Cristián Daniel Sahli Vera et al. v. Chile, Case 12.219, Report No. 43/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005).

REPORT Nº 43/05

CASE 12.219

MERITS

CRISTIÁN DANIEL SAHLI VERA ET AL.

CHILE[1]

March 10, 2005

I. SUMMARY

1. On October 6, 1999, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition presented by the Center for Justice and International Law (CEJIL), the Corporation of the Rights of the People (Corporación de Derechos del Pueblo -CODEPU), and the Chilean Group for Conscientious Objection "Neither Helmet nor Uniform" (Grupo Chileno de Objeción de Conciencia "Ni Casco ni Uniforme"-NCNU) (hereinafter "the petitioners"), alleging the violation by the Chilean State (hereinafter "the State" or "the Chilean State) of Articles 1(1), 2, 11, and 12 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") for failing to adapt its domestic legislation to the provisions of the Convention, to the detriment of Cristián Daniel Sahli Vera, Claudio Salvador Fabrizzio Basso Miranda, and Javier Andrés Garate Neidhardt, three Chileans who, having turned 18 years of age, were facing the obligation of fulfilling their compulsory military service, and who expressed their total and complete conscientious objection to military service and to participating in it.

2. The petitioners allege that the State is responsible for violating the alleged victims' right to conscientious objection, with a direct detrimental impact on their freedom of conscience and religion; their right to the privacy; and the obligation to respect and ensure the rights established in the Convention. The State considers that there has been no violation of Articles 1(1), 2, 11, or 12 of the Convention, since the alleged victims have not been called to appear by any court, nor has any penalty been imposed on them for failing to comply with compulsory military service. The State considers, moreover, that the obligation to carry out one's military service is a limitation on the rights of the individual that is authorized by the American Convention.

3. After the analysis of the parties' arguments, the rights established in the Convention, and the rest of the evidence in the record, the Commission concludes in this report that the State is not responsible for the violation of Articles 1(1), 2, 11, and 12 of the American Convention, as alleged in this case.

II. PROCESSING AFTER THE ADMISSIBILITY REPORT

Friendly settlement

4. On October 6, 1999, the complaint was received at the Commission. On October 9, 2002, the Commission approved Report 45/02 on the admissibility of this case.[2] On October 28, 2002, the admissibility report was transmitted to the State and the petitioners, and the parties were notified that the Commission placed itself at their disposition in order to assist them in reaching a friendly settlement, pursuant to Article 48(1)(f) of the Convention, if they were interested in doing so. The Commission requested the parties to respond to the offer as soon as possible. Neither the State nor the petitioners expressed interest in negotiating a solution of this sort, and, therefore, the Commission decided to proceed with the preparation of the report on the merits.

5. On April 16, 2003, the State sent its response to the observations submitted by the petitioners on November 9, 2000, which were transmitted to the State on December 13, 2000. That communication was transmitted to the petitioners on June 23, 2003; they were asked to respond within 30 days. On August 6, 2003, the petitioners requested a 30-day extension to provide their answer; that request was granted on September 17, 2003. On January 30, 2004, the petitioners submitted their additional observations on the merits. On February 2, 2004, the Commission transmitted the pertinent parts of the petitioners' observations, giving them two months to submit any observations. Once the two months had lapsed, the Commission did not receive any more information from the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

6. The petitioners argue that the alleged victims, on turning 18 years, in keeping with the current legislation of the Chilean State, are under an obligation to comply with the compulsory military service law. The petitioners argue that in December 1998, prior to the State drawing up the list of citizens who must render military service, which is published in March of each year, the alleged victims submitted individual requests to the notification office of the Recruitment Department of the General Bureau on Mobilization of the Chilean State, in which they expressed their conscientious objection to compulsory military service and to their participation in said military service.

7. The petitioners state that the alleged victims never received a response to the requests presented, and that despite the express objection of conscience, their names were included in the regular and compulsory call for military service. In addition, the three youths were summonsed to appear on March 18 and 19, 1998, at 8.00 a.m., so as to proceed through the normal channels to carry out that obligation.

8. As regards the requirement of exhaustion of domestic remedies, the petitioners argue that the alleged victims filed a writ to protect their rights (recurso de protección) before the Court of Appeals of Santiago, to protect their right to freedom of conscience, set forth in Article 19(6) of the Chilean Constitution. On March 22, 1999, the Court of Appeals of Santiago held the recurso de protección inadmissible. The petitioners filed a motion (recurso de reposición) to set aside this decision, which was rejected by the Court of Appeals of Santiago on March 29, 1999.

9. The petitioners argue that the Chilean State has violated the rights and guarantees contained in Articles 12 and 11 in connection with Articles 1(1) and 2 of the American Convention, to the detriment of Messrs. Cristian Daniel Salhí Vera, Claudio Salvador Fabricio Basso Miranda, and Javier Andrés Garate Neidhardt.

1. Alleged violations of the right to freedom of conscience

10. The petitioners allege that the obligation to perform military service constitutes a violation of the freedom of conscience of the young men Sahli, Basso, and Garate, as they have been subjected to restrictive measures that are an attack on their beliefs as to how they should carry out their life plans.

11. Similarly, the petitioners suggest that Article 12 of the American Convention establishes the obligation "not to thwart the legitimate exercise of considerations of conscience," which encompasses "the obligations related to the performance of political and civic duties."[3] Thus, the petitioners defined conscientious objection as "the conscious non-performance of a legal provision by reason of it being in open and clear confrontation with the life plan or personal considerations, in this respect, of the person subject to the imposition."[4] The petitioners defend the position that conscientious objection to compulsory military service is part of the exercise of freedom of conscience, a right protected by Article 12 of the American Convention, and they cite in support of their position an amicus curiae brief filed by Amnesty International before the Commission in Case Nº 11.596 Luis Gabriel Caldas León (Colombia), a case still under study by the Commission.

12. In this context, the petitioners argue, the right to freedom of conscience, contained in Article 12 of the Convention, is transformed into a limitation on the State as regards interference with the individual's personal sphere, and the individual is subjected to restrictive measures at odds with his or her most intimate beliefs as regards the realization of his or her life plans.

13. The petitioners argue that the Chilean legislation does not afford an opportunity, with respect to compulsory military service, to invoke conscientious objection, since the only exemptions are based on disability, or on a person's special characteristics or privilege.[5] According to the petitioners, the only situation that could be called conscientious objection is the possibility afforded direct descendants of those victims of the human rights violations committed during the military government who are included in the report issued by the National Commission on Reparation and Reconciliation. This situation does not constitute conscientious objection, but is a mere exception based on a specific and exceptional historical-political situation that merits special treatment.[6]

14. The petitioners add that the various international human rights instruments that have been ratified by Chile enshrine the right to freedom of conscience and religion.[7] The various international mechanisms, and the international doctrine of the United Nations headed by the Commission on Human Rights, have organized an awareness-raising campaign since the mid-1980s to abolish compulsory military service and to incorporate into any legislation that makes military service compulsory, at the very least, conscientious objection as grounds for exemption. They argue that Chilean legislation does not provide for conscientious objection as an exception to compulsory military service, and that while Article 19(6) of the Chilean Constitution provides for the right of freedom of conscience and religion, as well as its free exercise, the Chilean courts and the administration of justice organs do not provide for conscientious objection as an expression of this right, thereby denying the exercise of a fundamental human right, enshrined by the Constitution and by the international instruments that are incorporated into Chilean legislation, leaving the petitioners defenseless vis-à-vis the laws that make military service compulsory. They stress that the youths have been deprived of "the ability to determine the way of life of their own existence,"[8]

denying them a right inherent to their status as persons, and turning them into offenders (delincuentes), as provided for by the Law on Recruitment and Mobilization of Armed Forces.

15. The petitioners consider that the State is imposing a restriction on the freedom of conscience and religion prohibited by the American Convention that implies a "suppression of the minimal core content of the guarantee established in Article 12."[9] In this way, petitioners argue, the State cannot use legitimate mechanisms of restriction that annul and render ineffective the rights enshrined in the American Convention. Thus the restriction imposed by the State becomes, petitioners argue, an absolute derogation of the minimal or core content of the right to freedom of conscience and religion, in violation of Article 29(a) of the American Convention. They add that the State, in not allowing the young men to exercise conscientious objection, deprived them of one of the most basic attributes of their right to freedom of conscience and religion.

16. They underscore that even though Article 12 does not expressly recognize the existence of a right to conscientious objection to compulsory military service, its dynamic interpretation, supported by the international case law and doctrine, lead to the conclusion that the American Convention protects this right.

2. Alleged violations of the petitioners' right to a private life

17. The petitioners allege that the facts demonstrate that the State has violated the petitioners' right not to be subject to arbitrary and abusive intrusions into their private life. They argue that the concept of private life, protected by Article 11 of the Convention, is not reduced to the protection that every person enjoys to ensure that matters that fall within his or her personal sphere of privacy not be disclosed or made public. Based on the case law of the European system, the petitioners argue that "the right to privacy constitutes a space of moral autonomy within which each individual can develop, without being subject to arbitrary meddling, all those matters that are a manifestation of such decisional autonomy and which represent his or her particular personal identity."[10] The petitioners argue that they have been "detrimentally affected in their autonomous decisional space by the establishment of restrictions that not only have a detrimental impact on their capacity to exercise their rights independently, but – moreover – represent an attack on their very image as autonomous rational beings with respect to moral issues, and with respect to their honor and dignity as human beings."[11]

18. The petitioners consider, moreover, that there has been an arbitrary intrusion in the private life of the alleged victims, in the context of the right contained in Article 11 of the American Convention. They argue that the concept of private life is not limited to the protection every person enjoys of not having issues that fall within his or her personal sphere disclosed or made public, but

"covers the physical and moral integrity of a person."[12] The petitioners affirm that on protecting a person's moral integrity, one is guaranteeing the effective exercise of moral autonomy, that fundamental principle of democracies that it is important to accept the idea of individual free choice as to life plans and the adoption of ideals of human excellence, and that the State must not interfere in such a choice, limiting its role to designing institutions that facilitate the individual pursuit of those life plans and the satisfaction of that pursuit.[13]

19. They note that the youths Sahli, Basso, and Garate have been subjected to arbitrary intrusions into their private lives, since the burden of compulsory military service is not necessary for the security of all, is not proportional, nor falls within the circumstances of Article 32(2) of the American Convention, on not allowing them to exercise their rights independently, due to restrictions on their autonomous decisional space. They also call into question the State's argument, when it notes that none of the petitioners has been subjected to any summons by the Armed Forces, or by a military tribunal or a civilian court, since the amnesty decreed in late 2000 impacted thousands of youths who had been punished or found guilty of not complying with compulsory military service. The mere existence of an amnesty law presupposes a scenario in which there are youths who have violated a legal provision in force.[14]

3. Alleged violations of the obligation to respect and ensure the rights enshrined in the Convention, without discrimination (Article 1(1)), and of the obligation to bring domestic legislation into line with those rights (Article 2 of the American Convention)

20. They argue that the State has a dual obligation: First, the obligation not to violate the human rights recognized in the Convention, and second, the obligation to adopt all measures necessary to ensure the full enjoyment of these rights. The petitioners argue that the Chilean State has not adopted all the necessary measures to bring its domestic legislation and practice into conformity with the provisions of the Convention, but rather that it is flagrant breach of it.

21. The petitioners argue that the failure to adopt norms that protect the situation of the alleged victims constitutes a violation of Article 2 of the American Convention. Finally, the petitioners argue that the lack of a rationale that would make it possible to exempt conscientious objectors from military service amounts to a violation by the State of the duty to ensure the rights established in the Convention, in particular, the duty to protect and effectively guarantee the right to freedom of conscience. Accordingly, they consider that the State's failure to adapt its legislation and governmental action to the provisions of the American Convention represents a violation of the rights contained in Articles 1(1) and 2 of that instrument. They add that the absence of constitutional, statutory, and regulatory provisions cannot be invoked by States to exempt them from or to modify compliance with their international obligations.

B. The State's position

22. The State has indicated in its brief of April 16, 2003, that it is undertaking a reform of the military service system, which in principle would be mostly voluntary, recurring to a lottery only if they are unable to cover the minimum number of persons needed with the voluntary system. This process would include all on an equal footing. Accordingly, it accepts that Chile's domestic legislation does not provide any guarantee for those persons who consider that they cannot comply with compulsory military service for reasons of conscientious objection and that this would constitute a violation of the principle of equality before the law. During the hearing that was held on admissibility, the State clearly indicated that it is not possible to accept conscientious objection in Chile without a constitutional reform, which requires a complex process.[15]

23. The State affirms that the Constitution, at Article 19(6), recognizes the right contained in Article 12 of the American Convention, ensuring for all persons freedom of conscience, the right to express all beliefs and to practice all forms of worship not opposed to morality, good customs, or ordre publique. In addition, the State notes that the norm in question should be read together with the provision of Article 1(4) of the Constitution, which provides that: "It is a duty of the State to safeguard national security, provide protection to the population and the family, contribute to its strengthening, promote the harmonious integration of all sectors of the Nation, and ensure the right of persons to participate, with equal opportunities, in the life of the nation." In addition, Article 90 of the Chilean Constitution states: "The Armed Forces are made up only of the Army, the Navy, and the Air Force, they exist for the defense of the homeland, they are essential for national security and to guarantee the institutional order of the Republic."

24. The State asserts that from this perspective, the Constitution "reconciles its provisions so as to establish a correspondence between the rights and duties of Chileans, requiring them to bear certain public burdens for the common good."[16] Article 12(3) of the American Convention, the State argues, explicitly affirms that the freedom to profess one's own religion and one's own beliefs is subject only to the limitations prescribed by law, and that are necessary for protecting security, order, health, and public morality, or the rights and freedoms of others."[17] Along these lines, the State concludes that in keeping with the limitations set forth in Article 12(3), compulsory military service is a restriction on the right to freedom of conscience and religion that is based on the duty of citizens to contribute to the security and order of the country, and that the unchanging value of security and the objective of national defense legitimate this state practice, in keeping with the Convention.

25. The State argues that the Convention allows the limitation on the freedom of conscience to uphold certain immutable values, such as security, which, moreover, is essential for the exercise of the rights and freedoms that both the Chilean Constitution and the Convention recognized as basic and inherent to every person."[18] It argues that compulsory military service fits within the concept

of prevention for preserving national security, both internal and external, and cannot be considered a violation of the freedom of conscience and religion, but merely as a contribution to maintaining the country's security. In addition, it argues that it does not require persons to do anything in the face of their most intimate beliefs "due to the fact that it is no more than military preparation or training for a pre-determined period."[19] It adds that it is the temporary nature of compulsory military service that makes it such that "it does not constitute an attack on the right to determine one's way of life or own existence."[20] Therefore, it notes, compulsory military service is a contribution to national security that the State requires of youths for a determined and limited time.

26. As for the specific situation of the youths Sahli, Basso, and Garate, the State indicates that none of the complainants to this day "has received any summons from the Armed Forces, from a military tribunal or civilian court, or suffered any threat, coercion, been followed, prosecuted, deprived of liberty or had any civil, administrative, or criminal sanction whatsoever imposed for the facts that have led to the complaint in question" such that none of their human rights could have been violated by the State.[21] The State considers, therefore, that the complaint is unfounded and unjustified, and, accordingly, should be rejected for failure to characterize any violation of the American Convention. The State adds that in the last 20 years, no youth has been detained for failure to complete his or her military service. The State argues that "it does not see, from any angle, any injury suffered by the petitioners or the real foundation for their claims for the existence of some right recognized by the Convention that has been violated, therefore the conditions for the Commission to have competence are not present."[22]

27. With respect to the right to privacy, the State considers that there is no violation of this right, thus military service is not an arbitrary or abusive demand on privacy, but rather is regulated by law, is part of the cultural experience of youths who must serve, and is considered by the American Convention as a legitimate restriction on the exercise of fundamental rights, in keeping with Article 32(1) of the Convention. It also argues that compulsory military service is nothing more than citizens' contribution to securing the common good and the exercise of the rights and freedoms of a whole country. It adds "it is not more than training, martial instruction, that does not require the use of arms against other human beings, such that the limitation imposed does not entail the nullification or the complete inefficacy of the rights recognized and guaranteed."[23] It concludes that this is the objective proportional to the rights and freedoms that the State recognizes for citizens.

IV. THE FACTS

28. In December 1998, prior to the State drawing up the list of citizens who must carry out military service, which is published in March of each year, the youths Cristian Daniel Sahlí Vera, Claudio Salvador Fabricio Basso Miranda, and Javier Andrés Garate Neidhardt presented individual requests to the notification office of the Recruitment Department of the General Bureau of Mobilization of

the Chilean State in which they expressed their conscientious objection to compulsory military service and to their participation in such military service, as an arbitrary intrusion into their private lives and an arbitrary meddling in their life plans. Under the legislation in force in the Chile, every citizen, on turning 18 years of age, is under the obligation to complete compulsory military service.

29. The alleged victims never received a response to the requests submitted, and despite their express conscientious objection, their names were included in the ordinary and obligatory call to perform military service. In addition, the three were called to appear on March 18 and 19, 1998, at 8.00 a.m., to proceed to comply with this obligation in the regular manner. The young men did not present themselves, but they were never summonsed or prosecuted for their failure to appear.

30. Subsequently, the petitioners filed writ protective of their rights (recurso de protección) before the Court of Appeals of Santiago, alleging their right to freedom of conscience, provided for at Article 19(6) of the Constitution of the Republic of Chile.[24] On March 22, 1999, the Court of Appeals of Santiago held the writ to be inadmissible. The petitioners then filed a motion (recurso de reposición) to set aside this decision; which was rejected by the Court of Appeals of Santiago on March 29, 1999. The petitioners do not dispute the State's argument that none had received any summons or suffered any threat or administrative or criminal sanction for the facts giving rise to the complaint.

31. While the State made several submissions to the Commission in this case, none controverted the facts as presented by petitioners.

V. ANALYSIS OF THE MERITS

A. General Considerations

1. Domestic law

32. The parties to the case do not dispute the facts; the issue in this case is purely one of law. The legal issue may be summarized as to whether Articles 11 and/or 12 of the American Convention create(s) a right to object, for reasons of conscience, to compliance with the domestic law as regards compulsory military service when the domestic law does not provide for such exemptions. Specifically the issue is whether "conscientious objector" status may be invoked by the three individual petitioners in this case, who were drafted into the Chilean military service and attempted

to assert their right to an exemption on the grounds that such service would offend their conscience and beliefs.

33. Chilean law provides for compulsory military service but does not provide for conscientious objector status and consequently, all attempts by the petitioners to obtain relief from Chilean courts at the national level, failed. Chilean law does, however, exempt certain categories of individuals from military service. Article 17 of Decree Law N.º 2.306 exempts certain persons from compulsory military service.[25] Article 17 of this Decree Law, however, does not include persons outside a religious order who simply assert the right to freedom of conscience and as a corollary, the right to be "conscientious objectors."

34. Decree Law N.º 2.306, which sets forth the norms regarding recruitment and mobilization of the Armed Forces, provides simply that all eighteen year olds (men and women alike) must register for obligatory military service.[26] Their names are included in a data base and they may be called up, until they reach their thirtieth birthday, to perform two years' of military service. Once the individuals have registered, at the age of 18, they will be summoned for classification and selection in order to determine who will be inducted. Those who do not show up for possible induction when summoned will be held criminally liable.

35. Criminal liability for failure to appear for possible induction is set forth in Decree Law N.º 2.306. Article 72 provides:

Art. 72. Those who do not comply with the submissions required by this decree-law or who do not appear when called for the purposes of their classification and medical examination or fail to do so timely shall suffer the penalty of imprisonment in the minimum degree or a fine not less than one and not greater than ten times the minimum salary. The penalty provided for in the previous sentence shall be doubled for those who, having failed to appear the first time called, fail to appear the subsequent times.

In the instant case, despite the existence of the law, the State made no effort to arrest or otherwise prosecute the youths Sahli Vera, Basso Mirando and Garate Neidhardt, for failing to show up for possible induction when summoned, as provided for by the domestic law.

2. International Law

36. In the inter-American system no cases have as yet been decided on the issue of conscientious objection and the Commission has only made references to this issue outside the individual petition context.[27] Since both the United Nations and the European system have been called upon to interpret similar provisions in their respective human rights instruments, a brief review of their jurisprudence is useful as guidance in this case.

37. The American Convention does not expressly create or even mention a right to "conscientious objection", the alleged right to not be required to comply, for reasons of conscience, with obligations imposed by law. The term "conscientious objectors" only appears once in the American Convention. No explicit mention of the term "conscientious objection" is made in Article 12, which sets forth the right to freedom of conscience and religion, but it is referred to in the article defining forced or compulsory labor.[28] Article 6 of the American Convention defines the right to be free from slavery or involuntary servitude, and Article 6(3)(b), following ILO Convention Nº 29 on the same subject, expressly excludes from the definition of forced or compulsory labor "military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service." (Emphasis added)

38. In summary, and as will be concisely reviewed below, international human rights jurisprudence recognizes the status of conscientious objectors in countries that provide for such status in their national laws. In countries that do not provide for conscientious objector status, the international human rights bodies find that there has been no violation of the right to freedom of thought, conscience or religion. The European system has refused to recognize a right to conscientious objection within the larger context of the right to freedom of thought, conscience and religion (Article 9), due to the explicit reference to "conscientious objectors" in the article exempting military service or alternative service from the definition of forced or compulsory labor (Article 4(3) of the European Convention). The United Nations Human Rights Committee, in general, has explicitly recognized the existence of the right, as derived from article 18 (freedom of conscience) of the Covenant, but only in those States that have provided for conscientious objector status in their domestic law. In those States that have recognized conscientious objector status, the UN Human Rights Committee tends not to review the State authorities' evaluation of the grounds for the granting or denial of such status despite its general admonition that "When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs."[29] The Committee does appear to review whether there exists a belief system grounded in a coherent or "philosophical" framework, and is unwilling to accept mere self-definition as a conscientious objector. Once a belief system is identified, the Committee will not prefer one system to another or discriminate among them.

a. The United Nations' and the European system's treatment of the "right to conscientious objector" status

i. The United Nations

39. The United Nations system considers the right to conscientious objection to military service as a legitimate exercise of the right to freedom of thought, conscience and religion as articulated in Article 18 of the International Covenant on Civil and Political Rights and Article 18 of the Universal Declaration of Human Rights, and explicitly by the Human Rights Committee in General Comment No. 22 on Article 18 of the Covenant.[30]

40. In 1960, the Sub-Commission on the Promotion and Protection of Human Rights first affirmed the right to conscientious objection to military service in the context of freedom and non-discrimination in the matter of religious rights and practices. In 1981, the Sub-Commission appointed two Special Rapporteurs to study the issue. They submitted their final report in 1984, which recommended, inter alia, that states should recognize by law (a) the right of persons who, for reasons of profound religious, ethical, moral, humanitarian or similar conviction, refuse to perform armed service and, at a minimum, should extend the right of objection to persons whose conscience forbids them to take part in armed service under any circumstances.[31]

41. Numerous early cases decided by the UN Human Rights Committee, indicated that article 18 does not guarantee a right of conscientious objection, as in a right to freedom of compulsory military service on the basis of one's conscientious objection to military force.[32] The Committee emphasized that the authorities had to be convinced of the petitioner's ethical objections to military service to grant conscientious objector status.

42. In the Muhonen case, decided in 1981, the UN Human Rights Committee avoided deciding whether "article 18, paragraph 1, guaranteed a right of conscientious objection to military service.[33] In August 1976, Mr. Muhonen applied to be permitted to do alternative service instead of armed or unarmed service in the armed forces. The Examining Board rejected his application and he appealed. The appeal was also rejected. In 1978 he was called up, he reported and there refused to do any military service. Criminal court proceedings were initiated against him for refusal to do military service and he was sentenced to 11 months imprisonment. The Higher Court confirmed the verdict and he started to serve his sentence in June 1980. In the fall of 1980, while he was serving his sentence, the Examining Board granted him a new hearing and found in his favor. It stated that Mr. Muhonen had had the opportunity to explain his convictions personally to the Board and the Board found that he "has an ethical conviction within the meaning of the (…) Act. He was pardoned on March 27, 1981 and released from prison two weeks later.

43. The issue for the Committee was whether Mr. Muhonen was entitled to compensation in accordance with Article 14(6) of the Covenant.[34] Compensation was denied because the

Committee held that Mr. Muhonen was not pardoned because his conviction rested on a miscarriage of justice. His conviction came about because the Examining Board in 1977 denied him the status of conscientious objector. He had failed to be present at the Board's examination of his case in 1977, but he did appear in 1980 and managed to convince the Board of his ethical objections in person. According to Finnish law, "whoever refuses military service not having been recognized as a conscientious objector by the Examining Board commits a punishable offense. This means that the right to decline military service does not arise automatically once the prescribed substantive requirements are met, but only after due examination and recognition of the alleged ethical grounds by the competent administrative body."[35]

44. In another conscientious objector case, L.T.K. v. Finland, the Committee held that the "Covenant does not provide for the right to conscientious objection.[36] The Committee dismissed the communication as incompatible with the Covenant ratione materiae. It found the complaint to be inadmissible in the following terms:

5.2 The Human Rights Committee observes in this connection that, according to the author's own account he was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service. The Covenant does not provide the right to conscientious objection, neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3(c)(ii) of article 8, can be construed as implying that right. The author does not claim that there were any procedural defects in the judicial proceedings against him, which themselves could have constituted a violation of any of the provisions of the Covenant, or that he was sentenced contrary to law. (Emphasis added)

Article 8(3)(c)(ii) of the Covenant expressly leaves it to the States parties to determine whether they wish to recognize refusal to perform military service for reasons of conscience:

3. (c) For the purpose of this paragraph the term "forced or compulsory labor" shall not include:

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

45. In 1987, the UN Human Rights Commission adopted resolution 1987/46, in which the Commission urged universal recognition of the right of conscientious objection to military service. It is clear, however, that by 1987, in its interpretations of the scope of the right to freedom of conscience, the Committee was still looking for more than a simple allegation of the right and that

the author had to substantiate his claim. In a 1987 decision, V.M.R.B. v. Canada,[37] the UN Human Rights Committee found a complaint inadmissible in which the author contended that deportation proceedings had restricted his exercise of freedom of conscience or expression. The Committee found that this contention had been refuted by the State's uncontested statement that, as early as November 1980, the author had been excluded from re-entering Canada on national security grounds and it found the communication to be inadmissible because the author's claims were unsubstantiated.

46. In 1989, in resolution 1989/59, the UN Human Rights Commission affirmed the right to conscientious objection and appealed to States to amend their legislation to permit the exercise of the right of conscientious objection.

47. In 1991, the UN Human Rights Committee, in J.P. v Canada (446/1991), in dictum, recognized that Article 18 of the Covenant protects the right "to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures. . .".[38] The applicant, a Quaker, claimed that the use of a portion of her taxes for military or defense purposes violated her freedom of conscience and religion. The application was declared inadmissible by the Committee on the grounds that "the claim clearly falls outside the protection of article 18."[39] The Committee distinguished between the private and public manifestations of the right to conscience, and accepted the penalization of the public manifestation of the act of conscience when it implicated a violation of the law.

48. In 1993, The UN Human Rights Committee in paragraph 11 of General Comment 22, which interprets the right to freedom of thought, conscience and religion, set forth in Article 18 of the Covenant on Civil and Political Rights, elaborated on the recognition of the protection for conscientious objection under this article and stated:

Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right 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. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service.

49. The position of the UN Human Rights Committee was further elaborated in a number of concluding observations adopted following the examination of States parties' country reports.[40] The Committee has expressed concern with respect to States that recognize the right to conscientious objection in a discriminatory manner, i.e. by granting exemption only to certain religious groups and not others and has recommended that States recognize the right to conscientious objection without discrimination, recalling that "[c]onscientious objection should be provided for in law (. . .) bearing in mind that Article 18 also protects the right to freedom of conscience of non-believers."[41]

50. On March 10, 1993, in resolution 1993/84, the UN Human Rights Commission recognized the right of everyone to hold conscientious objections to military service, as a legitimate exercise of the right to freedom of thought, conscience and religion, as set forth in Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights and General Comment No. 22 of the UN Human Rights Committee, adopted at its forty-eighth session in 1993. Subsequently, the UN Human Rights Commission has affirmed this right in a number of resolutions.[42] In resolution 2000/34, the UN Human Rights Commission requested the Office of the UN High Commissioner for Human Rights to prepare a compilation and analysis of best practices in relation to the recognition of everyone to have conscientious objections to military service. The first preliminary report was prepared in 2002 (E/CN.4/2002/WP.2) and "outlines the right to conscientious objection to military service as protected at present in international law." In its subsequent report, prepared in 2004 (E/CN.4/2004/55) the Office of the High Commissioner prepared a compilation and analysis of best practices in relation to the recognition of this right and noted as the first item: "(a) Acceptance of claim to be a conscientious objector accepted without further inquiry. Though most States undertake some form of inquiry into applications for conscientious objection to military service, Austria, Belarus and the Republic of Moldova conduct no further inquiry. Denmark, for example, requires a simple statement asserting that military service is against the applicant's conscience, though a more formal process is applicable for those seeking conscientious objection during their military service".[43]

51. In 1993, in Brinkhof v. The Netherlands, the UN Human Rights Committee was faced with the issue of whether differentiation in treatment as regards exemption from military service between Jehovah's Witnesses and other conscientious objectors amounted to prohibited discrimination under Article 26 of the Covenant.[44] The "other" conscientious objectors were required to perform substitute service and if they refused to do so for reasons of conscience, they were prosecuted, and, if convicted, imprisoned. The Committee noted the State's argument that the differentiation is based on "reasonable and objective criteria, since Jehovah's Witnesses form a closely-knit social group with strict rules of behavior" and membership is said "to constitute strong evidence that the objections to military and substitute service are based on genuine religious convictions."[45] The Committee held that the exemption of only one group of conscientious objectors to the detriment of all the others "cannot be considered reasonable" and that General Comment on Article 18 emphasizes that "when a right of conscientious objection to military service is recognized by a State

party, no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs."[46] The Committee, although it recognized the right to conscientious objector status, only recognized the right in those State parties to the Covenant that provided for conscientious objection in their laws. States that recognized the right to conscientious objection were obliged to grant it, free of discrimination, but by 1993, no State was required to create the right where it did not exist, echoing the provisions of Article 8(3)(c) of the Covenant and the Committee's earlier jurisprudence.[47]

52. In Foin v. France, a case decided on November 3, 1999, the issue before the Committee was whether the specific conditions under which alternative service had to be performed could constitute a violation of the Covenant.[48] The Committee observed "under article 8 of the Covenant, States parties may require service of a military character and, in case of conscientious objection, alternative national service, provided that such service is not discriminatory."[49] The author claimed that the French law requirement that alternative service be for 24 months as compared to 12 months for military service constituted discrimination under Article 26 of the Covenant. The Committee stated that all differences of treatment do not constitute discrimination and that the differentiation must be "based on reasonable and objective criteria."[50] Further, it noted that "the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service."[51] The State submitted that it doubled the length of service to test the sincerity of the individual's convictions. The Committee was of the view that the reasons forwarded by the State did not refer to reasonable or objective criteria and did not make reference to the specific case at hand. Consequently, the Committee found a violation of Article 26 since the difference in treatment was not based on reasonable and objective criteria.

53. The dissent in Foin found that the longer service for conscientious objectors was based on reasonable and objective criteria and did not amount to discrimination.[52] The dissent indicates that the granting of conscientious objector status, which still remains optional with the State (given the renvoi back to Article 8), requires grounds of conscience and that mere opposition to military service would be "unacceptable."[53]

54. In Westerman v. The Netherlands (682/1996), one of the leading cases considered by the UN Human Rights Committee on this issue, the applicant sought to be recognized as a conscientious objector but was refused by the Dutch authorities. Despite his objections, he was inducted into military service where he refused to perform military duty, which made him liable to be charged with a criminal offense. At the beginning of his military service, he was ordered to put on a uniform, which he refused. He refused any sort of military service because of his conscientious objections. He was tried and convicted for being a "total objector", for refusing any kind of military service. The "total refusal" to do military service was an offense at the time it was committed under the old

Military Criminal Code, as well as under the new Military Code. The State argued that the Covenant does not preclude the institution of compulsory military service and the question of whether States recognize conscientious objections to military service is expressly left to the States themselves.[54]

55. Dutch law provides that those who have conscientious objections under the Military Service Act may request recognition of their objections. Under the Act, conscientious objections are defined as "insurmountable objections of conscience to performing military service in person, because of the use of violent means in which one might become involved while serving in the Dutch armed forces."[55] The author's request was denied by decision of January 25, 1989 by the Minister of Defense on the ground that the objection advanced by the author –that he would not be able to take decisions for himself in the armed forces- did not constitute sufficient grounds for recognition under the Act, since it was mainly concerned with the hierarchical structure of the army and not necessarily related to the use of violence.[56]

56. Despite the fact that the UN Human Rights Committee in General Comment 22 expressed the view that the right to conscientious objection to military service can be derived from Article 18, with regard to the author's claim that his conviction violated Article 18, the UN Human Rights Committee observed that "the right to freedom of conscience does not as such imply the right to refuse all obligations imposed by law, nor does it provide immunity from criminal liability in respect of every such refusal."[57] The author sought recognition as a conscientious objector, but the Committee noted that in this case Dutch law requires that the recognition of conscientious objections against military service be based on one's objection to the use of violent means.[58] The Dutch Minister of Defense decided that the petitioner's objection that he would not be able to take decisions for himself did not constitute grounds for recognition under Dutch law.[59] In his appeal to the Council of State in February 1989, the author stated:

Under no condition, appellant will obey the legal duty to do military service in the Dutch armed forces, because the nature of the armed forces is contrary to the destination of (wo)man. The armed forces ask namely of their participants to give away the most fundamental and inalienable right that they have as a human being, namely the right to act accordingly to their moral destination or essential being. The 'participator' is forced to give away the right of say and to become an instrument in the hands of other people, an instrument that ultimately is directed to kill a fellow human being when these other people consider such necessary.

This instrument (or armed force) can only function well, when the moral capacities or moral intuition of the participators are destructed. Every human being who knows to open himself, to listen to his moral destination will agree that elimination of the armed forces out of our society is of the utmost importance. An importance that transcends the possible consequences of a protest according to the Penal law.

The Council of State was not convinced and rejected his appeal for conscientious objector status on February 12, 1990.

57. The issue as framed by the Committee was whether the imposition of sanctions to enforce the performance of military duty was an infringement of the author's right to freedom of conscience. The majority of the UN Human Rights Committee noted that the State authorities evaluated the facts and arguments advanced by the author in support of his claim for conscientious objector status in the light of its legal provisions in regard to conscientious objection and that these legal provisions were compatible with the provisions of Article 18.[60] It is important to note that the Committee recognized the right to conscientious objector status under Article 18. The Committee concluded that the author failed to convince the State authorities that he was a conscientious objector opposed to "the use of violent means" and it decided not to substitute its own evaluation for that of the national authorities.[61] So, despite the fact that General Comment 22 states that the right to conscientious objection to military service 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", and goes on to say that [w]hen this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs", the author's allegation to the Council of State that members of the armed forces were required to abdicate their "right to act accordingly to their moral destination or essential being (…) and to become an instrument in the hands of other people, an instrument that ultimately is directed to kill a fellow human being", which rings of a pacifist belief system, however clumsily articulated, was not recognized by the Committee. This pacifist belief system was heard by the dissent in this case.

58. The dissent noted that the State had no right to interfere with the applicant's claim under Article 18 of the Covenant by denying the author conscientious objector status and imposing a term of imprisonment.[62] It reiterated the position set forth by the Committee in paragraph 11 of General Comment 22, that there should be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs. Consequently, the dissent found that the applicant was the victim of a violation of Article 18.[63]

ii. The European system

59. Both the former European Commission of Human Rights (hereinafter "European Commission") and the European Court of Human Rights (hereinafter "European Court") have considered petitions dealing with claims of conscientious objection to compulsory military service and neither body has been willing to find that such a right exists under the European Convention. [64]

60. The European Commission declined to find a violation of Article 9, dealing with freedom of conscience and religion, in regard to conscientious objectors, addressing the issue instead through the conscientious objection exemption, under Article 4, to compulsory and forced labor.[65] In X v. the Federal Republic of Germany case (7705/76) the European Commission interpreted Article 9 in the light of Article 4 and decided that the sanctions taken by a state against conscientious objectors who refused to carry out civilian service in substitution for military service did not infringe their freedom of conscience.

61. In the 1970s, the European Commission, after stating the principle of freedom of thought, conscience and religion, set forth in Article 9(1) of the European Convention, looked to the consequences of the manifestation of one's religion or belief in practice. In Arrowsmith v. the United Kingdom case (7805/77), the European Commission declared a petition inadmissible on the ground that the activities at issue did not constitute a "manifestation" of beliefs in the proper sense. The applicant had been prosecuted for distributing "pacifist" pamphlets concerning the activities of the British army in Northern Ireland. The leaflet cited ex-soldiers, one of whom says: "I'm not against being a soldier. I would be willing to fight to defend this country against an invader – I'd be willing to fight for a cause I can believe in. But what is happening in Ireland is all wrong." The European Commission concluded that although this was an "individual opinion", there had been no "manifestation of a belief" and that, accordingly, Article 9 had not been violated.

62. In the early 1980s, the European Commission took a formalistic approach when applications asserting a right of conscientious objection under Article 9 (comparable to Article 12 of the American Convention) came before it. It invariably found that the refusal to comply with the law was not the direct exercise of religious or conscience-driven practice. For example, in C v. U.K., the applicant, a Quaker, objected on religious grounds to have a proportion of his taxes used for military purposes.[66] The European Commission did not examine whether this was required by his religion but emphasized the narrow reach of Article 9(1) as being restricted to the personal sphere.[67] The obligation to pay taxes, it concluded, raised no issue of conscience.

63. Even if the jurisprudence of the European Convention does not recognize the right to be exempt from obligatory military service on grounds of conscientious objection, applicants have argued for a right of substitute service. The European Commission has dealt with these claims by a literal reading of Article 4(3) of the European Convention (comparable to Article 6(3)(b) of the American Convention), which specifically exempts military or alternative service from the definition of forced labor. This provision excludes "any service of a military character or, in the case of conscientious objectors in countries where they are recognized, service extracted instead of compulsory military service" from the Convention's prohibition on "forced or compulsory labor". The European Commission literally interpreted these words to mean that a State may, but is not

required to, recognize conscientious objection, and only if it does, should it consider providing for alternative service to obligatory military service.

64. The authority of States to require persons to undertake compulsory military or civilian service was considered by the European Commission in Johnasen v. Norway 44 DR 155 (1985). The Norwegian Constitution imposed a general duty on male citizens to perform military service, although since 1922 conscientious objection to military service has been recognized. If a person objected to military service, he would be required to undertake civilian service. If he refused to perform civilian service then the case would be referred to the courts and he could be ordered to work at a special camp for the duration of his civilian service. If he did not attend the camp or refused to perform the work assigned to him then he would be held in prison for the remainder of his period of civilian service. The applicant, a pacifist, was opposed to both military and civilian service in that he considered the latter a form of support to the former. The authorities recognized him as a conscientious objector and required him to perform civilian service, which he refused to carry out. His case was referred to the courts, which found him in breach of his legal duties. He then complained to the European Commission alleging a breach of his European Convention rights. The European Commission declared his application inadmissible because the duty to perform civilian service:

. . . is an obligation fully compatible with the Convention. The Convention does not oblige the Contracting States to make available for conscientious objectors to military service any substitute civilian service. In States which recognize conscientious objectors and provide for alternative service it is fully compatible with the Convention to require the objectors to perform alternative service. This is clear from the text of Article 4(3)(b) of the Convention which specifically sets out that service extracted from conscientious objectors instead of compulsory military service is not to be regarded as “forced or compulsory labor.” [68]

As regards the applicant’s argument that compulsory civilian service violated his freedom of conscience, the European Commission stated:

When interpreting this provision, the Commission has taken into consideration Article 4(3)(b) of the Convention . . . Since the Convention thus expressly recognizes that conscientious objectors may be required to perform civilian service it is clear that the Convention does not guarantee a right to be exempted from civilian service. … The Convention does not prevent a state from taking measures to enforce performance of civilian service, or from imposing sanctions on those who refuse such service .[69]

65. Despite the strict construction of these provisions by the European Commission, there is debate in the Council of Europe on the issue of whether an individual should be exempted from performing public obligations, especially military service, deriving from a right to freedom of conscience. The Parliamentary Assembly of the Council of Europe, as early as 1967, adopted Resolution 337(1967) deriving a right to conscientious objection from Article 9 of the European Convention:

1. Persons liable to conscription for military service, who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from the obligation to perform such service.

2. This right shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9 of the European Convention on Human Rights.[70] [Emphasis added.]

66. In 1983, the European Parliament adopted its first resolution on the issue which noted that "protection of freedom of conscience implies the right to refuse to carry out armed military service and to withdraw from such service on grounds of conscience" and stated that "no court or commission can penetrate the conscience of an individual and that a declaration setting out the individual's motives must therefore suffice in the vast majority of cases to secure the status of conscientious objector."[71]

67. On April 9, 1987, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (87)(8) that set forth the right to alternative service in States that provided for obligatory military service:

Anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service, on the conditions set out hereafter. Such persons may be liable to perform alternative service. (Emphasis added)

The procedure set forth is as follows:

States may lay down a suitable procedure for the examination of applications for conscientious objector status or accept a declaration giving reasons by the person concerned;

With a view to the effective application of the principles and rules of this recommendation, persons liable to conscription shall be informed in advance of their rights. For this purpose, the state shall provide them with all relevant information directly or allow private organizations concerned to furnish that information;

Applications for conscientious objector status shall be made in ways and within time limits to be determined having due regard to the requirement that the procedure for the examination of an application should, as a rule, be completed before the individual concerned is actually enlisted in the forces;

The examination of applications shall include all the necessary guarantees for a fair procedure;

An applicant shall have the right to appeal against the decision at first instance;

The appeal authority shall be separate from the military administration and composed so as to ensure its independence;

The law may also provide for the possibility of applying for and obtaining conscientious objector status in cases where the requisite conditions for conscientious objection appear during military service or periods of military training after initial service.

68. Van Dijk and van Hoof note that the Committee of Ministers' Recommendation has no binding force, "but still it can be considered as an authoritative interpretation, which cannot simply be ignored by the national authorities and the Strasbourg institutions."[72]

69. The European Commission, however, continued to reject applications for exemptions for military or alternative service on conscience-driven grounds. In 1990, the European Commission rejected an application on behalf of a Swiss national who was fined for failing to present himself for his introductory civil defense course (alternative service).[73] The civil defense forces were an arm of the national defense forces and the applicant, as a Christian, could not sanction a form of institutionalized violence such as the civil defense forces. In September 1988 he appealed against the fine and his appeal was dismissed. He appealed further to the Federal Court, alleging a violation of Article 9 of the European Convention. That appeal was also dismissed. In 1989 the applicant again refused to take part in civil defense courses and was imprisoned for six days. In 1991, he was again arrested and imprisoned. The European Commission declared the petition inadmissible because Article 9, read in conjunction with Article 4(3)(b), permitted the State not to acknowledge a right to refuse to undertake civil defense on grounds of conscience. Since the system did not

guarantee the right to be exempted from the obligation to undertake military service for reasons of conscience, Article 9 could not be read as providing such a guarantee.

70. In the 1990s, in the case of Manoussakis and Others v. Greece, the applicants were convicted for having established and operated a place of worship for religious ceremonies and meetings for followers of the Jehovah's Witnesses' denomination without first obtaining the authorization of the Minister of Education and Religious Affairs and of the bishop.[74] The European Court of Human Rights held that Jehovah's Witnesses come within the definition of "known religion" under Greek law and that the conviction was "not necessary in a democratic society." The national criminal court had relied expressly on the lack of the bishop's authorization as well as the lack of an authorization from the Minister of Education and Religious Affairs. The European Court noted that: "The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."[75]

71. In one recent case, the European human rights system cast doubt on its jurisprudence that a sentence passed for refusal to perform military service was not considered in itself to constitute a breach of Article 9 of the European Convention; but despite the "doubt", the European Court affirmed its long jurisprudence in this area. In the case of Thlimmenos v. Greece, decided by the Grand Chamber of the European Court on April 6, 2000, a Greek national alleged that the refusal of the authorities to appoint him to a post of chartered accountant on account of his criminal conviction for disobeying, because of his religious beliefs, the order to wear a military uniform was in breach of Article 14 (non-discrimination) read in conjunction with Articles 9 (freedom of conscience) of the European Convention.[76] In addition, he alleged that the proceedings before the national administrative court were not conducted in accordance with the due process requirements set forth in Article 6(1) of the Convention. The European Commission, in its merits report, issued on December 4, 1998, found for the applicant and held that there had been a violation of Article 9 of the Convention in conjunction with Article 14 and also of Article 6 § 1.

72. The applicant, a Jehovah's Witness, had been convicted by the Athens Permanent Army Tribunal in 1983 of insubordination for having refused to wear a military uniform at a time of general mobilization. The tribunal considered that there were "extenuating circumstances" and sentenced the applicant to four years in prison; he was released on parole after two years and one day.[77]

73. In June 1988, the applicant sat a public examination for the appointment of twelve chartered accountants and came in second among sixty candidates. The Executive Board of the Greek Institute of Chartered Accountants refused to appoint him on the ground that he had been convicted of a serious crime. On May 8, 1989, the applicant brought his case to the Supreme Administrative Court invoking his right to freedom of religion and equality before the law as guaranteed by the Greek

Constitution and European Convention and he also claimed that he had not been convicted of a crime but of a misdemeanor.

74. On April 18, 1991, the Third Chamber of the Supreme Administrative Court held a hearing and on May 25, 1991 decided to refer the case to the plenary court because of the important issues it raised. The Chamber's own view was that a person who would not qualify for appointment to the civil service could not be appointed a chartered accountant. According to the law (Civil Servants' Code) no person convicted of a serious crime could be appointed to the civil service. [78] On November 11, 1994, the (plenary) Court held that the Board had acted in accordance with the law and the case was remanded back to the Third Chamber to examine the remaining issues. On June 28, 1996, the Third Chamber rejected Mr. Thlimmenos's application for judicial review considering that "the Board's failure to appoint him was not related to his religious beliefs but to the fact that he had committed a criminal offense." [79]

75. By a law enacted in 1997, conscientious objectors, who had been convicted of insubordination in the past, were given the possibility of applying for recognition as conscientious objectors, retroactively, thereby having the conviction expunged from their criminal records.[80] Applications for such retroactive recognition had to be lodged within a three-month period beginning January 1, 1998; the applicant was unaware of this possibility and did not apply.[81] The European Court noted that even if the applicant had not missed the deadline, his claim that he could not serve in the armed forces because of his religious beliefs would have to have been examined by a commission, which would have advised the Minister of National Defense on whether or not he should be recognized as a conscientious objector[82] and that the commission was not obligated to recognize an individual as a conscientious objector but had discretion.[83]

76. The European Court noted that the applicant did not complain about his initial conviction for insubordination. The applicant complained that the law excluding persons convicted of a serious crime from appointment to a chartered accountant's post did not distinguish between persons convicted as a result of their religious beliefs and persons convicted on other grounds.[84] He submitted that his non-appointment was directly linked to the manifestation of his religious beliefs and thus fell within the ambit of Article 9 of the European Convention. He had not been appointed, he argued, because he had refused to serve in the armed forces and he had refused to serve because he had manifested his religious beliefs as a Jehovah's Witness.[85] He argued further that the class of persons to which he belonged, namely male Jehovah's Witnesses, was different from the class of most other criminal offenders and it could not serve any useful purpose to exclude someone from the profession of chartered accountants for having refused to serve in the armed forces on religious grounds. In the applicant's view, the law should not have excluded every person convicted of a serious crime.[86]

77. The State argued that Articles 14 and 9 did not apply and that the applicant had not been appointed because the rule excluded all persons convicted of a serious crime. The rule was neutral and the authorities could not inquire into the reasons that led to a person's conviction. The State also stressed that the Court "had no competence to examine the applicant's initial conviction. (…) [T]his had nothing to do with his religious beliefs. The obligation to do military service applied to all Greek males without any exceptions on grounds of religion or conscience."[87]

78. The European Commission held that there had been a violation of Article 14 because it found that the facts were within the ambit of Article 9 of the Convention. It considered that "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention was violated not only when States treated differently persons in analogous situations without providing an objective and reasonable justification but also when States, without an objective and reasonable justification, failed to treat differently persons whose situations were different."[88]

79. The European Court followed the European Commission's rationale and found that there had been a violation of Article 14 of the Convention, taken in conjunction with Article 9, for the State's failure to treat differently persons whose situations were different without an objective and reasonable justification. It found that the applicant is a member of the Jehovah's Witnesses, "a religious group committed to pacifism, and that there is nothing in the file to disprove the applicant's claim that he refused to wear the military uniform only because he considered that his religion prevented him from doing so. In essence, the applicant's argument amounts to saying that he is discriminated against in the exercise of his freedom of religion, as guaranteed by Article 9 of the Convention, in that he was treated like any other person convicted of a serious crime although his own conviction resulted from the very exercise of this freedom."[89] Consequently, the Court accepted that the applicant's "set of facts" fell within the ambit of Article 9.

80. The European Court, however, unlike the European Commission, did not find it necessary "to examine whether the applicant's initial conviction and the authorities' subsequent refusal to appoint him amounted to interference with his rights under Article 9 § 1. In particular, the European Court emphasized that it did "not have to address, in the present case, the question whether, notwithstanding the wording of Article 4 § 3(b), the imposition of such sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9 § 1."[90] The Court having found a breach of Article 14 in conjunction with Article 9 did not consider it to be necessary to consider whether there had been a violation of Article 9 taken on its own.[91]

81. The European Commission, in its merits report, noted the following in dictum:

The Commission cannot ignore the fact that the applicant refused to serve in the armed forces because of his religious beliefs. Moreover, the Commission notes that the applicant never refused to comply with his general civic duties. At the time of the applicant's conviction the possibility of alternative service did not exist in Greece. As a result, Jehovah's Witnesses were faced with the choice of either serving in the armed forces or being convicted. In those circumstances, the Commission considers that the applicant's conviction amounted to an interference with his right to manifest his religion. [Emphasis added.][92]

The European Commission then explained that the issue of Article 9 review of the applicant's conviction for insubordination would have been inadmissible ratione temporis, since it had been filed outside the six-months period required for admissibility:

The Commission has previously considered that a sentence passed for refusal to perform military service cannot constitute in itself a breach of Article 9 of the Convention (. . .). However, in the present case, the Commission is not called upon to examine whether the applicant's original conviction was justified under the second paragraph of Article 9. In any event, the Commission could not conduct such an examination since the applicant was convicted in 1983 and Greece has recognized the competence of the Commission to receive individual applications in relation to acts, decisions, facts or events subsequent to 19 November 1985. Moreover, the application was submitted more than 6 months after the applicant's final conviction.[93]

As a result, the European Commission concluded that there had been a violation of Article 9 in conjunction with Article 14 of the Convention and that it was not necessary to examine whether there had been a violation of Article 9 of the Convention on its own.

82. At the Second Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (the Copenhagen Meeting, June 5- July 29, 1990) the representatives of the participating CSCE States noted "that the United Nations Commission on Human Rights has recognized the right of everyone to have conscientious objection to military service" and agreed "to consider introducing, where this has not yet been done, various forms of alternative service, which are compatible with the reasons for conscientious objection, such forms of alternative service being in principle of a non-combatant or civilian nature, in the public interest and of a non-punitive nature." [94]

83. The Charter of Fundamental Rights of the European Union, adopted on December 7, 2000, but not yet in force, is the first international human rights instrument expressly to recognize the right to conscientious objection as part of the right to freedom of conscience. Article 10 of the Charter sets forth the right to freedom of thought, conscience and religion and Article 10(2) expressly recognizes

the right of conscientious objection “in accordance with the national laws governing the exercise of this right”, making it the first international human rights instrument to do so.[95]

B. Does Article 12 of the American Convention comprise a right to conscientious objector status with regard to compulsory military service?

84. Article 12 of the American Convention provides the following:

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

85. Does Article 12 of the American Convention allow for a reading that an individual may invoke conscientious objector status as grounds for an exemption from compulsory military service? Yes and no. The term is mentioned only once in the American Convention, in Article 6(3)(b), which expressly excepts military service and “in countries in which conscientious objectors are recognized”, national or alternative service, from the definition of “forced or compulsory labor.”

86. Consequently, the American Convention, in Article 12, read in conjunction with Article 6(3)(b), expressly recognizes the right to conscientious objector status in those countries in which conscientious objectors are recognized.[96] But what about those countries where conscientious objector status is not recognized by law, are they required to change their law and to recognize conscientious objector status?

87. The brief survey of the jurisprudence on this issue of the European system and the UN Human Rights Committee (supra) reveals that international human rights bodies are unwilling to create the right to conscientious objector status under the rubric of the right to freedom of conscience in those countries in which the status is not recognized by domestic law. These same

bodies, however, do recognize the right, under the right to freedom of conscience, in countries that provide for conscientious objector status in their law, but there controversies arise as to whether it is sufficient for the conscientious objector to self-define him or her self as such, or whether the Committee will defer to the State's applying a domestically administered test that requires a showing of adherence to a pacifist or religiously-oriented belief system to support the finding of such status.

1. Is compulsory military service to protect and defend national security a legitimate limitation to the right to freedom of conscience under the American Convention?

88. It is important at this juncture to consider the argument advanced by the State. Chile did not argue that the alleged right to conscientious objector status should not be read into Article 12 of the American Convention. On the contrary, the Chilean State maintains that the requirements of Article 12 of the American Convention are reflected in the Chilean Constitution in so far as Article 19(6) declares that freedom of conscience is guaranteed in Chile. The Chilean State argues that the Convention expressly enumerates permissible limitations to the right to freedom of conscience, and that these limitations include the preservation of the security of the State. Compulsory military service, it concludes, serves the purpose of preserving national security.

89. The petitioners allege that the duty to perform compulsory military service comprises a violation of the freedom of conscience of Messrs. Sahlí, Basso and Garate, because the requirement to carry out such service is an arbitrary interference with their deeply held beliefs and interferes with their life plans. The petitioners argued that freedom of conscience comprised "the conscious breach of a legal provision by reason of openly and clearly clashing with the life plan or personal considerations in this respect by the person called up."[97] On the other hand the State takes the view that Article 19(6) of the Constitution protects the right to freedom of conscience and religion, and that the exception set forth in Article 12(3) of the American Convention justifies the limitation on this fundamental right, invoked by the petitioners.

90. The right to freedom of conscience and religion set forth in Article 12 of the American Convention is limited explicitly by Article 12(3), which provides that:

Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

91. The State maintains that the Convention expressly enumerates in Article 12(3) permissible limitations to the right to freedom of conscience, and that these limitations include the preservation of the security of the State. The preservation of the security of the State, the State argues, is "essential for the exercise of the rights and freedoms that both the Chilean Constitution and the Convention recognize as basic and inherent to every person. The disappearance of or threat to national security restricts and renders volatile the rights and freedoms of the person. This is why the measures of prevention for preserving national security, both internal and external, cannot be considered a violation of the freedom of conscience and religion, but merely as a contribution by citizens to carrying out the duties of the State, and to maintaining the country's security."[98]

92. The State submits that obligatory military service must be understood within this framework of protection, and that it is the contribution that the State requires of its youth, for a fixed amount of time, in order to preserve national security. The fact that the contribution is only required for a fixed period of time is decisive in demonstrating that it does not constitute an arbitrary interference with the belief system or private life of the individual:

It is precisely the temporary nature of compulsory military service that makes it such that it does not constitute an attack on the right to determine one's way of life or own existence, that removes it from the dilemma between good and evil, nor violates the more personal, intimate, and private sphere of the person, since it does not require that one turn against one's most intimate beliefs, since it is merely military preparation or training for a pre-determined period.[99]

93. The limitations imposed on paragraph 9 of the European Convention, which guarantees freedom of thought, conscience and religion, are virtually identical. Article 9(2) provides that:

Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic state in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

94. Similar provisions limiting freedom of thought, conscience and religion are set forth in Article 18(3) of the International Covenant on Civil and Political Rights, which provides that:

Freedom 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.

95. It is clear from the jurisprudence reviewed (supra) that international human rights bodies recognize the right to conscientious objector status in those countries that provide for such status in their national laws. The renvoi to domestic law is crucial in the determination of this right. Even the newest international human rights instrument, the EU Charter of Fundamental Rights, which is not yet in force, is the first international human rights instrument to recognize the right to conscientious objector status under the right to freedom of conscience but also, and this is the significant point, only "in accordance with the national laws governing the exercise of this right."

96. In those countries that do not provide for conscientious objector status in their law, the international human rights bodies find that there has been no violation of the right to freedom of thought, conscience or religion. The European system has refused to recognize a right to conscientious objector status within the larger context of the right to freedom of thought, conscience and religion (Article 9), due to the explicit reference to "conscientious objectors" in the article exempting military service or alternative service from the definition of forced or compulsory labor (Article 4(3) of the European Convention).[100] Similarly, the United Nations Human Rights Committee has refused to recognize a right to conscientious objector status in those countries that do not recognize such status within the right to freedom of conscience (Article 18), due to the explicit reference to "conscientious objectors" in Article 8 that prohibits forced and compulsory labor in "countries where conscientious objectors are recognized", again leaving the door open for a State to choose to recognize or not to recognize conscientious objector status. The UN Human Rights Committee has recognized a right to conscientious objector status as derived from the right to freedom of conscience in those countries that have recognized the right in their law, but has deferred to the national authorities in determining whether an individual is to be granted conscientious objector status or not, despite the language in General Comment 22 that proclaims that "no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs."

97. The Commission sees no reason to diverge from this consistent and constant jurisprudence of the international human rights bodies, which derives from a common sense interpretation of the clear and ordinary meaning of the language of the respective treaties. The Commission reads Article 12 (the right to freedom of conscience) in conjunction with Article 6(3)(b) of the American Convention as expressly recognizing the right to conscientious objector status in those countries in which the status is recognized in domestic law. In Chile, conscientious objector status is not recognized in domestic law, and the State convincingly argues that it is not required to do so, since Article 12 of the Convention expressly authorizes the State to limit the scope of the right for reasons of national security, which it has accordingly done.

98. The petitioners in their final observations, dated January 30, 2004, submit that Article 29(a) of the American Convention prevents a State party from interpreting a provision of the Convention,

specifically, in this case, the limitation set forth in Article 12(3), as tantamount to suppressing "the enjoyment of [the] exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein."[101]

99. The Commission rejects this line of reasoning and is of the opinion that this interpretation ignores the express language of Article 6(3)(b) of the American Convention, a provision, which unambiguously allows a State not to recognize conscientious objectors. The petitioners' interpretation pretends to render the right to freedom of conscience and religion absolute, and impervious to any limitation, as if it were the right to freedom from torture, which tolerates no exceptions. One might analogize, for example, the European case of a Dutch applicant, a dairy farmer, who refused on religious grounds to participate in a compulsory health scheme designed to prevent tuberculosis among cattle.[102] The European Commission held that his conviction involved no violation of his freedom of conscience under the European Convention as the scheme in question could be justified by the reference to "the protection of health" in Article 9(2) of the European Convention. To argue that the participation in a compulsory health scheme "suppresses" this dairy farmer's right to exercise his or her right to freedom of conscience or religion and consequently is an impermissible limitation on Article 12 of the American Convention, reveals the hyperbolic reach of the petitioners' argument.

100. The Commission is of the view that the failure of the Chilean State to recognize "conscientious objector" status in its domestic law, and the failure to recognize Cristian Daniel Sahli Vera, Claudio Salvador Fabrizzio Basso Miranda and Javier Andres Garate Neidhardt as "conscientious objectors" to compulsory military service, does not constitute an interference with their right to freedom of conscience. The Commission is of the view that the American Convention does not prohibit obligatory military service and that Article 6(3)(b) of the Convention specifically contemplates military service in countries in which conscientious objectors are not recognized. Consequently, the Commission finds no violation by the Chilean State of Article 12 of the American Convention to the detriment of the petitioners in this case.

D. Violation of Article 11 of the American Convention: Protection of Privacy and Private Life

101. Article 11 of the American Convention on Human Rights protects an individual's right to privacy and right to a private life:

Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

102. The petitioners consider that there has been arbitrary interference in the private life of the alleged victims, in the context of the right contained in Article 11 of the American Convention, since "the right to privacy constitutes a space of moral autonomy within which each individual can develop, without being subject to arbitrary intrusions, all those matter that are an expression of such decisional autonomy, and which represent his or her particular personal identity."[103]

103. The petitioners argue that the fact that they have not been criminally prosecuted nor compelled to carry out alternative service is not conclusive in this matter. They argue that the maintenance in force of the impugned legislation constitutes a continuing interference with their private lives within the meaning of Article 11 of the American Convention. The very existence of this legislation continuously and directly affects their private lives: either they respect the law and present themselves for induction or they continue to refuse to present themselves and thereby become liable for criminal prosecution. They argue that the burden of obligatory military service is not: "(a) necessary for the security of all and is not related to the just demands of a democratic society; and (b) its application has not adhered strictly to the specific circumstances listed in Article 32(2), being, accordingly, inadequate and disproportionate."[104]

104. The State responded that it has not violated Article 11 of the American Convention. It asserts that there is no arbitrary interference with the private life of any individual because obligatory military service is carried out pursuant to laws that have been in existence for many years and which are known to all young men in the country. It is part of the cultural heritage of Chile and has been an obligation that has existed in the country for many years. Furthermore, the State responded that the petitioners have inappropriately invoked Article 32 of the Convention:

Of course it should be noted that Article 32 of the Convention, referring to the duties of persons and the correlation between duties and rights, is misinterpreted by the claimants, which to a significant extent warp its meaning and scope.

This provision is clear in affirming that every person has duties to the family, the community, and humankind, and that the rights of each person are limited by the rights of all others, by the security of all, and by the just demands of the general welfare in a democratic society.

Obviously the duty of each person to the community in which he or she lives is unquestionable and therefore the rights of all other persons who make up that community limit one's own rights for the common good. It is precisely for this reason that no one can doubt that the threat to national security impedes securing the common good and the exercise of the rights and freedoms of a whole country. For this reason it is legitimate for the State, to foreseeing a possible threat to the country's external security, even from a clearly deterrent posture, to adopt by way of anticipation measures for protection, to preserve its existence and conserve its integrity, preparing, for a limited time, a contingent of youths to defend its future security and to impose on them that duty, which is certainly correlative or proportional to the rights and freedoms it recognizes. What is stated above cannot be interpreted as a violation of the decisional space of autonomy of each person, nor is it an attack on the self-image of every individual who considers himself or herself to be a rational and autonomy being….

105. The Commission is of the view that the maintenance in force of the impugned legislation, which criminalizes the failure of the young men who are the subject of this petition, for failure to appear for possible induction, set forth in Article 72 of Decree Law N.º 2.306 (supra), does not constitute a continuing interference with the right of Cristian Daniel Sahli Vera, Claudio Salvador Fabrizzio Basso Miranda and Javier Andres Garate Neidhardt, to respect for their private lives, set forth in Article 11 of the American Convention. The Commission is of the view that the American Convention does not prohibit obligatory military service and that Article 6(3)(b) specifically contemplates military service in countries in which conscientious objectors are not recognized. Consequently, the Commission finds no violation by the Chilean State of Article 11 to the detriment of the petitioners in this case.

E. Alleged violation of Articles 1(1) and 2 of the American Convention

106. In view of the above findings, the Commission is of the opinion that no additional issues arise for its consideration under Articles 1(1) and 2 of the American Convention.

VI. CONCLUSIONS

107. The Commission is competent to take cognizance of this case, and based on the foregoing analysis, concludes that the Chilean State is not responsible for violating the right to freedom of conscience, enshrined in Article 12, or the right to protection of privacy, enshrined in Article 11, respectively, of the American Convention, to the detriment of the youths Cristián Daniel Sahli Vera, Claudio Salvador Fabrizzio Basso Miranda, and Javier Andrés Garate Neidhardt.

Done and signed by the Inter-American Commission on Human Rights on March 7, 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Commissioners: Evelio Fernández Arévalos, Freddy Gutiérrez and Florentín Meléndez.

[1] Commissioner José Zalaquett Daher, a Chilean national, did not participate in the consideration of or vote on this matter, pursuant to Article 17(2)(a) of the Commission's Rules of Procedure.

[2] Report No. 45/02 Cristián Daniel Sahli Vera et al., Case No. 12,219 (Chile), IACHR, ANNUAL REPORT 2002.

[3] Petitioners' Complaint of October 6, 1999.

[4] Id.

[5] Article 17(6) and Article 42 of Decree-Law No. 2.306 ISSUING RULES ON RECRUITMENT FOR MOBILIZATION OF THE ARMED FORCES (Published in the Official Gazette (Diario Oficial) of September 12, 1978).

[6] Article 32 (Title V "On compliance with Compulsory Military Service") of Law 19.123, which creates the National Corporation on Reparation and Reconciliation.

[7] International Covenant on Civil and Political Rights, Article 18; American Convention on Human Rights, Article 12.

[8] Complaint, supra, note 3.

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Id.

[14] Petitioners' observations of June 25, 2001.

[15] During the hearing on admissibility, held October 10, 2000, the petitioners argued that it seemed to them that it was not a problem of reform, but of interpretation of the Chilean Constitution.

[16] Response from the State, April 16, 2003.

[17] Id.

[18] Id.

[19] Id.

[20] Id.

[21] Observations by the State, of May 21, 2001.

[22] Id.

[23] Id.

[24] Article 19(6) provides in the relevant part: “The Constitution guarantees all persons: (6) Freedom of conscience, the expression of all beliefs, and the free exercise of all forms of worship not opposed to morality, good customs, or public policy.”

[25] Article 17 provides: “The following shall be exempt from the military duty so long as they remain in their positions: 1.- The President of the Republic, the Ministers of State, the Vice-ministers and those who have the rank of Minister of State, the Deputy Secretaries, and the Comptroller General of the Republic: 2.- The members of the Council of State and the legislators; 3.- The Ambassadors, Ministers Plenipotentiary, Chargés d’affaires, Counselors, Secretaries of Embassies and Legations, Consuls, and Consular Agents; 4.- The Ministers, Secretaries, and Reporters of the Courts of Justice, the Judges of Courts of First Instance (Jueces de Letras) and Clerks of Courts, officials who perform prosecutorial functions and Public Defenders; 5.- The Intendants, Governors, and Mayors; 6.- The Ministers or religious officers of any worship or religion who show such capacity by certificate of the bishop or religious authority under whom they serve, whose request for exemption is accepted by the Director-General; 7.- The personnel of Carabineros e Investigaciones de Chile, in the manner and conditions determined by law; and, 8.- Those who hold posts that cannot be abandoned for reasons of national interest, upon such a characterization being made by the President of the Republic. Also exempt from the military duty shall be married women and mothers with children under 18 years of age.”

[26] Decree-Law No. 2.306, supra note 5.

[27] IACHR, ANNUAL REPORT 1997 at p. 1053-4, and ANNUAL REPORT 1998, vol. II at p. 1194.

[28] Article 8 of the International Covenant on Civil and Political Rights and Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms both specifically exclude service of a military character, or service exacted instead of compulsory military service “in countries where they are recognized”, from the definition of forced or compulsory labor.

[29] UN Human Rights Committee, General Comment # 22 on Article 18 (1993).

[30] See, UN Commission on Human Rights, CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF CONSCIENTIOUS OBJECTION TO MILITARY SERVICE (Report of the Office of the High Commissioner for Human Rights), E/CN.4/2004/55, 16 February 2004.

[31] Id. at para. 15.

[32] Sarah Joseph, Jenny Schultz, Melissa Castan: THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Cases, Materials and Commentary (OUP, 2000) at p. 380.

[33] Muhonen v. Finland, 89/1981.

[34] Article 14(6) of the Covenant provides "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

[35] Muhonen v. Finland, supra at note 33, para. 11.2.

[36] L.T.K. v. Finland (185/1984).

[37] V.M.R.B. v. Canada (236/1987).

[38] J.P. v Canada (446/1991) at para. 4.1.

[39] Id. at para. 4.2

[40] See, UN Commission on Human Rights, CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF: CONSCIENTIOUS OBJECTION TO MILITARY SERVICE (Report of the High Commissioner submitted pursuant to Commission resolution 2000/34), E/CN.4/2002/WP.2, 14 March 2002 at para. 8.

[41] Id. at para. 9.

[42] Res. 1995/83; Res. 1998/77; Res. 2000/34; Res. 2002/45; Res. 2004/35.

[43] UN Commission on Human Rights, CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF CONSCIENTIOUS OBJECTION TO MILITARY SERVICE, Report of the Office of the High Commissioner for Human Rights, E/CN.4/2004/55, 16 February 2004 at p. 11. It should also be noted that some States, for example Singapore, take the position that "resolution 2002/45 goes beyond what is prescribed in the international law and the applicable human rights instruments." Id. at p. 5

[44] Brinkhof v. The Netherlands (402/1990) July 27, 1993.

[45] Id. at para. 9.2

[46] Id. at para, 9.3. Cf. the dissenting opinion in Tadman et al. v. Canada (816/1998) by P. Bhagwati, E. Evatt, L.Henkin and C. Medina, who dissented with the majority view finding the case inadmissible. The facts revealed that the Province of Ontario provided a benefit to the Catholic community by incorporating their religious schools into the public school system and funding them in full. The dissenters considered that this benefit was discriminatory in nature as it prefers one group in the community on the ground of religion and that those whose religious schools were not funded in this way were clearly victims of discrimination. The dissenters noted that the parents who desire religious education for their children and are not provided with it within the school system and who have to meet the cost of such education themselves should also be considered as victims.

The dissenters noted that the applicants were such persons and that their claims should be considered admissible.

[47] Similarly, analogizing to Tadman (supra), the Province of Ontario was not required to fund religious schools, but if it decided to fund religious schools, then it should fund schools of all religions and not just Roman Catholic schools. The petitioners in Tadman were not seeking publicly funded religious schools for their children, but on the contrary, were seeking the removal of the public funding to Roman Catholic schools.

[48] UNHRC, Foin v. France (666/1995). ICCPR, A/55/40 vol II (3 November 1999) 30 at para. 10.3.

[49] Id. at para. 10.3

[50] Id.

[51] Id.

[52] The dissenters in Foin were N. Ando, E. Klein and D. Kretzmer.

[53] See para. 3 of the dissent.

[54] UNHRC, Westerman v. The Netherlands (682/1996), ICCPR, A/55/40 vol. II (November 3, 1999).

[55] Id. at para. 6.5.

[56] Id.

[57] Id. at para. 9.3.

[58] Id.

[59] Id. at para. 9.4.

[60] Id. at para. 9.5.

[61] Id.

[62] Id. The dissenters were P. Bhagwati, L. Henkin, C. Medina, F. Pocar, M. Scheinin and Solari Yrigoyen.

[63] Id.

[64] E/CN.4/2002/WP.2, 14 March 2002: Report of the High Commissioner submitted to the Commission on Human Rights pursuant to Commission resolution 2000/34 at para. 30.

[65] Id.

[66] Cf. J.P. v. Canada (supra).

[67] No. 10358/83, 37 DR 142 at 147 (1983) cited in Harris, O'Boyle, Warbrick, THE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1995) at 368.

[68] Johnasen v. Norway 44 DR 155 (1985) at 162.

[69] Id. at p. 165.

[70] Council of Europe, Cons. Ass., Eighteenth Ordinary Session (Third Part), Texts Adopted (1967), reiterated by the Parliamentary Assembly in its Res. 816 (1977), adopted on 7 October 1977; Collected Texts, Strasbourg, 1987, pp. 222-3. Cited in P. van Dijk, G.J.H. van Hoof, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2d ed. 1990) at 399.

[71] European Parliament resolution of 16 February 1983 on conscientious objection.

[72] Van Dijk and van Hoof, supra, note 70 at 400.

[73] E. Comm. H.R., Fadini v. Switzerland, E.H.R.R. CD 13. App. Nos. 17003/90 and 18206/91.

[74] E.Ct.H.R., Manoussakis and Others v. Greece, Judgment of September 26, 1996.

[75] Id.

[76] E.Ct.H.R., Thlimmenos v. Greece, Judgment of April 6, 2000.

[77] Id. at para. 7.

[78] Id. at para. 10.

[79] Id. at para. 13.

[80] Id. at para. 24.

[81] Id. at para. 30.

[82] Id. at para. 31.

[83] Id.

[84] Id. at para. 33.

[85] Id. at para. 34.

[86] Id.

[87] Id. at para. 36.

[88] Id. at para. 38. In the European system, Article 14, the non-discrimination provision is not an autonomous guarantee but has effect solely in relation to the rights and freedoms protected by the other substantive provisions of the European Convention and its Protocols.

[89] Id. at para. 42.

[90] Id. at para. 43.

[91] Id. at para. 53.

[92] E.Comm.H.R., Iakovos Thlimmenos v. Greece, Application No. 34369/97 (December 4, 1998) at para. 45.

[93] Id. at para. 46.

[94] Document of the Copenhagen Meeting, CSCE, Second Conference on the Human Dimension, Copenhagen June 5-July 29, 1990 at para. 18.

[95] On January 9, 2002, the European Court of Human Rights, for the first time in its history received a formal request by the Committee of Ministers for an advisory opinion on "The Co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights." Similarly, the Committee of Ministers could request the European Court to provide it with an advisory opinion on "The compatibility of the EU Charter of Fundamental Rights and the European Convention on Human Rights." See, E. Court H.R., Grand Chamber: Annual Activity Report 2002 (January 2003) at p. 9.

[96] Article 6(3)(b) of the American Convention exempts "military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service" from the definition of forced or compulsory labor.

[97] Petitioner's Complaint of October 6, 1999.

[98] State's Response of June 5, 2000.

[99] Id.

[100] It specifically refused to do so in the recent (2000) Thlimmenos case (supra).

[101] This is the same argument made in the amicus brief filed by Amnesty International in Case 11,596, Luis Gabriel Caldas León (Colombia) on February 23, 1999.

[102] Application 1068/61.

[103] Petitioner's submission of December 7, 2000, p. 1.

[104] Petitioner's Complaint, October 6, 1999. Article 32(2): "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."