention by outlining the legal ambitions of the anti-war movement.⁵⁷

At the heart of MacBride's vision stood the figure of the conscientious objector who, MacBride believed, could become a primary conduit for the enactment of an international legal order dedicated to peace.⁵⁸ Reviewing legal or quasi-legal precedents that formed the basis for an effective peace campaign, MacBride insisted that the UN Charter "virtually outlaws war and certainly forbids 'the threat or use of force against the territorial integrity or political independence of any state in any other manner inconsistent with the purposes of the United Nations.'"⁵⁹ Most importantly, however, these prohibitions reached individuals, not just states. MacBride explained that in accordance with the Charter of the International Military Tribunal at Nuremberg, embraced by the UN General Assembly in December 1946, criminal liability for the violation of international law attached to individuals, whether conscript or volunteer, even if they were acting under orders.⁶⁰ Consequently, each individual was legally obligated to make a choice against war. Conversely, the integrity of international prohibitions on war-making depended on the "moral choice" of the individual.⁶¹

The next month, the topic of conscientious objection arose at the Third Committee of the General Assembly. Back in 1968, the International Conference on Human Rights at Tehran had called for the "education of youth in the respect for human rights and fundamental freedoms."⁶² And in 1970, the General Assembly had put the topic of "Youth, its education in the respect for human rights and fundamental freedoms, its problems and needs, and its participation in national development" on the Third Committee's agenda.⁶³ Earlier that spring, the Saudi Arabian delegate Jamal Baroodi had been impressed with Pax Christi's call for a right of conscientious objection at the Commission on Human Rights, and in the context of the topic of "Youth," he introduced a resolution that called on member states

57. Seán MacBride, *A New Dimension to the Legal and Moral Right to Refuse Military Service and Orders*, in International Peace Bureau, *supra* note 40, at 1663-74.

58. *Id.* at 1669.

59. *Id.* at 1666 (quoting U.N. Charter, art. 2, ¶ 4).

60. *Id.* at 1666-70.

61. *Id.* at 1669.

62. Final Act of the Int'l Conference on Human Rights, Apr. 22-May 13, 1968, *Tehran Int'l Conference on Human Rights*, U.N. Doc. A/CONF.32/41 (1968).

63. See Takemura, *supra* note 3, at 30.

"[n]ot to conscript arbitrarily any youth to join the armed forces of his country."⁶⁴ After this first proposal failed, Baroody put forward a revised resolution, calling on member states "[n]ot to punish any youth who refuses to join the armed forces of his country if such youth conscientiously objects to being involved in war. . . ."⁶⁵ When Baroody encountered continued resistance from several delegates, he requested that the text of his draft resolution simply be forwarded to the Commission on Human Rights for further consideration. Although Baroody was defeated at the Third Committee, his action ensured that a generally applicable "human right of conscientious objection to military service" would appear on the Commission's agenda the following year.⁶⁶

Before the Third Committee adjourned, however, the delegate from the Byelorussian Soviet Socialist Republic appended an amendment to another draft resolution on the question of youth and human rights. Rather than endorsing a universal right of conscientious objection on the basis of individual conscience, the Byelorussian amendment encouraged something akin to selective conscientious objection in the interests of national self-determination.

[The Third Committee] [c]onsiders it important that young people of all countries of the world should resolutely oppose military and other action designed to suppress the liberation movements of peoples still under colonial, racist, or alien domination and under military occupation, and should support those peoples in every way possible in conformity with the principles of the Charter of the United Nations and the decisions of United Nations organs recognizing the legitimacy of the struggle of the peoples for their freedom and independence, in their efforts to attain independence in accordance with the inalienable right of self-determination.⁶⁷

This proposal resolved the tension inherent in the World Youth Assembly's call for both a right of conscientious objection and solidarity in the fight for self-determination by implicitly endorsing conscientious objection only in those cases where one's country was engaged in the suppression of liberation movements. Yet while the language of conscientious objection had a non-violent sensibility, the language of "resolute opposition" could well include violent means.

64. Takemura, *supra* note 3, at 31 (quoting Baroody).

65. *Id.*

66. See Hovey, *supra* note 3, at 217–18.

67. G.A. Res. 2633 (XXV), U.N. Doc. A/8149 (Nov. 11, 1970).

With the Soviet and African blocs in the majority and the Western nations in opposition, the Third Committee added this amendment to the draft resolution.⁶⁸ Soon after, the General Assembly passed a resolution including this language.⁶⁹

The geopolitical wrangling that embroiled the Third Committee in September 1970 resulted in nothing like the unqualified endorsement of a right of conscientious objection that anti-war organizations such as Pax Christi and the IPB supported. Indeed, the Byelorussian amendment presaged the rise of an alternative account of conscientious objection grounded in anti-colonial politics. But such an anti-colonial model of conscientious objection would gain traction at the Commission on Human Rights only after the defeat of the anti-war vision.

In March 1971, members of the Commission from Austria, Chile, Netherlands, New Zealand, and Uruguay finally got the opportunity to propose a version of the IPB's Resolution on conscientious objection. In its preliminary paragraphs, the draft Resolution observed "the widespread violence and brutality of our era," and pointed to several normative sources to contextualize the intent of its operative paragraphs.⁷⁰ These normative sources were the "Principles of International Law known as the Nuremberg Principles formulated by the International Law Commission in July 1950 at the request of the General Assembly," "Article 18 of the [UDHR], and Article 18 of the [ICCPR,] which assure the right to manifest in practice and observance a conscientiously-held belief," and "Resolution 337 adopted by the Consultative Assembly of the Council of Europe," which in 1967 had called for pan-European recognition of a right of conscientious objection.⁷¹

The draft Resolution requested that the Secretary-General "undertake the preparation of a [s]tudy" to determine the treatment of conscientious objectors by the United Nations' member states, "the extent to which objectors of conscience who decline to do military service could be offered by the United Nations opportunities to perform duties in the furtherance of peace," and "the minimum protection which should be extended to objectors of conscience under national and international law."⁷² In introducing a version of this

68. Takemura, *supra* note 3, at 32.

69. *Id.*

70. International Peace Bureau, *supra* note 40, at 1682-83.

71. *Id.* at 1683; *see also* Eur. Consult. Ass., Right of Conscientious Objection, 18th Sess., Res. 337, at 1 (Jan. 26, 1967).

72. International Peace Bureau, *supra* note 40, at 1683.

Resolution to the Commission on Human Rights, the delegate from the Netherlands explained that at stake was "the right of every individual to refuse to perform military service on the grounds of conscience."⁷³ He acknowledged that the resolution "raise[d] the issue of the security of States and the relationship between the State and the individual."⁷⁴

Debate over the Resolution would pit Western representatives, supportive of the universalistic language and skeptical of the absolute prerogatives of state sovereignty,⁷⁵ against members from the Soviet and African blocs. These members, echoing the position that their nations had taken at the Third Committee the previous fall, explained they would not tolerate any international regulation of conscientious objection, but encouraged individuals "to object on grounds of conscience to wars unjustly undertaken by their governments, such as wars of aggression and colonialist oppression."⁷⁶

To those representatives for whom "defense of one's country was not a matter of freedom of conscience" and who believed that "one who refused to bear arms could be considered only an unethical coward,"⁷⁷ Sir Keith Unwin, the UK representative, responded: "The right of self-defense was of course universally recognized, but the United Nations was an organization created in the interests of peace, and young people who objected to compulsory military service on conscientious grounds were taking those ideas a step further."⁷⁸ But the representative of the Ukrainian Soviet Socialist Republic found such paeans to peace suspect, speculating that it was "perhaps in the interests of the wealthy countries that the Draft resolution on conscientious objection should be adopted, since these countries could always recruit mercenaries. . . ."⁷⁹ Several developing countries noted that "their countries were in no position to allow such an exemption, given their vulnerable political status and inferior level of economic development."⁸⁰

In reaction to this debate, the sponsors significantly watered down their proposal. They removed the more polemical preambular

73. Takemura, *supra* note 3, at 35–36.

74. *Id.* at 36.

75. Rep. of the U.N. Comm'n on Human Rights, 27th Sess., Feb. 22–Mar. 26, 1971, at 48, U.N. Doc. E/4949, E/CN.4/1068 (1971) [hereinafter UNCHR Rep. of the 27th Sess.].

76. *Id.*

77. Engram, *supra* note 3, at 362.

78. Takemura, *supra* note 3, at 37 (quoting Unwin).

79. *Id.*

80. Engram, *supra* note 3, at 362.

paragraphs of the IPB resolution. Now, the resolution only referred to Articles 18 and 3 of the Universal Declaration (protecting the right to life, liberty and security), not the versions of those Articles included in the binding ICCPR. The operative paragraphs requested that the Secretary General gather information from Member States on the nature of their military service laws and file a report with the Commission.⁸¹ On March 19, 1971, this anodyne resolution passed by a vote of eighteen to three with seven abstentions.⁸²

In January 1973, the Commission on Human Rights received the Secretary-General's report. Three months later, the World Council of Churches submitted to the Commission a "Statement on the Question of Conscientious Objection to Military Service" that called for immediate action. Noting "growing concern in the world's religious communities that young people who refuse to participate in a war on conscientious grounds should not be penalized for their moral stand," the WCC urged the Commission to "recommend to the United Nations General Assembly the adoption of a declaration recognizing conscientious objection to military service as a valid expression of the right of freedom of conscience" under Article 18 of the ICCPR.⁸³ Yet support at the Commission for a general right of conscientious objection remained weak. While anti-war organizations with consultative status at the Commission continued to lobby potentially sympathetic delegates, the next six years brought deadlock and deferral of the issue.⁸⁴

III. CONSCIENTIOUS OBJECTION AND THE ANTI-COLONIAL MOVEMENT

Although 1973 was not an auspicious year for conscientious objection at the Commission of Human Rights, it was a crucial year for the history of conscientious objection in other respects, as the two competing approaches to a right of conscientious objection came to a

81. *Id.*

82. *See Hovey, supra* note 3, at 218.

83. World Council of Churches, *The Churches in International Affairs: Reports 1970-1973*, at 136, 138 (1974).

84. International Law of Youth Rights, *supra* note 51, at 26 (showing the deferral of the conscientious objection question in 1974 and 1975); U.N. Comm'n on Human Rights, *The Role of Youth in the Promotion and Protection of Human Rights*, 32nd Sess., U.N. Doc. E/CN.4/RES/1/XXXII (Feb. 11, 1976) (noting the unresolved debate between countries supporting a general right of conscientious objection and countries rejecting such a right as injurious to their basic military needs in 1976); Takemura, *supra* note 3, at 39 (deferral of conscientious objection question in 1977, 1978, and 1979).

head. A month after the World Council of Churches ("WCC") called on the Commission of Human Rights to recognize a universal right of conscientious objection, the joint UN/Organization of African Unity ("OAU") conference on Southern Africa proposed an alternative approach. While the WCC had envisioned conscientious objection as a right that could be exercised by the citizens of every nation in the interests of peace, the UN/OAU discussions at Oslo supported a different vision of conscientious objection: as a tactical and legal technology specifically suited to resisting colonial regimes on the basis of the illegality of those regimes' foreign and domestic policy. Both approaches saw the conscientious objector as a vehicle for the fulfillment of international law, but their different ideological programs had generated different ideal objectors.

In his report on the "armed struggle of the liberation movements . . . against Portuguese domination in Angola, Mozambique, and Guinea-Bissau," the Dutch anti-apartheid activist Sietse Bosgra argued that international law created a legal duty to aid those who resisted military service in apartheid regimes. He declared that the "best support we can give the victims of *apartheid* and colonialism is to cooperate in dislodging the oppressor by supporting these liberation movements."⁸⁵ Pursuant to this conclusion, Bosgra explained that "[d]esertion from the Portuguese army or refusal to be enlisted should be considered a positive contribution to the struggle against Portuguese colonialism."⁸⁶ Although Bosgra did not speak of a "right" to conscientious objection, he did suggest that support for anti-apartheid objectors could be grounded in other forms of international law: the law of war as embodied in the UN Charter and the law of refugees. Explaining that "[f]oreign support to deserters and objectors is imperative because of the absolutely illegal nature of the Portuguese occupation," Bosgra recommended that "countries of Western Europe should acknowledge the conscientious objectors and deserters as political refugees without restrictions," and pointed to the status given such objectors by the Danish government as a "model."⁸⁷ Later that year, the General Assembly passed the International Convention on the Suppression and Punishment of the Crime of Apartheid.⁸⁸ This convention

85. Sietse Bosgra, *Territories Under Portuguese Domination: Proposals for Action*, in The UN-OAU Conference on Southern Africa, Oslo, 9–14 April, 1973: Papers and Documents 79 (Olav Stokke & Carl Gösta Widstrand eds., 1973).

86. *Id.* at 87.

87. *Id.* at 87–88.

88. G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, at 75 (1974).

attached individual criminal liability to those who "participate in' the crime of apartheid."⁸⁹ In doing so, it implied the existence of a legal duty—if not yet a legal right—to refuse to cooperate with conscription policies in apartheid countries.

Five years later, in 1978, the General Assembly passed a resolution that would have lasting repercussions for the human right of conscientious objection, tying the cause of conscientious objection to the groundswell of opposition to apartheid. Taking the 1973 Convention as its foundation, the 1978 resolution recognized "the right of all persons to refuse service in military or police forces which are used to enforce apartheid."⁹⁰ Echoing Bosgra's 1973 recommendations, the 1978 resolution called upon member states "to grant asylum or safe transit . . . to persons compelled to leave their country of nationality solely because of a conscientious objection to assisting in the enforcement of *apartheid* through service in military or police forces."⁹¹ Strikingly, the resolution cited Article 18 of the Universal Declaration of Human Rights as a reason that member nations should recognize the legitimacy of anti-apartheid conscientious objectors.⁹² In 1980, the General Assembly issued another resolution, calling "all governments and organisations to assist persons compelled to leave South Africa because of their objection, on grounds of conscience, to serving in its military or police force."⁹³

Despite the limited conception of a right of conscientious objection endorsed by the GA resolutions, they laid the foundation for later declarations of a more general right.⁹⁴ Indeed, at the height of anti-apartheid fever at the GA, the Commission on Human Rights took up the question of conscientious objection anew. On March 12, 1980, the representative from the Netherlands introduced a resolution asking the Secretary-General for current information on national conscientious objection policies. In introducing this resolution, the Dutch representative pointed to the facts that "of about 90 countries with compulsory military service, 37 made some

89. Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* 77 (1992).

90. G.A. Res. 33/165, ¶ 1, U.N. GAOR, 33rd Sess., Supp. No. 45, U.N. Doc. A/33/45, at 154 (1978).

91. *Id.* ¶ ¶ 2-3.

92. *Id.*

93. G.A. Res. 39/72A, U.N. Doc. A/39/51, at 42 (Dec. 13, 1984).

94. The laying of this foundation was not accidental. The 1978 resolution was drafted by the Quaker United Nations Office, a long-term proponent of the general right of conscientious objection. See Hovey, *supra* note 3, at 221.

legislative or administrative provision for conscientious objectors," and that "[b]road public support for recognition of conscientious objectors appeared to be growing."⁹⁵ Though some representatives resisted the resolution, it eventually passed. The resolution's preamble referred to the 1978 General Assembly Resolution, "which recognized the right of all persons to refuse service in military or police forces used to enforce apartheid."⁹⁶

The next year, the Commission on Human Rights' Sub-Commission on Discrimination and Protection of Minorities requested a new study on conscientious objection. The members of the Sub-Commission chosen to draft the study, Asbjørn Eide and Charna L. C. Mubanga-Chipoya, submitted a preliminary report in September 1982, and Resolution 1982/30 requested a final version. The preamble of this Resolution acknowledged the difference between the right promulgated in the General Assembly's 1978 resolution and a universal right of conscientious objection:

Recognizing the right of all persons to refuse service in military or police forces which are used to enforce *apartheid*, to pursue wars of aggression, or to engage in any other illegal warfare;

Recognizing the possibility of the right of all persons to refuse service in military or police forces on grounds of conscience or deeply held personal conviction. . . .⁹⁷

Unlike the right of conscientious objection promulgated by the 1978 GA resolution, the right contemplated in paragraph (b) would be a right good against any citizen's home state. Even paragraph (a) was somewhat novel, as it expanded the limited right recognized in 1978 to cover not just apartheid regimes but all "wars of aggression" and "other illegal warfare." The Sub-Commission thus suggested that "conscience" might become a vehicle through which individuals could give voice to a panoply of international legal norms. Eide and Mubanga-Chipoya's report elaborated such a vision, explaining that for "a conscientious person, human rights provisions would be among

95. U.N. Commission on Human Rights, Discussion of Agenda Item 17, 36th Sess. (Mar. 12, 1980), in *International Law of Youth Rights*, *supra* note 51, at 318.

96. E.S.C. Res. 38 (XXXVI), 36 U.N. ESCOR Supp. No. 3, U.N. Doc. E/1980/13, E/CN.4/1408, at 198 (Mar. 12, 1980).

97. Asbjørn Eide & Charna L. C. Mubanga-Chipoya, *Conscientious Objection to Military Service*, U.N. Doc. E/CN.4/Sub.2/1983/30/Rev.1, U.N. Sales No. E.85.XIV.1, at 1 (1985).

the central norms that would guide him in determining the dividing line between legitimate and illegitimate taking of the life of others."⁹⁸ If Eide and Mubango-Chipoya had their way, not only would conscience suffice to justify objection to compulsory service under international law, but the conscientious objector could himself become an enforcer of international law.

The authors went on to make a series of recommendations that went far beyond the limited 1978 right to conscientiously object to participation in apartheid. They proposed a draft Resolution for the Commission of Human Rights, which would declare that "States should recognize by law the right of persons who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, or similar motives, refuse to perform armed service, to be released from the obligation to perform military service."⁹⁹ This right would be available to citizens who objected either to all armed service or to armed service "which the objector considers likely" to violate international laws against apartheid, genocide, and illegal occupation of foreign territory, among other crimes.¹⁰⁰ This new right would require national enforcement regimes. Eide and Mubanga-Chipoya's draft Resolution called on states to "maintain or establish independent decision-making bodies to determine whether a conscientious objection is valid under national law" and to establish alternative forms of service for objectors.¹⁰¹

In making these recommendations, Eide and Mubanga-Chipoya drew liberally on the working papers produced at the height of the Vietnam conflict by non-governmental organizations such as the International Peace Bureau.¹⁰² It was the issue of apartheid, however, that had made these documents newly accessible, opening up common ground between Western activists dedicated to world peace and Soviet, Arab, and African member states wary of Western rights talk and protective of their rights of self-determination. Indeed, one of the seven legal sources for a right of conscientious objection that Eide and Mubanga-Chipoya identified was "self-determination":

Objection to participation in armed repression of self-determination will no doubt be particularly strong in the case of individuals who belong to a people whose

98. *Id.* at 7.

99. *Id.* at 18.

100. *Id.*

101. *Id.*

102. *See id.* at 9.

self-determination is denied. Resistance by the young people of Namibia and South Africa to military service in the South African-controlled armed forces provides an example of such a case.¹⁰³

Eide and Mubanga-Chipoya's reasoning helps explain why the first official formulations of a right of conscientious objection at the UN arrived via anti-colonial politics. In the case of apartheid at least, the conscientious objector and the legitimate sovereign are one and the same, as the true popular sovereigns are disempowered by the compulsory mechanisms of illegitimate rulers. In such a case, Eide and Mubanga-Chipoya suggested, the conscientious objector could act as a conduit for *both* legitimate national self-determination *and* the international order that prohibits the domination of a people by an alien force. In the apartheid struggle, then, the nationalistic violence of liberation and the internationally-minded non-violence of conscientious objection achieved an original and politically potent synthesis.

In the spring of 1984, the Commission on Human Rights asked the Economic and Social Council to give Eide and Mubanga-Chipoya's report the "widest possible distribution" and ECOSOC complied.¹⁰⁴ Thus, substantial momentum preceded the Commission's 1985 meeting when, in addition to Eide and Mubanga-Chipoya's report, the Commission heard testimony from several non-governmental organizations including the International Peace Bureau, the International Commission of Jurists, Pax Christi, and Amnesty International.¹⁰⁵ The first movers at the Commission, however, were several Soviet bloc countries who submitted two superficial resolutions emphasizing "the important role of young people in the struggle for peace and international co-operation" while studiously avoiding the question of conscientious objection.¹⁰⁶ The cocktail of conscientious objection and self-determination offered by Eide and Mubanga-Chipoya's report might have been strong enough to attract African and Arab support, but Soviet suspicion of Western interference could still spoil the party.

103. *Id.* at 6-7.

104. See U.N. Comm'n on Human Rights, Draft Resolution on Conscientious Objection to Military Service, 41st Sess., U.N. Doc. E/CN.4/1985/L.33/Rev.1 (Mar. 13, 1985), in *International Law of Youth Rights*, *supra* note 51, at 330-331.

105. *Id.* at 325.

106. U.N. Comm'n on Human Rights, Draft Resolution on Conscientious Objection to Military Service, 41st Sess., U.N. Doc. E/CN.4/1985/L.32 (Feb. 27, 1985), in *International Law of Youth Rights*, *supra* note 51, at 328.

On February 27, 1985, Austria, Costa Rica, the Netherlands, and Spain submitted their own resolution. It squarely addressed the issue of conscientious objection while recalling in its preamble the 1978 General Assembly resolution and Eide and Mubanga-Chipoya's report. The draft Resolution's first operative paragraph declared "that the right of conscientious objection to military service is a legitimate exercise of the right to freedom of thought, conscience and religion recognized by the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights."¹⁰⁷ The resolution went on to request states to "reconsider their legislation or administrative arrangements with a view to recognizing the right of persons who, for reasons of conscience or profound conviction, refuse to perform armed service to be released from the obligation to perform military service."¹⁰⁸

The Commission deferred consideration of this contentious draft, and on March 13, the original drafters, now joined by France and the United Kingdom, submitted a revised version which eliminated the phrase "the right of conscientious objection" and simply stated "that conscientious objection to military service is a legitimate exercise of the right to freedom of thought, conscience, and religion."¹⁰⁹ This revision did not quiet the qualms of the Soviet-aligned countries. Bulgaria introduced a series of amendments, one of which replaced the first operative paragraph which "[c]onsiders that conscientious objection to military service, when exercised in accordance with national legislation, can be construed as an expression of the right to freedom of thought, conscience and religion."¹¹⁰ This amendment sought to vitiate the very concept of an international right of conscientious objection by defining the expression of the right to freedom of conscience in terms of obedience to a nation's positive law.

Realizing that passage was not in the cards, the representative from the Netherlands moved to adjourn debate on the

107. U.N. Comm'n on Human Rights, Draft Resolution, 41st Sess., U.N. Doc. E/CN.4/1985/L.33 (Feb. 27, 1985), in *International Law of Youth Rights*, *supra* note 51, at 330.

108. *Id.*

109. U.N. Comm'n on Human Rights, U.N. Doc. E/CN.4/1985/L.33/Rev.1, *supra* note 104, at 332.

110. U.N. Comm'n on Human Rights, U.N. Doc. E/CN.4/1985/L.60 (Mar. 13, 1985) in *International Law of Youth Rights*, *supra* note 51, at 333.

resolution for two years.¹¹¹ As David Weissbrodt has argued, this particular two-year window may have been absolutely crucial.¹¹² In 1986, the nuclear meltdown at Chernobyl, among other events, accelerated reform within the USSR and the international thawing of the Cold War.¹¹³

IV. UNIVERSALIZING THE RIGHT OF CONSCIENTIOUS OBJECTION

At the Commission on Human Rights's 1987 meeting, the Western sponsors of an updated resolution on conscientious objection engaged in productive talks with presumed opponents such as Bulgaria, the German Democratic Republic, and Tanzania. These talks sought to resolve residual Cold War and anticolonial tensions. First, the Byelorussian delegates wanted to include language referencing the "New International Economic Order," a theory of global development supported by the Soviet bloc.¹¹⁴ The United States, however, had developed a practice of dissenting or abstaining from any resolution that invoked the phrase.¹¹⁵

Second, the delegate from Tanzania threatened to use his influence to turn the African bloc against the proposal if Austria, Australia, Ireland, and Norway did not relent in attempting to narrow a recent Congolese resolution on mercenaries.¹¹⁶ Although the Western nations refused to withdraw their amendments, these amendments were defeated and Tanzania ultimately did not oppose the conscientious objection resolution.¹¹⁷ The Byelorussian Soviet Socialist Republic and its bloc would eventually abstain, rather than dissent, after several further concessions on the part of the pro-conscientious-objection sponsors.¹¹⁸

Prior to the vote on the resolution, Christian Strohal, the alternative representative from Austria, emphasized that, unlike the 1985 resolution, this new draft "did not touch on any national

111. U.N. Comm'n on Human Rights, Discussion of Agenda Item 15, 41st Sess. (Mar. 14, 1985), in *International Law of Youth Rights*, *supra* note 51, at 334.

112. Weissbrodt, *supra* note 3, at 54–56.

113. See Boris Kagarlitsky, *Perestroika: The Dialectic of Change*, in *The New Detente: Rethinking East-West Relations* 323, 333 (Mary Kaldor, Gerald Holden & Richard A. Falk eds., 1989).

114. Weissbrodt, *supra* note 3, at 56.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 59.

prerogatives" nor "infringe on the rights of countries which have compulsory military service," including Austria itself.¹¹⁹ Indeed, the resolution merely "recommended that such countries introduce various forms of alternative service," while referring deferentially to "national legal systems."¹²⁰

Despite these concessions, a few more were needed before passage could be secured. These final alterations appealed to those states still anxious about the prerogatives of national sovereignty: drafters added a reference to the "right to self-determination" in a preambular paragraph and changed the phrase "take measures aimed at recognizing the right to be exempt from military service" to "take measures aimed at exemption from military service."¹²¹ Indeed, the resolution's sponsors had purged it of any explicit mention of a *right of conscientious objection*; explicit articulation of the right would have to wait two more years. Nonetheless, when Resolution 1987/46 finally passed on March 10, 1987, the Commission on Human Rights for the first time endorsed conscientious objection to military service as a practice in which all citizens might engage, not just those engaged in resistance to colonial or neo-colonial regimes.¹²² Only Iraq and Mozambique dissented.

Two years later, the Commission on Human Rights finally declared the existence of a general right of conscientious objection. It was the first time in the UN's history that any charter or treaty body had done so. On March 8, 1989, the Commission issued a resolution on conscientious objection that explicitly recognized "*the right of everyone to have conscientious objections* to military service as a legitimate exercise of the right to freedom of thought, conscience and religion. . . ."¹²³ In doing so, the Commission dedicated a preambular paragraph to the General Assembly's 1978 anti-apartheid resolution, acknowledging the ground that struggles for national liberation and self-determination had laid for the novel right.

Between 1989 and 1992, former Soviet bloc countries Poland and Hungary recognized the right of conscientious objection and

119. *Id.* at 57-58.

120. *Id.*

121. U.N. Comm'n on Human Rights, Discussion of Agenda Item 15, 42nd Sess. (Mar. 10, 1987), in *International Law of Youth Rights*, *supra* note 51, at 339.

122. U.N. Comm'n on Human Rights, Res. 1987/46, 42nd Sess., U.N. Doc E/CN.4/1987/L.73 (Mar. 10 1987).

123. U.N. Comm'n on Human Rights, Res. 1989/59, 43rd Sess., U.N. Doc. E/CN.4/RES/1989/59 (Mar. 8, 1989) (emphasis added).

began to offer non-military alternative service.¹²⁴ Meanwhile, the Commission on Human Rights' Special Rapporteur on "Human Rights and Youth" lamented that many parts of the world were falling short of the standards set by the Commission's 1989 resolution.¹²⁵ The breadth of the Special Rapporteur's list—which included both states perennially ravaged by war and those pacific enclaves which had most fully supported the declaration of a right of conscientious objection—indicated how relatively ambitious the standards set out in the 1987 and 1989 resolutions were. This gap between resolution and reality also indicated the great distance between the declaration of a right and the curing of its violation.

As the Commission on Human Rights turned in earnest to the question of conscientious objection in the 1980s, another UN body, specifically authorized to hear individual complaints about human rights violations, began to develop a conscientious objection jurisprudence. In 1976, two years before the General Assembly recognized a limited right of conscientious objection, the ratification of the ICCPR had led to the creation of a Human Rights Committee.¹²⁶ The function of the HRC was to review the compliance of member states with the ICCPR and to issue General Comments interpreting rights enumerated within the ICCPR.¹²⁷ For those countries who signed on to the Optional Protocol to the ICCPR, however, the Committee took on an additional function: "to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that [country] of any of the rights set forth in the Covenant."¹²⁸

124. U.N. Comm'n on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 42nd Sess., Recommendations of the Special Rapporteur on "Human Rights and Youth," U.N. Doc. E/CN.4/Sub.2/1992/36 (June 18, 1992), in *International Law of Youth Rights*, *supra* note 51, at 360.

125. *Id.* at 361.

126. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 28, S. Exec. Doc. E, 95-2, at 13 (1978), 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

127. *Id.* at art. 40.

128. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1, 999 U.N.T.S. 302, 302 (entered into force Mar. 23, 1976) [hereinafter ICCPR Optional Protocol]. Upon receipt of individual complaints, the HRC "must decide whether the state party has violated a right secured under the ICCPR" and "is instructed to forward its views to the State Party concerned and to the individual." Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *The Future of UN Human Rights Treaty Monitoring* 15, 23 (Philip

In the mid-1980s, the HRC began to hear individual complaints from conscientious objectors denied recognition by their national governments. The HRC's jurisprudence registered the effect of the Commission's late-1980s move to recognize a right of conscientious objection in Article 18 of the ICCPR. But, engaged in a direct confrontation with states that might blithely violate such a right if posited, the HRC was more reluctant to give the right of conscientious objection a full-throated endorsement.

The Human Rights Committee first issued a substantive view on conscientious objection in 1984. In *L.T.K. v. Finland*, a Finnish citizen had been denied alternative service because he had not "proven that serious moral considerations based on an ethical conviction prevented the author from performing armed or unarmed military service."¹²⁹ Accordingly, the Finnish government ordered the citizen to perform armed service. After exhausting national appeals, the citizen petitioned the HRC, arguing that his rights under Articles 18 and 19 of the ICCPR had been violated (the latter protecting the right to freedom of opinion and expression).

The Committee did not decide the merits of the citizen's claim but rather found the petition itself inadmissible because neither Article 18 nor Article 19 included a right of conscientious objection. The HRC's decision referred not just to the absence of such an explicit right in Articles 18 and 19, but to the presence of "conscientious objection" in Article 8(3)(c)(ii) of the Covenant. There, the HRC acknowledged conscientious objection as an optional, but by no means necessary, exception to compulsory military service.¹³⁰ Because the

Alston & James Crawford eds., 2000) (internal quotations omitted). While such decisional power is clearly adjudicatory in some sense, the "views" of the HRC are not generally considered legally binding. See P.R. Gandhi, *The Human Rights Committee and the Right of Individual Communication* 40-41 (1998) (noting that while the Committee is not "a formal judicial body . . . [i]ts views read like judgments of a court"). Yet many commentators treat them as an "authoritative ascertainment of law." Yuji Iwasawa, *The Domestic Impact of International Human Rights Standards*, in *The Future of UN Human Rights Treaty Monitoring*, *supra*, at 258. As Henry Steiner has suggested, the power of the HRC to issue its views on individual cases was "feared by many states as the most imposing or potentially threatening of the Committee's powers." Steiner, *supra*, at 23. Although neither the HRC's views nor its General Comments may be self-executing international legal decisions, several countries' constitutions demand that they be considered in the formulation of national law. See Iwasawa, *supra*, at 259.

129. *L.T.K. v. Finland*, Comm. No. 185/1984, Rep. of the Human Rights Comm., U.N. GAOR, 14th sess., Supp. No. 40, at 240, U.N. Doc. A/40/40 (1985).

130. *Id.* at 242.

Committee did not find that a right to refuse military service existed in the Covenant, the citizen could not petition the Committee to decide whether such a right had been violated.

In 1991, two years after the passage of the Commission of Human Rights' 1989 resolution deriving a right of conscientious objection from Article 18 of the Covenant,¹³¹ the HRC heard *J.P. v. Canada*.¹³² The author of the petition, a Quaker, "refused to pay a certain percentage of her assessed taxes, equal to the amount of the Canadian federal budget earmarked for military appropriations."¹³³ Before ever being prosecuted, she sought a declaratory judgment from Canadian courts that her refusal was lawful. National courts denied her such a judgment. When the Canadian Internal Revenue Service "threaten[ed] to collect the taxes owed," the petitioner sought a protective judgment from the HRC, arguing that payment of her back taxes would violate her right to freedom of conscience under Article 18 of the Covenant.¹³⁴

Given the author's outlandish claim, this communication seemed much simpler than *L.T.K. v. Finland*. As in *L.T.K.*, the Committee found the petition inadmissible, but not because Article 18 of the Covenant lacked a right of conscientious objection. Instead, the Committee explicitly declared that "article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, *including conscientious objection to military activities and expenditures*."¹³⁵ This declaration—contrary to the HRC's finding in *L.T.K.*—harmonized with the Commission on Human Rights' intervening 1987 and 1989 resolutions that connected conscientious objection to Article 18.¹³⁶ Acknowledging the existence of a right of conscientious objection, the HRC simply found that "refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article."¹³⁷ Thus, the tax-resister had not had her rights violated.

131. See *supra* note 123 and accompanying text.

132. *J.P. v. Canada*, Comm. No. 446/1991, Rep. of the Human Rights Comm., U.N. GAOR, 47th Sess., Supp. No. 40, at 426, U.N. Doc. A/47/40 (1992).

133. *Id.*

134. *Id.* at 427.

135. *Id.* at 427 (emphasis added).

136. While HRC decisions generally follow the Committee's own precedents, "[n]either the [Optional Protocol] nor the HRC's rules of procedure state that the HRC is bound by its previous decisions." Kirsten A. Young, *The Law and Process of the U.N. Human Rights Committee* 182 (2002).

137. *J.P. v. Canada*, *supra* note 132, at 427.

Two years later, in General Comment 22, the Committee's official interpretation of Article 18 of the ICCPR, the HRC moved toward the Commission on Human Rights' endorsements of a right of conscientious objection. General Comment 22 declared that:

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.¹³⁸

This passage generated significant debate at the HRC. Committee members recognized that in declaring that a right of conscientious objection could be derived from Article 18, the General Comment overturned the HRC's earlier decision in *L.T.K. v. Finland* (though affirming *J.P. v. Canada*).¹³⁹ On the other hand, as the U.K. delegate pointed out, the "can be derived" language was a hedge: the "paragraph did not seem to provide clear guidelines for State parties on their obligation to grant the right of conscientious objection under article 18, but merely indicated that it was possible to derive such a right from that article."¹⁴⁰ Indeed, the HRC's final language was more reticent than the Commission of Human Rights' most recent treatment of conscientious objection. On March 10, 1993, the Commission had re-affirmed "the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought, conscience, and religion."¹⁴¹ The HRC was not yet willing to speak so decisively when it came to interpreting the binding language of the Covenant.

V. VIOLATING THE RIGHT OF CONSCIENTIOUS OBJECTION

In 1999, the HRC drew nearer to the Commission's clear statements linking a human right of conscientious objection to Article 18 of the ICCPR. In *Westerman v. Netherlands*, as in *L.T.K. v. Finland*, the Committee faced a case in which a country had a system of conscientious objection but had refused to recognize the

138. Human Rights Committee, General Comment 22, Article 18, 48th Sess. (July 30, 1993), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, at 35 (1994).

139. See Takemura, *supra* note 3, at 60.

140. *Id.* at 60-61 (quoting U.K. delegate).

141. U.N. Comm'n on Human Rights, Res. 1993/84 (Mar. 10, 1993), in *International Law of Youth Rights*, *supra* note 51, at 383-85.

particular petitioner as a legitimate objector.¹⁴² The Netherlands' law required that an objector have an "insurmountable objection of conscience to military service because of the use of violent means."¹⁴³ State authorities determined that Westerman, who objected even to non-combatant (and thus non-violent) duty, did not have such an objection. In this case, the existence of a right of conscientious objection was not the question in dispute, but rather the specific content of that right. The HRC found that the Dutch standard was compatible with Article 18, and refused to interpose its own analysis of whether the petitioner's beliefs met or did not meet that standard.¹⁴⁴

The *Westerman* majority opinion generated two dissenting opinions, one signed by the American member, famed international lawyer Louis Henkin.¹⁴⁵ The Henkin dissent argued that the Dutch restriction of recognition to a specific type of conscientious objection—an "insurmountable objection . . . because of the use of violent means"—improperly differentiated "among conscientious objectors on the basis of the nature of their particular beliefs," a differentiation prohibited by General Comment 22.¹⁴⁶ The dissent's interpretation of the General Comment cast doubt on *all* discriminations among potential conscientious objectors. Such an interpretation could seriously undermine a state's ability to administer any form of compulsory military service. The radicalism of the Henkin dissent signaled an increasingly pro-conscientious-objection tendency on the Committee.

Seven years later, by 2006, staunch advocates of the human right of conscientious objection found themselves in the majority. In *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*,¹⁴⁷ the HRC for the first time found a country in violation of Article 18 for its failure to provide alternative service for those unwilling to perform military service. Under its Military Service Act, the Republic of Korea

142. *Westerman v. Netherlands*, Commc'n. No. 682/1996, Rep. of the Human Rights Comm., U.N. GAOR, 55th Sess., Supp. No. 40, vol. 2, at 41, U.N. Doc. A/55/40 (Nov. 3, 1999).

143. *Id.* ¶¶ 6.5, 9.3.

144. *Id.* ¶ 9.5.

145. *Id.* at Individual Opinion (dissenting), P. Bhagwati, L. Henkin, C. Medina Quiroga, F. Pocar, and M. Scheinin.

146. *Id.*

147. *Yoon and Choi v. Republic of Korea*, Commc'n. No. 1321-1322/2004, Rep. of the Human Rights Comm., U.N. GAOR, 62nd Sess., Supp. No. 40, U.N. Doc. A/62/40, vol. II, annex VII, § 5, at 195 (Nov. 3, 2006).

required over two years of military service of each male citizen.¹⁴⁸ For years, Jehovah's Witnesses, who objected to all military service, had been imprisoned for their draft resistance. Beginning in 2001, some Buddhists and non-religious objectors began resisting the draft too, and in 2002 a non-governmental group, Korean Solidarity for Conscientious Objection, formed.¹⁴⁹ In 2004, twenty-two Korean congressmen drafted an amended Military Service Act with an alternative service provision.¹⁵⁰ The next year, the Korean National Human Rights Commission also pushed for alternative service and judicial recognition of conscientious objection as a legitimate exercise of freedom of conscience.¹⁵¹

In this liberalizing national context, the HRC received a petition from two South Korean Jehovah's Witnesses whose imprisonment for refusing to serve had been upheld by South Korea's highest court. Yoon and Choi complained that the absence of "an alternative to compulsory military service, under pain of criminal prosecution and imprisonment, breache[d] their rights under article 18, paragraph 1, of the [ICCPR]."¹⁵² Rather than contesting that Article 18 of the ICCPR included a right of conscientious objection, South Korea pointed out that while paragraph 1 of Article 18 acknowledges a right to freedom of conscience, paragraph 3 holds that "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."¹⁵³

In hindsight, it is surprising that Korea's paragraph 3 challenge to the project of deriving a right of conscientious objection from Article 18 of the Covenant had not arisen sooner. Of course, when, in the mid- to late-1960s, non-governmental organizations first formulated an international right of conscientious objection, they referenced the Universal Declaration of Human Right's Article 18, not the recently-promulgated and still-unratified ICCPR.¹⁵⁴ In later UN documents referring to a right of conscientious objection,

148. See Kuk Cho, *Conscientious Objection to Military Service in Korea: The Rocky Path from Being an Unpatriotic Crime to a Human Right*, 9 Or. Rev. Int'l L. 187, 190 (2007).

149. *Id.* at 195.

150. *Id.*

151. *Id.* at 196-97.

152. Yoon and Choi v. Republic of Korea, *supra* note 147, ¶ 3.

153. G.A. Res. 2200A, *supra* note 126, at art. 18, ¶ 3.

154. See, e.g., International Peace Bureau, *The Right to Refuse Military Service*, *supra* note 41, at 5 (citing the Universal Declaration of Human Rights).

however, the two Article 18s were usually cited in tandem.¹⁵⁵ Yet the Covenant's Article 18, unlike the UDHR's, explicitly limits the right of freedom of conscience in the interests of public safety, order, and health.¹⁵⁶ Compulsory military service, of course, is just the kind of policy that is likely to be instituted when "public safety, order, [and] health" are at risk.¹⁵⁷ And, in *Yoon*, South Korea argued that being "the world's sole divided nation," it was confronted with "specific security circumstances" that made its system of compulsory military service absolutely "necessary to protect public safety."¹⁵⁸

The right of conscientious objection first entered the mainstream of UN discourse in 1978 by way of something of a backdoor—through the General Assembly's endorsement of objection in the case of illegal, apartheid regimes that threatened populations' right to self-determination. Then, at the Commission of Human Rights during the 1980s and 1990s, older arguments for a universal right of conscientious objection that had first gained prominence during the Vietnam era piggy-backed onto the right to object to apartheid service. Now, thirty years later, Korea insisted that its right to secure—to determine—its own existence necessitated the limitation of any right of conscientious objection. Korea's argument implied that a right of conscientious objection stood in inherent conflict with the right of self-determination.

The HRC had to explain away this conflict. First, recalling its "previous jurisprudence" in *J.P. v. Canada* and General Comment 22, the Committee found that Yoon and Choi's "refusal to be drafted for compulsory service was a direct expression of their religious beliefs," and that their "conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief" in violation of Article 18, paragraph 1 of the ICCPR.¹⁵⁹ Having established that a human right had been restricted, the Committee asked if this restriction was "justified by the permissible limits described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public

155. See, e.g., UN Comm'n on Human Rights, Res. 1989/59, *supra* note 123 (citing both the Universal Declaration and the ICCPR).

156. Furthermore, in 2001, the HRC confirmed that while Article 18 rights were non-derogable even in a state of emergency, the limitations of Article 18, paragraph 3 were always in effect. See Human Rights Comm., General Comment 29, Article 4: Derogations During a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

157. Yoon and Choi v. Republic of Korea, *supra* note 147, ¶ 8.3.

158. *Id.* ¶¶ 4.2–4.3, 8.3.

159. *Id.* ¶ 8.3.

safety.”¹⁶⁰ Was South Korea’s restriction on petitioners’ right of conscientious objection justified by a basic concern for public safety, the right of a nation to sustain itself and protect its people?

To answer this question, the HRC turned not to a formalistic discussion of rights but to actual national practice. Pointing to the fact that “an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service,” the Committee found that Korea had “failed to show what special disadvantage would be involved for it” if it did fully respect the petitioners’ rights of conscience or religious belief.¹⁶¹ Widespread adoption of alternatives to compulsory national service undermined Korea’s argument that public safety necessitated its refusal to provide such alternatives. Consequently, the HRC found that Korea’s facial violation of Article 18, paragraph 1 was not subject to a paragraph 3 exception. Korea was thus “under an obligation to provide [Yoon and Choi] with an effective remedy [for their imprisonment], including compensation . . . [and] to avoid similar violations of the Covenant in the future.”¹⁶²

As discussed in the Introduction, Ruth Wedgwood, serving as the United States’ HRC member, dissented from the majority view. Wedgwood explained that she was “unable to conclude that the right to refrain from mandatory military service is strictly required by the terms of the Covenant, as a matter of law.”¹⁶³ She criticized the majority for citing “no evidence from the Covenant’s negotiating history to suggest” that a distinction could be made between a conscientious objection to military service and an objection to any other legal obligation on the basis of religious belief or other conviction.¹⁶⁴ Highlighting the diffident language of the HRC’s General Comment 22, Wedgwood noted that “in the interval of more than a decade since [issuing the General Comment], the Committee has never suggested in its jurisprudence under the Optional Protocol that such a ‘derivation’ is in fact required by the Covenant.”¹⁶⁵ She finally noted that Article 8 of the ICCPR clearly discussed

160. *Id.*

161. *Id.* ¶ 8.4.

162. *Id.* ¶ 10.

163. Yoon and Choi v. Republic of Korea, *supra* note 147, app. (Dissenting Opinion by Committee Member Ms. Ruth Wedgwood).

164. *Id.*

165. *Id.*

conscientious objection as an optional, rather than required, component of compulsory military service.¹⁶⁶

Wedgwood's reasoning implied that the only valid method to establish the human right of conscientious objection would be to amend the ICCPR, explicitly introducing such a human right into Article 18 or elsewhere in the Covenant. As we have seen, however, transnational movements against colonialism and war took a different path. Over the course of decades, these movements lobbied the Commission on Human Rights and the General Assembly to link Article 18 of the ICCPR with conscientious objection. This activism bore fruit when first the General Assembly and then the Commission derived a human right of conscientious objection from Article 18 (among other legal instruments). In turn, the HRC gradually harmonized its own jurisprudence with the pro-conscientious-objection stance that had emerged within other UN bodies.

Because "the HRC's decisions must have their legal basis in the ICCPR and the [Optional Protocol],"¹⁶⁷ one might consider it invalid for the Committee's views to be influenced by decisions of other UN bodies, previous Committee decisions that themselves depart from a literal reading of the ICCPR,¹⁶⁸ or social and political change at the national level. Wedgwood's dissent suggested as much. Yet it is more useful to understand the *Yoon* decision as an expression of the inherent challenges that international human rights law must face in a world of nation-states than as an unfortunate example of jurisprudential overreach.

For instance, given the plethora of UN charter and treaty bodies authorized to interpret human rights law (each created by different though overlapping sets of member states), lack of coordination between these different bodies can undermine the legitimacy of the human rights system as a whole.¹⁶⁹ In this light, the

166. *Id.*

167. Young, *supra* note 136, at 33–34.

168. In general, international norms of treaty interpretation require respect for the "ordinary meaning" of the legal text. Elihu Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RCADI 337, 417 (1976). On the other hand, Lauterpacht notes that where there is controversy about the best interpretation of a provision, recourse to ordinary meaning is "tantamount to ignoring the existence of controversy." *Id.* at 418.

169. See Young, *supra* note 136, at 26–27 ("While it is essential from the point of view of credibility for the HRC to maintain its independence, lack of coordination has led to . . . contradictory interpretations of states parties'")

evolution of HRC jurisprudence toward the Commission on Human Rights' position on conscientious objection may represent a search for legitimating coordination among the "proliferation of bodies dealing with human rights."¹⁷⁰

The HRC's reliance on its own precedent, rather than on evidence from ICCPR drafting sessions, may also reflect concerns about—rather than indifference to—the legitimacy of human rights jurisprudence. As Elihu Lauterpacht has observed, "in the case of multilateral conventions . . . acceded to by States which have not participated in the [original] negotiations," negotiating history is a particularly unreliable guide to the legitimate interpretation of current signatories' treaty obligations.¹⁷¹ As time goes by, Lauterpacht argues, the past practice of a treaty body such as the HRC may become a better guide to widely accepted interpretations of a treaty.¹⁷² Indeed, international norms of treaty interpretation recognize that treaty bodies are competent to interpret their own constituent instruments and that, as a result, the meaning of constituent instruments will change over time.¹⁷³ Such a "living" approach to interpretation may actually insure that human rights law remains responsive to—and thus legitimate in the eyes of—the states it seeks to govern.¹⁷⁴

Along the same lines, Yoon's reliance on developments in national practice may indicate an effort to shore up the legitimacy of human rights law. Faced with a world of nation-states, a human rights body such as the HRC rests on particularly solid ground when

obligations that may also undermine the credibility of the HRC, and indeed the entire human rights system.").

170. *Id.* at 23.

171. Lauterpacht, *supra* note 168, at 440.

172. *Id.* at 447–60.

173. See, e.g., Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 1, 1155 U.N.T.S. 331, art. 31(3)(b) (entered into force Jan. 27, 1980) (describing past practice as a legitimate guide to a treaty's interpretation); Young, *supra* note 136, at 81 (noting that the ICCPR and the Optional Protocol "must, as a result of the HRC's practice, evolve and change in a manner which may not have been predictable from the original wording of the texts"); Felice Morgenstern, *Legality in International Organizations*, 48 Brit. Y.B. Int'l L. 241, 253–54 (1976–77) (noting how a body's competence to interpret its own constituent instrument makes the legality of its decisions difficult to challenge).

174. For further discussion of responsive legal interpretation, see Philippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (1978); Robert Post, *Theories of Constitutional Interpretation*, 30 Representations 13 (1990).

it roots its decisions in actual state practice. Furthermore, failure to modify the interpretation of human rights treaties in the face of changing national practice could actually undermine acceptance of those treaties.

As this discussion about the reasoning behind the *Yoon* decision demonstrates, the tension between Wedgwood's dissent and the majority opinion is symptomatic of a more basic tension between international human rights law and national sovereignty.¹⁷⁵ In *Yoon*, both Wedgwood and the HRC majority faced the challenge of elaborating a legitimate system of universally-binding human rights law in a world of sovereign nation-states. Wedgwood's dissent implied that this challenge could be best met by hewing as closely as possible to the text of the ICCPR and the evidence left behind by the state representatives who had drafted it. The majority opinion chose instead to emphasize the HRC's own past precedents—which themselves were reflective of decisions reached by state representatives to the General Assembly and the Commission on Human Rights—and current state practice. In answering the question of whether Article 18 of the ICCPR protected the right of conscientious objection, Wedgwood and the majority disagreed about the proper balance to accord competing international and national authorities. Such disagreement may be inescapable. Indeed, as we have seen, the anti-war and anti-colonial social movements that first put the human right of conscientious objection on the UN's agenda had similar disagreements about the proper extent of such a right and its ultimate relationship to national sovereignty.

VI. CONCLUSION

The HRC's decision in *Yoon* was widely lauded by the anti-war and human rights communities as conclusive recognition that Article 18 of the ICCPR includes a universal right of conscientious objection.¹⁷⁶ In 2008, however, South Korea decided not to create a

175. See *supra* notes 5–8 and accompanying text.

176. See, e.g., Rachel Brett, *International Standards on Conscientious Objection to Military Service* 1 (2008) (noting that the HRC has “recognised the right of conscientious objection to military service” under Article 18 of the ICCPR in *Yoon* and in other reports); Sarah Joseph, *Human Rights Committee: Recent Jurisprudence*, 7 Hum. Rts. L. Rev. 567, 581 (2007) (“*Yoon* and *Choi* finally establishes a right of conscientious objection to military service under Article 18 of the ICCPR.”).

system of alternative service for conscientious objectors.¹⁷⁷ Nor have the petitioners in *Yoon* received any compensation from the South Korean government.¹⁷⁸ In 2010 and 2011, the HRC re-affirmed its decision in *Yoon*, finding that Korea continued to violate the rights of conscientious objectors by refusing to offer them alternative service.¹⁷⁹ In the wake of the 2010 decision, the Korean Ministry of Justice was reportedly working with the National Human Rights Commission “to search for effective ways of implementing” the HRC’s finding.¹⁸⁰ Yet on August 30, 2011, Korea’s Constitutional Court upheld the nation’s unreformed compulsory military service policy, finding that it did not violate freedom of conscience.¹⁸¹ Thus, while the Commission on Human Rights and the HRC have codified and implemented a right of conscientious objection, such a right cannot by itself pierce the veil of national sovereignty.¹⁸²

Thanks to Korea’s ongoing internal debates over HRC doctrine, the shadow of sovereignty continues to fall across the right of conscientious objection. As Ruth Wedgwood’s terse dissent indicated, a right of conscientious objection failed to gain traction during the ICCPR drafting sessions precisely because such a right threatened member states’ sovereign control of their own military policies. How, then, could the HRC find that Korea had violated the ICCPR by prosecuting conscientious objectors? This Article has attempted to answer that question. It has recounted the process by

177. Jon Herskovitz & Kim Junhyun, *South Korea Rethinks ‘Alternative’ to Conscription*, Reuters, Dec. 24, 2008, <http://www.reuters.com/article/2008/12/24/us-korea-objectorsidUSTRE4BN0D820081224> (last visited Mar. 18, 2013).

178. E-mail from Yoon Jin Shin, J.S.D. Candidate, Yale Law Sch., to the author (May 17, 2012, 10:29 EST) (on file with author).

179. *Eu-min Jung v. Republic of Korea*, Commc’n. Nos. 1593–1603/2007, Rep. of the Human Rights Comm., ¶¶ 8–9, U.N. Doc. CCPR/C/98/D/1593–1603/2007 (Mar. 23, 2010); *Min-Kyu Jeong v. Republic of Korea*, Commc’n. Nos. 1642–1741/2007, Rep. of the Human Rights Comm., ¶¶ 8–9, U.N. Doc. CCPR/C/101/D/1642–1741/2007 (Mar. 24, 2011).

180. Lee Hyo-Sik, *Conscientious Military Service Objectors Will Appeal to UN*, Korea Times, May 6, 2010 (on file with author).

181. See Constitutional Court [Const. Ct.], 2007Hun-Ka12, 2009Hun-Ba103 (consol.), Aug. 30, 2011, (23-2(A) KCCR, 132) (S. Kor.); Constitutional Court [Const. Ct.], 2008Hun-Ka22, Aug. 30, 2011, (23-2(A) KCCR, 174) (S. Kor.).

182. On the problem of the effectiveness of the HRC, see generally Markus G. Schmidt, *Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond*, in *The UN Human Rights Treaty System in the 21st Century* (Anne F. Bayefsky ed., 2000) (discussing the absence of legally binding, enforceable decisions in U.N. human rights institutions); see also Steiner, *supra* note 128, at 15 (discussing the evolving role of individual claims in international human rights adjudication in relationship to national sovereignty concerns).

which anti-war and anti-colonial activists worked to challenge national policies—of war-making and apartheid—at the UN. Both groups of activists converged on the figure of the conscientious objector as a vehicle for the international critique of member states' legal and political regimes. This anti-war and anti-colonial advocacy, in turn, shaped the reasoning by which the Commission on Human Rights, the General Assembly, and the HRC did, eventually, declare a right of conscientious objection. Yet that right of conscientious objection remains constrained by the same force that continually delayed its invention: the unwillingness of nation-states to jeopardize their sovereignty.

This history of ongoing struggle complicates any simple opposition between collective rights to self-determination and individual human rights, national sovereignty and international law. In seeking to transform national programs of conscription and apartheid, transnational anti-war and anti-colonial activists invoked both human rights and rights to self-determination. *Both* rights traditions contributed to the invention of the right of conscientious objection. Indeed, in the eyes of activists, the conscientious objector was both a national and an international citizen; a participant in the self-determination of his people *and* an advocate of international prohibitions on war and apartheid.

Today, in the Republic of Korea and across the globe, the transnational movement in favor of conscientious objection continues to challenge national programs that deny the individual's right to refuse military service on conscientious grounds. Neither the original meaning of Article 18 of the ICCPR nor the formal limits of national sovereignty will decide the outcome of this contest. Instead, the fate of the human right of conscientious objection will depend on continuing international efforts to shape the meaning of Article 18, and continuing national efforts to invoke that meaning within the "national frame."¹⁸³

183. Witt, *supra* note 9, at 279–80.

