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Human Rights of Conscientious Objectors vis-à-vis Armed Non-State Actors and De Facto Authorities

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I. INTRODUCTION: RECOGNIZING A LEGAL DILEMMA

This article could have been one of the shorter academic contributions, consisting of just one paragraph. We could have confined ourselves to looking at the Guidelines on International Protection No. 10, issued first in 2013 by the United Nations High Commissioner for Refugees (UNHCR), which bluntly note that “only States can require military conscription,” and which go on to state: “International law does not entitle non-State armed groups, whether or not they may be the *de facto* authority over a particular part of the territory, to recruit on a compulsory or forced basis.”¹ We could have simply written that because such non-State actors are not entitled to conscript under international law there is no regulation of conscription under that law and no legal issues arise. If international law contains no authorization for armed groups to engage in conscription, then there is no need to attempt to explain how international law regulates such unauthorized conscription.

Alessandra Spadaro recently noted:

As far as states are concerned, conscription is an exception to the prohibition of forced labour (Article 8(3)(c)(ii) International Covenant on Civil and Political Rights, Article 6(3)(b) American Convention on Human Rights, Article 4(3)(b) European Convention on Human Rights, Article 2(2)(a) Convention concerning Forced or Compulsory Labour No. 29). The prerogative of states to conscript individuals is tempered by the conscripted individuals’ right of conscientious objection, which derives from their freedom of thought, conscience, and religion or belief.

Armed groups arguably do not have any right to conscript individuals under international law (UNHCR [Guidelines on International Protection No. 10], para. 7). As it has been noted elsewhere, “if an armed group adopts a (rebel) law to forcibly conscript civilians in the territory over which it exercises *de facto* control, civilian populations would find themselves under two competing sets of laws with which it is impossible to comply: to refuse forcible recruitment would violate the rebel law, while to comply

1. U.N. High Comm’r for Refugees, *Guidelines on International Protection No. 10: Claims to Refugee Status Related to Military Service within the Context of Article 1A(2) of the 1951 Convention and/ or the 1967 Protocol Relating to the Status of Refugees*, ¶ 7, U.N. Doc. HCR/GIP/13/10/Corr. 1 (Nov. 12, 2014).

would invoke individual criminal responsibility under the State's domestic law prohibiting insurrection."²

So States have an obligation not to engage in forced labor, and at the same time retain an exception for conscription. Similarly, States also have an exception to their duty to respect the right to life: under certain circumstances they may apply a judicial death penalty. In neither case does this mean that armed non-State actors can enjoy these exceptions to their obligations not to engage in forced labor or killings. Everyone has an obligation not to engage in forced labor or killing. In our view only States have the privilege of enjoying the exceptions spelled out in the human rights treaties.³

On reflection, the conundrum is not so different from the laws of war. Even though armed groups do not have the right to start an armed conflict, once they are engaged in an armed conflict there are rules with which they have to comply. Frédéric Mégret has suggested that one might think about the similar duality in the context of detention "in terms of a *jus in detentio*, and a *jus ad detentium*," although he himself says this "terminology is a bit misleading."⁴ Drawing on Mégret, if it helps, we are separating out the *jus ad conscriptum* from the *jus in conscriptio*, and we are stating that there is no need to conceive of an equality of belligerents in either branch.⁵

2. Alessandra Spadaro, "Rebel Courts" Book Symposium—The Prosecution of Conflict-Related Offences by Courts of Armed Groups, ARMED GROUPS AND INTERNATIONAL LAW (June 2, 2022), <https://www.armedgroups-internationallaw.org/2022/06/02/rebel-courts-book-symposium-the-prosecution-of-conflict-related-offences-by-courts-of-armed-groups/> (citations omitted) (quoting MATIAS THOMSEN & SOPHIE RONDEAU, FORCIBLE RECRUITMENT OF ADULTS BY NON-STATE ARMED GROUPS IN NON-INTERNATIONAL ARMED CONFLICT 15 (2019)).

3. Andrew Clapham, *Detention by Armed Groups under International Law*, 93 INTERNATIONAL LAW STUDIES 1, 31–33 (2017).

4. Frédéric Mégret, *Detention by Non-State Armed Groups in NLACs: IHL, International Human Rights Law and the Question of the Right Authority*, in INTERNATIONAL HUMANITARIAN LAW AND NON-STATE ACTORS 169, 170 (Ezequiel Heffes et al. eds., 2020).

5. Moral philosophers have also played with the idea that ordinary life furnishes examples of situations where one may not have the right to engage in certain activity, but nevertheless when one does one will be bound by a separate set of rules covering that activity, which one had no right to be engaged in in the first place. Consider the examples provided by Ripstein who refers to the rules of the road and parenting. *Ad vebendum* refers to the rules governing the entitlement to drive, while *in vebendo* cover the manner of driving. Even if you are not licensed to drive, the second set of rules apply. Similarly, even if one is not entitled to the custody of a child (*ad parentem*) as in a kidnapping, the rules *in parente* would still apply. ARTHUR RIPSTEIN, RULES FOR WRONGDOERS: LAW, MORALITY, WAR 31–33 (2021).

In recent years, scholars have highlighted that non-State armed groups may not only suffer from a lack of willingness to abide by the rules, but their disrespect of certain rules may—in Marco Sassòli’s analysis—be due to a “lack of ability.”⁶ He suggests that in the context of a conflict between a State and an armed group “we must consider abandoning the fiction of the equality of belligerents and require full respect of customary and conventional rules of IHL from the government, while demanding respect only according to their ability from their enemies.”⁷ In the end he considers that the “equality of belligerents is a fiction” in non-international armed conflicts.⁸ However, abandoning the equality of belligerents under international humanitarian law (IHL) may be too much to ask for others, such as Yuval Shany, who considers this would be to throw the “baby out with the bathwater.”⁹ Instead, he proposes that we supplement IHL standards “by norms derived from international human rights law.”¹⁰ He prefers this to a rejection of the equality of belligerents under IHL because, unlike IHL,

human rights law is not based on a notion of equality or reciprocity; hence its lopsided application (assuming that non-state actors are subject to fewer human rights obligations than states) raises fewer doctrinal objections than those raised by a departure from the principle of belligerent equality in IHL. Since human rights law is not invested with the reciprocity-based “baggage” that accompanies IHL norms, it constitutes a better legal area for developing asymmetric obligations than the latter body of law.¹¹

Our analysis and normative approach combines these insights and proposes a set of human rights standards applicable on “a sliding scale” to de facto authorities and armed groups, based on their control over people and territory, alongside their *capacity* and *ability* to fulfil these obligations. These obligations do not mirror those of States. First, because States have, under international law, certain rights to demand compulsory labor from their citizens, while non-State actors have no such rights. Secondly, because the aim

6. Marco Sassòli, *Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality Between Armed Groups and States?*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 426, 429 (2011).

7. *Id.* at 431.

8. *Id.*

9. Yuval Shany, *A Rebuttal to Marco Sassòli*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 432, 432 (2011).

10. *Id.* at 435.

11. *Id.*

of human rights law has never been concerned with providing a level playing field for a fight to resolve differences. Rather, human rights law empowers individuals to enforce their demands for respect for their dignity and an environment to allow human beings to flourish. Let us turn then to the real-world problem.

The reality on the ground is dramatic for many individuals in several regions across the globe. They face human rights challenges related to coerced recruitment by armed non-State actors and de facto authorities, including arbitrary detention and punishment due to conscientious objection and denial of freedom of conscience more generally. The estimated numbers of those who are living in areas controlled by non-State armed groups vary from sixty-six million people (as of September 2020),¹² to sixty-eight million individuals living under the direct State-like governance of armed groups (as of March 2021),¹³ to fifty–six million people living under the full territorial control of armed groups, to one hundred million individuals in areas where this control is contested or fluid (as of July 2021).¹⁴

Both academic commentary¹⁵ and the Office of the United Nations High Commissioner for Human Rights (OHCHR)¹⁶ have stressed that persons who live in territory controlled by armed groups or de facto authorities often face human rights protection gaps. Noting that some de facto authorities do not recognize the right to conscientious objection to military service or fail to ensure its full implementation in practice, the 2022 report by OHCHR concludes that many individuals face violations of this right along with other

12. EZEQUIEL HEFFES, DETENTION BY NON-STATE ARMED GROUPS UNDER INTERNATIONAL LAW 176 (2022).

13. “From Words to Deeds”: *Groundbreaking Studies on FARC-EP and MNL A and Dedicated New Website*, GENEVA ACADEMY (Mar. 9, 2021), <https://www.geneva-academy.ch/news/detail/425-from-words-to-deeds-groundbreaking-studies-on-farc-ep-and-mnla-and-dedicated-new-website>; see also ICRC Position Paper, *ICRC Engagement with Non-State Armed Groups: Why, How, For What Purpose, and other Salient Issues*, 102 INTERNATIONAL REVIEW OF THE RED CROSS 1087, 1088 (2020).

14. Irénée Herbet & Jérôme Drevon, *Engaging Armed Groups at the International Committee of the Red Cross: Challenges, Opportunities and COVID-19*, 102 INTERNATIONAL REVIEW OF THE RED CROSS 1021, 1026, 1029 (2020).

15. HEINER BIELEFELDT, NAZILA GHANEA & MICHAEL WIENER, FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 286–88 (2016).

16. Office of the U.N. High Comm’r for Human Rights, *Conscientious Objection to Military Service*, ¶ 56, U.N. Doc. A/HRC/35/4 (May 1, 2017). See also Office of the U.N. High Comm’r for Human Rights, *Conscientious Objection to Military Service*, ¶¶ 51–53, U.N. Doc. A/HRC/50/43 (May 11, 2022).

rights, and it recommends bringing policies and practices into line with international human rights norms and standards.¹⁷

Already in 2013, former High Commissioner Navi Pillay stressed that “[h]uman rights do not have any borders. It is vital to address underlying human rights issues in disputed territories, regardless of the political recognition or the legal status of a territory.”¹⁸ Indeed, people living in such territories face not only security, development, and humanitarian concerns, but they also have only limited access to effective legal remedies, which ultimately leads to human rights protection gaps. Yet, the High Commissioner stressed that “all human rights should be enjoyed by all people at all times regardless of these constraints.”¹⁹

The objective of this article is to elucidate the human rights of conscientious objectors and to offer substantive guidance for protecting their rights vis-à-vis armed non-State actors and de facto authorities. This is a field where multiple agencies are engaging with a variety of actors. The terminology is constantly changing. Most recently the civil society group Geneva Call explained that, from now on, they will be referring to these actors as “Armed Groups and de facto Authorities—AGDA.” Geneva Call’s consultations had revealed

that in practice a vast number of armed groups operate as hybrids, maintaining or claiming some form of relationship with state structures. Therefore, using “Armed Non-State Actors” or “ANSA” to describe them can be misleading. It is seen by many actors as a breach of neutrality by Geneva Call, as the term ANSA implicitly qualifies them.²⁰

Because our review covers a range of reports and publications by various agencies, we will be referring to armed non-State actors, armed groups, de facto authorities, and de facto administrations without treating these terms

17. U.N. Doc. A/HRC/50/43, *supra* note 16, ¶¶ 56–57.

18. Office of the U.N. High Comm’r for Human Rights, *Human Rights Do Not Have Any Borders: Pillay* (Feb. 14, 2013), <https://www.ohchr.org/en/press-releases/2013/02/human-rights-do-not-have-any-borders-pillay>.

19. *Id.*

20. Geneva Call, *Armed Groups and De Facto Authorities (AGDA): Geneva Call Adapts its Engagement Terminology* (July 15, 2022), <https://www.genevacall.org/armed-groups-and-de-facto-authorities-agda-geneva-call-adapts-its-engagement-terminology/>.

particularly consistently or as terms of art.²¹ The key point is that some groups will indeed consider themselves as States (even if they are only recognized by a few States) but for our purposes their international obligations will be derived from non-treaty law and practice as none of them are parties to the international human rights treaties nor do they report to the human rights treaty bodies.²²

After briefly looking into recent practice by international human rights mechanisms in Part II, we will focus on the engagement by UN independent experts with several de facto authorities concerning freedom of

21. The problem highlighted by Geneva Call also arises for UN entities, such as commissions of inquiry. See, for example, a 2018 report of the U.N. Comm'n on Human Rights in South Sudan:

The Commission would highlight that in the context of South Sudan control over some towns has shifted between the government and opposition forces multiple times over the course of the conflict, in some cases a town might change hands perhaps twelve times in as many months. In addition, while some armed groups are allied with the Government, other armed groups may change allegiance from day-to-day, moving from being part of the opposition to being part of the Government and then perhaps even breaking away again.

Rep. of the Comm'n on Human Rights in South Sudan, ¶ 149, U.N. Doc. A/HRC/37/CRP.2 (Mar. 6, 2018).

22. For the most recent example of conscription by entities whose designation is contested, see the concern expressed by U.N. High Comm'r for Human Rights Michelle Bachlet: "We are also concerned about confirmed allegations of forced conscription by Russian-affiliated armed groups at the end of February 2022, in Donetsk and Luhansk." Office of the U.N. High Comm'r for Human Rights, *Ukraine: High Comm'r Updates Human Rights Council* (July 5, 2022), <https://www.ohchr.org/en/statements/2022/07/ukraine-high-commissioner-updates-human-rights-council>. See also Office of the U.N. High Comm'r for Human Rights Ukraine, *Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation: 24 February—15 May 2022*, ¶ 109 (June 29, 2022), <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmed-Attack-EN.pdf> ("Men complained of being trapped in a situation where refusing to be recruited would trigger criminal prosecution under the 'legislation' of self-proclaimed 'republics', while conscription would constitute a crime under Ukrainian legislation" (footnotes omitted)). For the related observations of the mission of experts established under the Organization for Security and Co-operation in Europe (OSCE) Moscow Mechanism, see Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, Note Verbale 256/2022, at 31, ODIHR.GAL/36/22/Corr.1 (July 14, 2022) (transmitting their *Rep. of Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine (1 April–25 June 2022)*, <https://www.osce.org/files/f/documents/3/e/522616.pdf> ("In mid-April, for example, local social media groups in Donetsk highlighted how philharmonic and opera musicians, circus performers, educators, and social professionals were forcibly enlisted as 'volunteers', despite having no connection to the military").

conscientious objection in Part III. Part IV and the Annexes will use the eighteen points recommended in 2022 by OHCHR to bring “national laws, policies and practices relating to conscientious objection to military service” in line with international human rights law,²³ with a view to adapting these points to the specificities of armed non-State actors and de facto authorities.

II. RECENT PRACTICE BY INTERNATIONAL HUMAN RIGHTS MECHANISMS

A. Human Rights Obligations of Armed Non-State Actors

International human rights treaties focus mainly on the obligations of the State parties.²⁴ UN treaty bodies are mandated to monitor the implementation by State parties of their obligations under the respective international human rights treaties, which only rarely address non-State armed groups directly.²⁵

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict notably includes two references that directly address non-State armed groups. Its preamble condemns “with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recogniz[es] the responsibility of those who recruit, train and use children in this regard.”²⁶ In addition, its Article 4(1) prohibits armed groups that are distinct from the armed forces of a State, under any circumstances, from recruiting or using in hostilities persons under the age of eighteen. This provision in an Optional Protocol, which is only open for signature by a State that is party to the Convention on the Rights of the

23. U.N. Doc. A/HRC/50/43, *supra* note 16, ¶ 57.

24. See Andrew Clapham, *Non-State Actors*, in INTERNATIONAL HUMAN RIGHTS LAW 583, 590–91 (Daniel Moeckli et al. eds., 4th ed. 2022).

25. Some exceptions are Article 4(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222, as well as Article VII(5) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Oct. 23, 2009, https://au.int/sites/default/files/treaties/36846-treaty-kampala_convention.pdf [hereinafter *Kampala Convention*].

26. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *supra* note 25, annex I, pmbl. ¶ 11.

Child or has signed it,²⁷ is noteworthy since it addresses the legal obligations of armed non-State actors and has been applied by the UN Commission of Inquiry in Syria to this effect. The Commission concluded in 2013 that “[a]nti-Government armed groups are also responsible for using children under the age of 18 in hostilities in violation of the [Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict], which by its terms applies to non-State actors.”²⁸ The summary also makes the same point: “Both Government-affiliated militia and anti-Government armed groups were found to have violated the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, to which the Syrian Arab Republic is a party.”²⁹

Similarly, at the regional level, one objective of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa is to “[p]rovide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons.”³⁰

In 2013, the Committee on the Elimination of Discrimination against Women (CEDAW) took an important step by stressing in its “General Recommendation Number 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations” that “under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights.”³¹ In addition, the CEDAW Committee explicitly addressed armed non-State actors, urging them: “(a) To respect women’s rights in conflict and post-conflict situations, in line with the

27. *Id.* art. 9(1). *See also id.* art. 9(2) (“The present Protocol is subject to ratification and is open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.”).

28. *Rep. of the Independent Int’l Comm’n of Inquiry on the Syrian Arab Republic*, Annex X, ¶ 44, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013).

29. *Id.* at 2. *See also* Tilman Rodenhäuser, *International Legal Obligations of Armed Opposition Groups in Syria*, INTERNATIONAL REVIEW OF LAW (2015), <https://journals.qu.edu.qa/index.php/IRL/article/view/1241>.

30. Kampala Convention, *supra* note 25, art. II(e).

31. Committee on the Elimination of Discrimination against Women, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, ¶ 16, U.N. Doc. CEDAW/C/GC/30 (Nov. 1, 2013).

Convention; (b) To commit themselves to abiding by codes of conduct on human rights and the prohibition of all forms of gender-based violence.”³²

Beyond the treaties and the treaty monitoring bodies we have a body of customary international human rights law, *jus cogens* obligations, and general principles of international law.³³ The UN’s monitoring bodies, including its commissions of inquiry and “special procedures” have been applying human rights law to armed non-State actors and engaging directly with the armed groups themselves over their alleged violations.³⁴ The doctrinal debate remains lively and yet several scholars prefer to move on and address the practical problems associated with the lives of those living under the control of non-State actors rather than remaining mired in the logics of legal legitimacy. As recently asserted by Katharine Fortin:

even if readers are not convinced by the legal legitimacy of the practice, the reality that the application of human rights to armed groups controlling territory and exercising functions of government is now fairly commonplace provides enough of a reason to study how different human rights norms . . . can be operationalized, when applied to such groups.³⁵

32. *Id.* ¶ 18.

33. The special rapporteur of the International Law Commission, writing on the topic of “general principles of law,” has stated that “they ought to apply in the relations between subjects of international law generally.” Marcelo Vázquez-Bermúdez, Special Rapporteur, *First Rep. on General Principles of Law*, ¶ 126, U.N. Doc. A/CN.4/732 (Apr. 5, 2019). Whether or not a de facto authority or an armed group can be considered a “subject of international law” is a complex doctrinal debate beyond the scope of this article. See Jochen A. Frowein, *De Facto Regime*, ¶ 3, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013) (“State practice shows that entities which in fact govern a specific territory for a prolonged period will be treated as partial subjects of international law”).

34. Clapham, *supra* note 24, at 599–600; Jean-Marie Henckaerts & Cornelius Wiesener, *Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice*, in INTERNATIONAL HUMANITARIAN LAW AND NON-STATE ACTORS 195–227 (Ezequiel Heffes et al. eds., 2020); Ginevra Le Moli, *From “Is” to “Ought”: The Development of Normative Powers of UN Investigative Mechanisms*, 19 CHINESE JOURNAL OF INTERNATIONAL LAW 625 (2020).

35. Katharine Fortin, *The Procedural Right to a Remedy When the State has left the Building? A Reflection on Armed Groups, Courts and Domestic Law*, 14 JOURNAL OF HUMAN RIGHTS PRACTICE 387, 390 (2022); see also Joshua Joseph Niyo, *Legal Fragmentation and Obligations for Armed Non-State Actors: Can International Humanitarian Law and International Human Rights Law Learn from Each Other?*, in HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW: CHALLENGES AHEAD 32–53 (Norman Weiß & Andreas Zimmermann eds., 2022).

B. Effective Control

In his 2015 report to the UN Human Rights Council, the former special rapporteur on freedom of religion or belief, Heiner Bielefeldt, provided examples of how UN special procedures³⁶ and commissions of inquiry have “addressed human rights violations committed in the name of religion by armed groups with effective control over territory,” such as the Taliban, Hezbollah, Al-Shabaab, and Islamic State in Iraq and the Levant.³⁷ In this context, the special rapporteur also defined the term “effective control” to mean “that the non-State armed group has consolidated its control and authority over a territory to such an extent that it can exclude the State from governing the territory on a more than temporary basis.”³⁸ His successor, Ahmed Shaheed, also stated, in a subsequent thematic report to the Human Rights Council, that the international community must consider prioritizing its immediate focus on “[l]imited State powers, whereby parts of the country are beyond the effective control of the Government, where there is generalized disregard for the rule of law.”³⁹ Furthermore, his report annexed the 2017 Beirut Declaration on “Faith for Rights,” drawing an analogy between the notion of effective control, which provides the foundation for responsibilities of non-State actors in times of conflict, with “a similar legal and ethical justification in case of religious leaders who exercise a heightened degree of influence over the hearts and minds of their followers at all times.”⁴⁰

Armed non-State actors *without* effective control over territory were also held to have committed human rights violations, as illustrated notably in two UN reports published in 2009 about attacks on civilians by the Lord’s Resistance Army in the Democratic Republic of the Congo as well as in the

36. “The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective.” *Special Procedures of the Human Rights Council*, UNITED NATIONS HUMAN RIGHTS, <https://www.ohchr.org/en/special-procedures-human-rights-council> (last visited Nov. 2, 2022).

37. Heiner Bielefeldt, *Rep. of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 55, U.N. Doc. A/HRC/28/66 (Dec. 29, 2014) (referring, in n.17, to examples regarding the Taliban, Hezbollah, Al-Shabaab, and Islamic State in Iraq and the Levant).

38. *Id.* (citing Regulations Respecting the Laws and Customs of War on Land art 42, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539).

39. Ahmed Shaheed, *Rep. of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 64, U.N. Doc. A/HRC/40/58 (Mar. 5, 2019).

40. *Id.* annex I ¶ 19.

states of Western Equatoria and Central Equatoria in what is now South Sudan. Thus, even in situations without effective control by an armed non-State group, civilians may be affected by de facto conscription. For example, the Lord's Resistance Army was found to have abducted "children who are more malleable and easily conditioned in order to strengthen its labor and fighting forces in case of attack"⁴¹ and these children "were forcibly recruited as child soldiers."⁴² The UN special rapporteur on extrajudicial, summary or arbitrary executions also noted with deep concern that thousands of children had reportedly been abducted by the Lord's Resistance Army, and that many of the abducted boys were "forcibly recruited as soldiers."⁴³

The special representative of the UN Secretary-General for children and armed conflict recently noted that the commanders of six armed groups and factions in the Democratic Republic of the Congo had "signed unilateral commitments to end and prevent child recruitment and use," which reportedly led to the release of more than 260 children by armed groups following direct engagement by the United Nations.⁴⁴

The precise scope of human rights obligations of armed non-State actors has been developed in recent years. In 2014, a report by the United Nations Mission in the Republic of South Sudan stressed that "[t]he most basic human rights obligations, in particular those emanating from peremptory international law (*jus cogens*) bind both the State and armed opposition groups in times of peace and during armed conflict," including the

prohibitions of extrajudicial killing, maiming, torture, cruel inhuman or degrading treatment or punishment, enforced disappearance, rape, other conflict related sexual violence, sexual and other forms of slavery, the recruitment and use of children in hostilities, arbitrary detention as well as of any

41. U.N. Organization Mission in the Dem. Rep. Congo and Office of the U.N. High Comm'r for Human Rights, *Summary of Fact Finding Missions on Alleged Human Rights Violations Committed by the Lord's Resistance Army (LRA) in the Districts of Haut-Uélé and Bas-Uélé in Orientale Province of the Democratic Republic of Congo*, ¶ 32 (Dec. 2009), https://www2.ohchr.org/SPdocs/Countries/LRAReport_December2009_E.pdf.

42. Office of the U.N. High Comm'r for Human Rights, *Twelfth Periodic Rep. of the U.N. High Comm'r for Human Rights on the Situation of Human Rights in the Sudan*, ¶ 8.4 (Dec. 2009), https://www2.ohchr.org/SPdocs/Countries/LRAReport_SudanDecember2009.doc.

43. *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Rep. of the Special Rapporteur, Ms. Asma Jahangir, Submitted Pursuant to Comm'n on Human Rights Res. 1999/35*, ¶ 38, U.N. Doc. E/CN.4/2000/3 (Jan. 25, 2000).

44. Virginia Gamba, *Rep. of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 34, U.N. Doc. A/76/231 (July 26, 2021).

violations that amount to war crimes, crimes against humanity, or genocide.⁴⁵

In 2022, the Commission on Human Rights in South Sudan continued to document incidents of rape and sexual violence perpetrated by armed men “who have been identified as part of regular or of non-State armed forces,” and the Commission recommended that all armed forces and non-State armed groups “[o]rder, clearly and publicly, all troops and allied militias to comply fully with international human rights law and international humanitarian law.”⁴⁶

From the outset the Commission highlighted that with regard to torture:

The African Commission has interpreted torture as the “intentional and systematic infliction of physical or psychological pain and suffering in order to punish, intimidate or gather information.[”] It has found that torture can be carried out by “State or non-State actors at the time of exercising control over such person or persons.”⁴⁷

And the Commission was clear: “While armed opposition groups cannot become parties to international human rights treaties, such non-state actors are increasingly deemed to be bound by certain international human rights obligations, particularly those actors exercising de facto control.”⁴⁸

45. U.N. Mission in the Republic of South Sudan, *Conflict in South Sudan: A Human Rights Rep.*, ¶ 18 (May 8, 2014), https://unmiss.unmissions.org/sites/default/files/unmiss_conflict_in_south_sudan_-_a_human_rights_report.pdf.

46. Comm’n on Human Rights in South Sudan, *Conflict-Related Sexual Violence Against Women and Girls in South Sudan*, ¶¶ 37, 226, U.N. Doc. A/HRC/49/CRP.4 (Mar. 21, 2022). See also the list of serious violations of human rights and international humanitarian law found by the Commission on Human Rights in South Sudan in its 2019 report (¶ 96, U.N. Doc. A/HRC/40/69 (Mar. 12, 2019)) as well as the recruitment and use of children as analyzed in the Commission’s 2020 report (¶¶ 45–57 and annex II, U.N. Doc. A/HRC/43/56 (Jan. 31, 2020)).

47. *Rep. of the Comm’n on Human Rights in South Sudan*, *supra* note 21, ¶ 109 (quoting African Commission on Human and Peoples’ Rights, Communication No. 279/03–296/05, *Sudan Human Rights Organization and Centre on Human and Peoples’ Rights and Evictions v. Sudan*, ¶ 156 (May 27, 2009)).

48. *Id.* ¶ 120.

C. *Obligations of States*

Of course, addressing any human rights obligations of armed non-State actors should not let States off the hook concerning their obligations as the primary duty-bearers. With regard to the due diligence obligation of territorial States, the former special rapporteur on torture, Nils Melzer, noted in 2017 that “even where armed groups have brought part of the national territory under their control, Governments are not absolved from doing everything feasible in the circumstances to protect their citizens.”⁴⁹ These obligations may include diplomatic, economic, judicial, or other measures that are in the State’s power to take and in accordance with international law.⁵⁰ Melzer also stressed that “the exercise of control by an organized armed group as de facto authority over the population of a State does not deprive the people living in this territory of their rights.”⁵¹

In addition to the residual obligations by the State that has lost effective control over part of its territory, other States may also incur responsibility under international law. The European Court of Human Rights held that State responsibility could “arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory,” which leads to the State’s obligation to secure human rights in such an area due to “the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”⁵²

It is worth separating out a few ideas that tend to get confused. First, in order for the European Convention to apply extraterritorially the applicant will have to bring themselves within one of the accepted exceptions to the

49. Nils Melzer, *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 46, U.N. Doc. A/HRC/34/54 (Feb. 14, 2017). We might add that these State obligations under international law are not confined to the State’s *citizens*; the government must take all possible measures, without discrimination, to ensure that *all individuals* in that part of the territory can effectively enjoy their rights. Human Rights Comm., *Concluding Observations on the Third Periodic Rep. of the Republic of Moldova*, ¶¶ 5–6, U.N. Doc. CCPR/C/MDA/CO/3 (Oct. 31, 2016); Human Rights Comm., *Concluding Observations on the Third Periodic Rep. of Georgia*, ¶ 6, U.N. Doc. CCPR/C/GEO/CO/3 (Oct. 26, 2007).

50. *Ilaşcu and Others v. Moldova and Russia*, 2004-VII Eur. Ct. H.R. 179, ¶¶ 313, 331; *Catan and Others v. Moldova and Russia*, 2012-V Eur. Ct. H.R. 309, ¶ 109.

51. Melzer, *supra* note 49, ¶ 46 (quoting Human Rights Committee, *General Comment No. 26 on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights*, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Oct. 29, 1997).

52. *Loizidou v. Turkey*, App. No. 15318/89, ¶ 52 (Dec. 18, 1996), <https://hudoc.echr.coe.int/eng?i=001-58007>; *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, ¶ 76.

territoriality principle under the Convention. In the present context this means that the State has effective control of the relevant area either through its own armed forces or a subordinate entity. The European Court of Human Rights has developed the relevant factors to be taken into account to determine a sufficient nexus with the subordinate authority in the context of the relationship between Armenia and the Nagorno-Karabakh Republic (“NKR”). In 2015 in *Chiragov and Others v. Armenia*, the Court concluded:

All of the above reveals that Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the “NKR,” that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the “NKR” and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention.⁵³

The Court is at pains to explain that this test for establishing jurisdiction is not the same as the international law test for determining attribution and hence direct State responsibility.⁵⁴

In its *Avanesyan v. Armenia* judgment, the European Court of Human Rights recently applied this principle of obligations within the jurisdiction of Armenia resulting from the “NKR” surviving due to “military and other support,” to the case of a conscientious objector from the Nagorno-Karabakh region. It held that the conscientious objector “had no possibility—or was deprived of the possibility—to perform alternative civilian service instead of military service, a circumstance which led eventually to his conviction and imprisonment” in the unrecognized “NKR.”⁵⁵ The European Court concluded that Armenia had violated the applicant’s freedom of conscience.⁵⁶ The Court found that

53. *Chiragov and Others v. Armenia*, 2015-III Eur. Ct. H.R. 135, ¶ 186.

54. *Id.* ¶ 168, quoting *Catan and Others*, *supra* note 50, ¶ 115 (“the test for establishing the existence of ‘jurisdiction’ under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under international law”).

55. *Avanesyan v. Armenia*, App. No. 12999/15, ¶ 58 (July 20, 2021), <https://hudoc.echr.coe.int/eng?i=001-211259>.

56. *Id.*

Armenia was responsible for the acts and omissions of the “NKR” authorities and was under an obligation to secure in that area the rights and freedoms set out in the Convention. Therefore, the Government’s argument that the “NKR” was a separate entity where the Alternative Service Act did not apply is artificial for the purposes of the present case.⁵⁷

Once it is established that the alleged human rights violations fall within the jurisdiction of the State, two possibilities emerge for finding a violation. Either the State is responsible for failing to fulfill its responsibilities in the area under its control (direct or indirect) or the acts concerned are attributable to the State under the international law rules on State responsibility. These rules on attribution have been spelled out by the International Law Commission.

The Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts provide in Article 8 that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”⁵⁸ Thus the responsibility of a State may flow from giving specific instructions, providing direction, or exercising control over non-State actors relating to the conduct that is said to have amounted to an internationally wrongful act. Those acts are then attributable to the State. The commentary to Article 8 stresses that “[e]ach case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of.”⁵⁹ The fact that a State may assume responsibility for the conduct of a (group of) person(s) under the above-mentioned conditions does not exclude concurrent responsibility by a non-State actor concerning those decisions that were or were not taken under the instructions, direction, or control of that State.

57. *Id.* See also the discussion, *infra* Section III(D), as well as Christian Religious Organization of Jehovah’s Witnesses in the NKR v. Armenia, App. No. 41817/10, ¶ 79 (Mar. 22, 2022), <https://hudoc.echr.coe.int/eng?i=001-216366>.

58. Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 56 U.N. GAOR Supp. No. 10, art. 8, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf.

59. *Id.* at 48 (commentary on draft art. 8, ¶ 7).

In some circumstances the acts of de facto authorities may be attributed to the State to the extent that they are “in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”⁶⁰

Depending on the circumstances, there may consequently be several duty-bearers with simultaneous and overlapping obligations: (1) the territorial State that has lost effective control over part of its territory, (2) the State that exercises effective control, either directly or through a subordinate authority, over this territory or people in it, and (3) non-State actors who exercise control over the territory or people and whose conduct affects the human rights of the individuals under their control (armed groups and de facto authorities).⁶¹

To the extent that UN commissions of inquiry have grappled with this problem we might reproduce here the approach of the UN Commission on Human Rights in South Sudan, which sets out the standard to which it held the State with regard to the acts of non-State actors. In short, it depends on the substantive rights in issue:

Under international law, including human rights law, the State may be held generally responsible for the wrongful conduct of non-State individuals or groups when the latter are acting in “complete dependence” on the State. A State might also be held responsible in cases in which non-State individuals or groups act on its instructions or under its direction or its “effective control,” and also when its own agents acknowledge and adopt the conduct of non-State groups. States must investigate the use of lethal force by their agents, particularly those involved in law enforcement. For State investigations to be effective, they must be as prompt as possible, exhaustive, impartial, independent and open to public scrutiny.⁶²

The African Commission on Human and Peoples’ Rights has explained that: “A State can be held responsible for killings by non-State actors if it

60. *Id.* art. 9.

61. Office of the U.N. High Comm’r for Human Rights, *Rep. on the Question of Human Rights in Cyprus*, ¶ 11, U.N. Doc. A/HRC/25/21 (Jan. 22, 2014).

62. *Rep. of the Comm’n on Human Rights in South Sudan*, *supra* note 21, ¶ 116 (footnotes omitted) (for “complete dependence,” quoting Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 392, 399 (Feb. 26); for “effective control,” quoting Int’l Law Comm’n, *supra* note 58, art. 8).

approves, supports or acquiesces in those acts or if it fails to exercise due diligence to prevent such killings or to ensure proper investigation and accountability.”⁶³

With regard to sexual violence, the United Nations Committee on the Elimination of Discrimination against Women has recently explained:

Article 2(e) of the Convention explicitly provides that States parties are required to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. This obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole and accordingly States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women.⁶⁴

In sum, a State that has lost control of territory to an armed group or de facto regime may have residual obligations to the people in that area. A State may incur responsibility abroad where it is in effective control of territory or supporting a subordinate authority that is dependent on it. Whether or not the acts of the subordinate authority or armed group are attributable to a State, the State—depending on its level of control—will have obligations to investigate and punish acts by non-State actors. These positive obligations, or due diligence obligations will vary according to the substantive human rights at issue. Particular scrutiny will be involved where the non-State actor has violated the right to life or engaged in gender-based violence.

D. *De Facto Authorities*

What are the implications of referring to non-State actors as de facto authorities? In this context the former UN special rapporteur on extrajudicial, summary or arbitrary executions, Agnès Callamard, provided some terminological clarifications in her 2020 report to the Human Rights Council. Referring to a UN publication from 2006, she defined the term “armed non-State

63. African Comm’n on Human and Peoples’ Rights, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*, ¶ 9 (Nov. 18, 2015), https://www.achpr.org/public/Document/file/English/general_comment_no_3_english.pdf.

64. Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19*, ¶ 24(b), U.N. Doc. CEDAW/C/GC/35 (July 14, 2017) (footnotes omitted).

actors” as “[g]roups that have the potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structures of States, State-alliances or intergovernmental organizations; and are not under the control of the State(s) in which they operate.”⁶⁵ As a sub-group, she specifies that de facto authorities are “armed non-State actors exercising exclusive control over a specific territory, meaning that they ‘exist side-by-side with the established authorities’; in effect have displaced State authority and thus exercise ‘effective sovereignty.’”⁶⁶

Since 2005, several UN special procedures mandate-holders have noted that it was especially appropriate and feasible to call for an armed group to respect human rights norms when it “exercises significant control over territory and population and has an identifiable political structure.”⁶⁷

Much more recently, in their 2021 joint statement, a total of forty-five UN special procedures mandate-holders noted that “at a minimum, armed non-State actors exercising either government-like functions or de facto control over territory and population must respect and protect the human rights of individuals and groups.” The mandate-holders recommended that armed non-State actors “should (1) expressly commit and signify their willingness to respect, protect and fulfil human rights; (2) implement their human rights responsibilities in their codes of conduct or other internal documents; (3) ensure proper and genuine accountability within their ranks and organizations for abuses of human rights.”⁶⁸ The signatories of this joint statement included the special rapporteur on freedom of religion or belief as well as the

65. Agnès Callamard, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life*, ¶ 4 n.5, U.N. Doc. A/HRC/38/44 (Dec. 7, 2020) (quoting the definition of “armed groups” in GERARD MCHUGH & MANUEL BESSLER, *HUMANITARIAN NEGOTIATIONS WITH ARMED GROUPS: A MANUAL FOR PRACTITIONERS* 87 (2006), <https://www.unocha.org/sites/unocha/files/HumanitarianNegotiationswArmedGroupsManual.pdf>).

66. Callamard, *supra* note 65, ¶ 46.

67. *See, e.g.*, Philip Alston, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 76, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004); *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt; The Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin; And the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari*, ¶ 19, U.N. Doc. A/HRC/2/7 (Oct. 2, 2006).

68. *Joint Statement by Independent U.N. Human Rights Experts on Human Rights Responsibilities of Armed Non-State Actors*, UNITED NATIONS HUMAN RIGHTS (Feb. 25, 2021), <https://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights?LangID=E&NewsID=26797>.

special rapporteur on minority issues, since religious or belief minorities are in particularly vulnerable situations vis-à-vis armed non-State actors.

It has been pointed out that international humanitarian law in non-international armed conflicts provides only limited protection in terms of freedom of thought and conscience as well as minority rights, “which have traditionally fallen into the realm of human rights law.”⁶⁹

E. Freedom of Conscience

Freedom of thought, conscience, religion, and belief is protected under Article 18 of the International Covenant on Civil and Political Rights, which guarantees that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”⁷⁰ In its jurisprudence on conscientious objection to military service, the UN Human Rights Committee has also, since 2011, stressed the prohibition of coercion in the context of military service, recalling that “[r]epression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibited the use of arms, is incompatible with article 18(1) of the Covenant.”⁷¹ While the UN Human Rights Committee only monitors the compliance of the treaty by States parties, the formulation of Article 18(2) deliberately takes a rights-holder perspective and suggests that the duty-bearers are not limited to States.⁷²

69. Tilman Rodenhäuser, *The Legal Protection of Persons Living Under the Control of Non-State Armed Groups*, 102 INTERNATIONAL REVIEW OF THE RED CROSS 991, 1011 (2022).

70. International Covenant on Civil and Political Rights art. 18(2), Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171.

71. Human Rights Comm., Views of the Committee, ¶ 7.4, U.N. Doc. CCPR/C/101/D/1642-1741/2007 (Apr. 27, 2011); *see also* Human Rights Comm., Views of the Committee, ¶ 10.5, U.N. Doc. CCPR/C/104/D/1853-1854/2008 (June 19, 2012); Human Rights Comm., Views of the Committee, ¶ 7.5, U.N. Doc. CCPR/C/106/D/1786/2008 (Feb. 1, 2013); HEINER BIELEFELDT, NAZILA GHANEA & MICHAEL WIENER, FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 267-69 (2016); Dominic McGoldrick, *Thought, Expression, Association, and Assembly*, in INTERNATIONAL HUMAN RIGHTS LAW 209, 218 (Daniel Moeckli et al. eds., 4th ed. 2022) (for the Council of Europe and under certain regional regimes).

72. Compare the open formulation of Article 18(2) of the International Covenant on Civil and Political Rights, *supra* note 70, with the explicit reference to the obligation of States parties under Article 18(4) (“The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”).

The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration) is more explicit by referring also to non-State actors. It provides: “No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or belief.”⁷³ This provision “establishes direct responsibilities of religious institutions, leaders and even each individual within religious or belief communities.”⁷⁴ The 2017 Beirut Declaration, adopted by “faith-based and civil society actors working in the field of human rights,” also notes: “Under certain circumstances, in particular when non-State actors exercise significant/effective control over territory and population (e.g. as de facto authorities), they are also obliged to respect international human rights as duty bearers.”⁷⁵ Furthermore, Commitment 15 on “Faith for Rights,” adopted by the same participants in Beirut, includes the pledge to fully respect “everyone’s freedom to have, adopt or change a religion or belief” as well as the commitment not to coerce anyone.⁷⁶ Thus, with regard to terminology, we suggest referring to “coerced recruitment” by armed non-State actors, which makes the inherent link to the prohibition of coercion more apparent than the alternative formulations “compulsory recruitment” or “forced recruitment.”

In addition, the Declaration on the Right to Peace, as adopted by the General Assembly on December 19, 2016, is formulated in a broad manner with regard to the potential duty-bearers and rights-holders: “Inviting solemnly all stakeholders to guide themselves in their activities by recognizing the high importance of practicing tolerance, dialogue, cooperation and solidarity among all human beings, peoples and nations of the world as a means to promote peace.” Its Article 1 declares: “Everyone has the right to enjoy peace such that all human rights are promoted and protected and development is fully realized.”⁷⁷ The Declaration on the Right to Peace, the Beirut Declaration, and the 1981 Declaration are not designed as treaties to be ratified by States. Their formulations can therefore afford to be more inclusive in terms of addressing not only States but also all entities that may negatively

73. G.A. Res. 36/55, annex, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief art. 2(1) (Nov. 25, 1981).

74. Shaheed, *supra* note 39, annex I ¶ 18.

75. *Id.* at 27 n.7.

76. *Id.* annex II, commitment XV.

77. G.A. Res. 71/189, annex, Declaration on the Right to Peace, pmb. ¶ 37, art. 1 (Feb. 2, 2017).

impact on the human rights of individuals under their control, including armed non-State actors and de facto authorities.

III. ENGAGEMENT BY UN INDEPENDENT EXPERTS WITH DE FACTO AUTHORITIES IN AFGHANISTAN, CYPRUS, MOLDOVA AND AZERBAIJAN AND THE RELATED CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Against this legal background, we now examine how UN independent experts (“special procedures”) have engaged with de facto authorities and consider observations by international human rights mechanisms on conscientious objection against coerced recruitment by armed non-State actors. The focus will be on four examples of UN engagement with the de facto authorities in Afghanistan (Taliban), Cyprus (northern part), the Republic of Moldova (Transnistrian region), and Azerbaijan (Nagorno-Karabakh region), we incorporate the case-law of the European Court of Human Rights in each relevant context.

A. Afghanistan (Taliban)

The United Nations have long reported on, and engaged with, the Taliban concerning coerced recruitment in Afghanistan. Already in January 1995, when the Taliban only controlled some southern provinces, the then-UN special rapporteur on the situation of human rights in Afghanistan, Felix Ermacora, noted that the representatives of the Taliban informed him that they intended to create a national army and collect weapons.⁷⁸ His successor, Special Rapporteur Choong-Hyun Paik, added in February 1997, that “[t]he introduction and strict enforcement of a number of repressive measures by the Taliban movement prompted . . . a number of young men fearing forcible

78. *Final Rep. on the Situation of Human Rights in Afghanistan Submitted by the Special Rapporteur, Mr. Felix Ermacora, in Accordance with Comm’n on Human Rights Res. 1994/84*, ¶ 17, U.N. Doc. E/CN.4/1995/64 (Jan. 20, 1995) (which also provides some interesting details about the special rapporteur’s engagement with the Taliban in December 1994: “The Special Rapporteur met with the members of the new *Taliban Shura* (Council), as well as with the head of the judiciary, *Maulavi* Sayed Mohammad Paksami. At this juncture, reference must be made to the fact that the human rights officer of the Centre for Human Rights and the official United Nations interpreter who accompanied the Special Rapporteur during his mission to Afghanistan and Pakistan, both of whom are women and who have extensive and long-standing experience concerning his mandate, were not permitted by the *Taliban* to accompany the Special Rapporteur during his visit to Kandahar.” *Id.*).

conscription, to leave Kabul, either for Pakistan or the north of the country.”⁷⁹ A year later, he reported on a massive campaign of coerced recruitment in the Kandahar and Helmand provinces, where “some villages had set up observation posts to watch out for conscription teams” and reportedly a district center of the UN Food and Agriculture Organization “had been expropriated for conscription purposes.”⁸⁰ His successor, Special Rapporteur Kamal Hossein, referred to “credible reports that Taliban forces under the command of Mullah Dadallah systematically executed ethnic Uzbek prisoners in Samagan [sic] Province in early May 2000,” including “Hazara conscripts who refused to serve with the Taliban and young men who had been arbitrarily detained in Samangan shortly before.”⁸¹

Several special rapporteurs also submitted a letter to the Taliban “in a humanitarian spirit,” alleging human rights violations. The three UN special rapporteurs on torture, summary executions, and Afghanistan alleged violations of the right to life of at least thirty male prisoners from Herat prison on July 15, 1996, contrary to the statement of a Taliban official who had “stated subsequently that those persons had not been executed but had been killed in an armed confrontation.”⁸² Following alleged massacres of civilians by Taliban forces in Mazar-I-Sharif in August 1998, Special Rapporteur Asma Jahangir transmitted an urgent appeal to the head of the Taliban Council in order “to ensure the physical integrity of the civilian population of Bamyan and other parts of Afghanistan under Taliban control.”⁸³ In 2000, she reported that the Taliban Council had not responded to her communication and she expressed deep concerns at reports “that thousands of children, some no more than 14 years of age, have been recruited by Taliban

79. *Final Rep. on the Situation of Human Rights in Afghanistan Submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in Accordance with Comm’n on Human Rights Res. 1996/7*, ¶ 94, U.N. Doc. E/CN.4/1997/59 (Feb. 20, 1997).

80. *Situation of Human Rights in Afghanistan: Rep. of the Secretary-General*, ¶ 32, U.N. Doc. E/CN.4/1998/71 (Mar. 12, 1998).

81. *Rep. on the Situation of Human Rights in Afghanistan Submitted by Mr. Kamal Hossain, Special Rapporteur, in Accordance with Comm’n Res. 2000/18*, ¶ 43, U.N. Doc. E/CN.4/2001/43 (Mar. 9, 2001).

82. *Extrajudicial, Summary or Arbitrary Executions: Rep. of the Special Rapporteur, Mr. Bacre Waly Ndiaye, Submitted Pursuant to Comm’n on Human Rights Res. 1997/61*, ¶¶ 444–45, U.N. Doc. E/CN.4/1998/68/Add.1 (Dec. 19, 1997).

83. *Extrajudicial, Summary or Arbitrary Executions: Rep. of the Special Rapporteur, Ms. Asma Jahangir, Submitted Pursuant to Comm’n on Human Rights Res. 1998/68*, ¶ 25, U.N. Doc. E/CN.4/1999/39 (Jan. 6, 1999). Asma Jahangir was from 1998 to 2004 the U.N. special rapporteur on extrajudicial, summary or arbitrary executions, and subsequently the U.N. special rapporteur on freedom of religion or belief from 2004 to 2010.

and opposition forces in Afghanistan,” while acknowledging that “Taliban authorities have denied these claims.”⁸⁴ The Taliban also rejected the 1998 memorandum by the special rapporteur on the situation of human rights in Afghanistan as “vast propaganda which only provokes baseless prejudices and brainwashes the people.”⁸⁵ The Taliban did not respond to the two urgent appeals sent in early 2001 by Abdelfattah Amor, UN special rapporteur on freedom of religion or belief, who had shared his concerns about the protection of religious minorities and monuments in Afghanistan, which led the special rapporteur to consider “that the case of the Taliban is an instance not only of the use of religion for political purposes, but of obscurantism as well.”⁸⁶

In addition to special rapporteurs, the UN secretariat reported on coerced recruitment by the Taliban during their effective control over large parts of Afghanistan from 1996 to 2001. The secretary-general’s report on the question of conscientious objection to military service noted in January 1997 that “[i]n view of the present conflict it is difficult to assess whether there is a coherent policy of conscription superseding policy of the previous regime under which conscription existed” and that in Afghanistan “[u]ntil recently, conscientious objectors were tried and imprisoned. Now they are arrested and sent to the army,” referring to information received from

84. *Rep. of the Special Rapporteur, Ms. Asma Jahangir, supra* note 43, ¶¶ 15, 38.

85. Choong-Hyun Paik, *Interim Rep. on the Situation of Human Rights in Afghanistan Submitted by the Special Rapporteur of the Comm’n on Human Rights in Accordance with G.A. Res. 52/145 and Economic and Social Council Decision 1998/267*, annex ¶ 5, U.N. Doc. A/53/539 (Oct. 26, 1998) (reproducing an unofficial translation of a note issued by the leadership of the Islamic Emirate of Afghanistan on human rights at Mazar-I-Sharif, in reply to the special rapporteur’s memorandum: “To illustrate the author’s short-mindedness, it is enough to reject this unjust claim of his which states that Taliban kill even animals, women and children, or rape women. All of these accusations are baseless, and are only directed to disrespect Islam.” *Id.* at 9. Subsequently, the U.N. Sub-Commission on the Promotion and Protection of Human Rights adopted Res. 1999/14 on the situation of women and girls in Afghanistan, which “calls upon Muslim religious leaders and scholars to give special attention to the extremely difficult and unprecedented situation of women in Afghanistan, and to use their authority and their knowledge with a view to bringing the policies and practices of the Taliban into line with the true spirit of Islam and the principles of human rights and fundamental freedoms.” *Rep. of the Sub-Commission on the Promotion and Protection of Human Rights on its Fifty-First Session*, at 43–44, U.N. Doc. E/CN.4/Sub.2/1999/54 (Nov. 10, 1994).)

86. Abdelfattah Amor, *Interim Rep. of the Special Rapporteur of the Comm’n on Human Rights on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, ¶¶ 27, 30, U.N. Doc. A/56/253 (July 31, 2001).

Amnesty International.⁸⁷ In December 1999, the secretary-general's follow-up report on conscientious objection to military service indicated that "[i]t is not known if the Taliban has introduced legislation on conscription since it came to power."⁸⁸

While the first Taliban regime was toppled in December 2001, they returned to power in the whole country two decades later, capturing Kabul again in August 2021. Yet it is difficult to get verified information about the current level of child recruitment in Afghanistan,⁸⁹ and none of the twenty-seven written submissions received in the call for inputs for the 2022 OHCHR report on conscientious objection to military service referred to the situation in Afghanistan.⁹⁰ Three special rapporteurs jointly sent a letter to the Taliban in November 2021 alleging violations of freedom of thought, conscience, and religion or belief of persons belonging to minorities,⁹¹ but the Taliban have not responded to this communication. Richard Bennett, the newly appointed special rapporteur on the situation of human rights in Afghanistan, met with Taliban representatives in May 2022. They assured him "that they will respect the international human rights treaties ratified by Afghanistan, albeit as far as consistent with Sharia law."⁹² However, in August 2022, Bennett, along with fifteen UN special procedures, stated that "the daily reports of violence . . . gives us no confidence that the Taliban has any intention of making good on its pledge to respect human rights."⁹³

87. *The Question of Conscientious Objection to Military Service: Rep. of the Secretary-General Prepared Pursuant to Comm'n Res. 1995/83*, at 15, 46, U.N. Doc. E/CN.4/1997/99 (Jan. 16, 1997).

88. *Civil and Political Rights, Including the Question of: Conscientious Objection to Military Service: Rep. of the Secretary-General Submitted Pursuant to Comm' Res. 1998/77*, at 15, U.N. Doc. E/CN.4/2000/55 (Dec. 17, 1999).

89. *Children and Armed Conflict: Rep. of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 3, U.N. Doc. A/HRC/49/58 (Jan. 4, 2022).

90. U.N. Doc. A/HRC/50/43, *supra* note 16.

91. Letter from Three U.N. Special Rapporteurs to Khan Muttaqi (Nov. 4, 2021), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26763>; see also Ibrahim Salama & Michael Wiener, "Faith for Rights" in *Armed Conflict: Lessons from Practice*, JOURNAL OF HUMAN RIGHTS PRACTICE (forthcoming).

92. *Statement by the U.N. Special Rapporteur on the Situation of Human Rights, Richard Bennett, Following His Visit to Afghanistan from May 15–26, 2022* (May 26, 2022), https://www.ohchr.org/sites/default/files/2022-05/26052022-Afghan-SR-visit_press-statement.docx.

93. *Afghanistan: UN Human Rights Experts Warn of Bleak Future Without Massive Turnaround*, UNITED NATIONS HUMAN RIGHTS (Aug. 12, 2022), <https://www.ohchr.org/en/statements/2022/08/afghanistan-un-human-rights-experts-warn-bleak-future-without-massive-turnaround>.

B. Cyprus (Northern Part)

Another avenue of engaging with de facto authorities on conscientious objection is through in situ visits by UN independent experts. Heiner Bielefeldt, the special rapporteur on freedom of religion or belief, visited the divided island of Cyprus in 2012, meeting in its southern part with the Government of the Republic of Cyprus, and in the northern part with the de facto authorities. In his mission report, Bielefeldt noted that “[a]s a result of violent conflicts in the 1960s and following the military intervention by Turkish troops in 1974” only a few hundred Christians continued to live in the northern part and that the number of Muslims living in the southern part was also small.⁹⁴ He criticized the fact that there were no provisions dealing with conscientious objection to military service in the northern part, and therefore conscientious objectors faced the risk of punitive measures. He highlighted a case that had been transferred from a “military court” to the “constitutional court” in the northern part and five additional individuals who had submitted written refusals to take part in military training in the north.⁹⁵ To the de facto authorities in the northern part of the island, he recommended that they should recognize the right to conscientious objection to military service and that “[c]onscientious objectors should have the option to perform alternative civilian service which should be compatible with their reasons for conscientious objection and have no punitive effects.”⁹⁶

The de facto authorities responded to each of the special rapporteur’s other recommendations in his 2014 “follow-up table,” with the notable

94. *Rep. of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, Addendum: Mission to Cyprus*, ¶ 21, U.N. Doc. A/HRC/22/51/Add.1 (Dec. 24, 2012).

95. *Id.* ¶ 68.

96. *Id.* ¶ 87. In ¶ 69, Special Rapporteur Bielefeldt also reiterated the substantive guidance on conscientious objection to military service in *General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993), and in his predecessors’ reports, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Rep. Submitted by Mr. Angelo Vidal d’Almeida Ribeiro, Special Rapporteur Appointed in Accordance with Comm’n on Human Rights Res. 1986/20 of 10 March 1986*, ¶ 185, U.N. Doc. E/CN.4/1992/52 (Dec. 18, 1991); *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Rep. of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir*, ¶ 22, U.N. Doc. A/HRC/6/5 (July 20, 2007).

exception of his recommendation on conscientious objection.⁹⁷ Special Rapporteur Bielefeldt included follow-up information from two civil society organizations concerning the above-mentioned case of conscientious objector Murat Kanatli, which had in the meantime been decided by the “constitutional court.” The court is reported as stating “that the unavailability of alternative service constitutes an interference with the right to freedom of thought, conscience and religion safeguarded in the Article 23 of the Constitution” and that “the duty is upon the legislator to provide in laws and regulations for alternative service to military service and when doing so to review the article of the Constitution that relates to the duty of armed service.”⁹⁸ While this decision cited regional⁹⁹ and international¹⁰⁰ jurisprudence on conscientious objection, only one individual opinion held that the “constitutional court” should apply these directly to the Kanatli case, which was consequently referred back to the “military court.” The military court sentenced him on February 25, 2014 to a fine or ten days’ imprisonment in default of payment, while the court disregarded the cited case law of the European Court of Human Rights and even argued that Murat Kanatli’s objections based on his political beliefs would not have constituted a conviction of sufficient cogency, seriousness, cohesion, and importance to be protected under Article 9 of the European Convention on Human Rights.¹⁰¹ His appeal against this decision was dismissed by the “security forces appeal court” in October 2014, and—at the regional level—the case *Kanatli v. Turkey* is currently pending before the European Court of Human Rights.¹⁰²

97. *Follow-Up Table to the Country Visit of the Special Rapporteur on Freedom of Religion or Belief to Cyprus (29 March—5 April 2012)*, at 18, <https://www.ohchr.org/sites/default/files/Documents/Issues/Religion/FollowUpCyprus.pdf> (last visited Nov. 2, 2022).

98. As reported by the International Fellowship of Reconciliation (IFOR) and Conscience and Peace Tax International (CPTI), *Submission to the 111th Sess. of the Human Rights Comm. for the Attention of the Country Rep. Task Force on Cyprus* 7 (Apr. 2014), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CYP/INT_CCPR_ICO_CYP_17198_E.doc.

99. *Bayatyan v. Armenia*, 2011-IV Eur. Ct. H.R. 1; *Erçep v. Turkey*, App. No. 43965/04 (Nov. 22, 2011), <https://hudoc.echr.coe.int/eng?i=001-107533>; *Savda v. Turkey*, App. No. 42730/05 (June 12, 2012), <https://hudoc.echr.coe.int/eng?i=001-111415>.

100. U.N. Doc. CCPR/C/104/D/1853-1854/2008, *supra* note 71.

101. International Fellowship of Reconciliation (IFOR), *Submission to the 113th Sess. of the Human Rights Comm., Cyprus* 8 (updated Feb. 2015), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CYP/INT_CCPR_CSS_CYP_19627_E.doc.

102. *Kanatli v. Turkey*, App. No. 18382/15, Questions to the Parties (May 28, 2018), <https://hudoc.echr.coe.int/eng?i=001-184213>. In addition, the European Court of Human

In addition to these decisions by de facto “courts” in the northern part of Cyprus, a “parliamentary committee” also investigated the possibility of instituting alternative service for conscientious objectors and took evidence from representatives of the conscientious objection movement in September 2016.¹⁰³ Subsequently, a draft amendment, which would have included conscientious objection and alternative service, was discussed by a “parliamentary committee” in February 2019, however, following a change of the de facto authorities the draft amendment was withdrawn during autumn 2019.¹⁰⁴

It is noticeable that the mission reports of several UN special procedures¹⁰⁵ addressed their human rights recommendations to the de facto authorities, whereas the European Court of Human Rights and the Government of the Republic of Cyprus stated that Turkey had effective control over northern Cyprus and thus redress should have been requested from

Rights has communicated questions to the parties in *Tufanli v. Turkey*, App. No. 29367/15, Questions to the Parties (Feb. 15, 2021), <https://hudoc.echr.coe.int/eng?i=001-208228>, and also accepted on January 10, 2020 the conscientious objection case of *Karapasaoglu v. Turkey*, App. No. 40627/19.

103. Office of the U.N. High Comm’r for Human Rights, *Conscientious Objection to Military Service: Analytical Rep. of the Office of the U.N. High Comm’r for Human Rights*, ¶ 57, U.N. Doc. A/HRC/35/4 (May 1, 2017); International Fellowship of Reconciliation, *Submission to the Office of the UN High Comm’r for Human Rights for the Analytical Rep. on Conscientious Objection to Military Service*, 2017, at 12, <https://www.ohchr.org/sites/default/files/Documents/Issues/RuleOfLaw/ConscientiousObjection/IFOR.pdf>.

104. Office of the U.N. High Comm’r for Human Rights, *Approaches and Challenges with Regard to Application Procedures for Obtaining the Status of Conscientious Objector to Military Service in Accordance with Human Rights Standards*, ¶ 9, U.N. Doc. A/HRC/41/23 (May 24, 2019); U.N. Doc. A/HRC/50/43, *supra* note 16, ¶ 52; *Conscientious Objection to Military Service: Conscience and Peace Tax International (CPTI) Submission [sic] for the Thematic Rep. by the Office of the U.N. High Commissioner for Human Rights*, 2022, at 2–3 (Mar. 2022), <https://www.ohchr.org/sites/default/files/2022-05/CPTI-HRC50.pdf>.

105. See the Cyprus mission reports by the special rapporteur on freedom of religion or belief, *Rep. of the Special Rapporteur on Freedom of Religion or Belief: Heiner Bielefeldt, Addendum: Mission to Cyprus*, *supra* note 94, ¶¶ 81–87; *Rep. of the Special Rapporteur in the Field of Cultural Rights on Her Mission to Cyprus*, ¶¶ 107–8, U.N. Doc. A/HRC/34/56/Add.1 (Mar. 3, 2017); *Rep. of the Working Group on Enforced or Involuntary Disappearances: Visit to Cyprus*, ¶¶ 29, 33, U.N. Doc. A/HRC/51/31/Add.1 (Sept. 7, 2022); *Rep. of the Working Group on Enforced or Involuntary Disappearances on its Mission to Turkey*, ¶¶ 28, 79, U.N. Doc. A/HRC/33/51/Add.1 (July 27, 2016); *Follow-Up to the Recommendations Made by the Working Group on Enforced or Involuntary Disappearances in its Rep. on its Visit to Turkey from 14 to 18 March 2016*, at 30–31, U.N. Doc. A/HRC/45/13/Add.4 (Aug. 28, 2020).

Turkey.¹⁰⁶ While the European Court of Human Rights did not wish to “elaborate a general theory concerning the lawfulness of legislative and administrative acts” of the de facto authorities, it noted “that international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, ‘the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory,’”¹⁰⁷ thereby applying the ICJ’s *Namibia* exception to the Cyprus context.¹⁰⁸

Furthermore, applicants in Strasbourg would have to exhaust the local remedies since, in the words of Judge Pinto de Albuquerque:

The so-called “Namibia exception” has been enshrined in the Court’s case-law, since the cases on the Turkish invasion of Cyprus, with the practical consequence that, when confronted with violations of Article 8 of the [European Convention on Human Rights] and Article 1 of Protocol No. 1 [to the Convention], the current and former inhabitants of a territory must exhaust the local remedies even in the case of a judicial system established by an unrecognised political regime, and even where they did not choose voluntarily to place themselves under its jurisdiction.¹⁰⁹

This illustrates the potential relevance of acts by de facto authorities, although it does not mean recognizing Statehood or the lawfulness of the acts, but rather acknowledges that “there is a judicial system operating de facto in that territory which could provide [the applicants] with effective redress.”¹¹⁰

106. See the comments by the Government of the Republic of Cyprus in *Rep. of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, Addendum: Mission to Cyprus: Comments by the State on the Rep. of the Special Rapporteur*, ¶ 3, U.N. Doc. A/HRC/22/51/Add.2 (Feb. 22, 2013); see also Karima Bennouna, *Rep. of the Special Rapporteur in the Field of Cultural Rights on Her Mission to Cyprus: Comments by the State*, ¶ 3, U.N. Doc. A/HRC/34/56/Add.2 (Mar. 13, 2017); *Rep. of the Working Group on Enforced or Involuntary Disappearances on their Visit to Cyprus: Comments by the State*, at 2, U.N. Doc. A/HRC/51/31/Add.2 (Sept. 5, 2022).

107. *Loizidou v. Turkey*, *supra* note 52, ¶ 45.

108. See generally Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 125 (21 June).

109. *Chiragov and Others v. Armenia*, *supra* note 53, Dissenting Opinion of Judge Paulo Pinto de Albuquerque, ¶ 4.

110. *Id.* ¶ 5.

As explained above,¹¹¹ there may be separate or concurrent responsibility of the State and/or non-State actor, depending on the circumstances and facts of each case, notably if the de facto authorities (including any “ministries,” “courts,” and “parliamentary committees”) took decisions under the instructions, direction, or control of the State or not. With regard to the question of human rights in Cyprus, OHCHR noted in 2014:

As the norms contained in the Universal Declaration of Human Rights constitute customary international law, they should be enjoyed by all, including those residing in regions of protracted conflict. In turn, these rights need to be guaranteed by the authority that has effective control of the territory, regardless of its international recognition and international political status.¹¹²

It remains to be seen how the regional and international human rights mechanisms may ultimately reconcile their diverging approaches and how they will answer the underlying question of the nature of the right to conscientious objection. That is, whether it “inheres” in the absolutely protected right to hold a belief (*forum internum* approach of UN human rights mechanisms)¹¹³ or if it is rather considered an external manifestation of one’s religion or belief, which may thus be subject to certain limitations (*forum externum* approach of the European Court of Human Rights).¹¹⁴ Yet these different interpretations in the global and regional jurisprudence will most likely lead to the same result in practice since the *forum internum* approach already

111. See, *supra*, discussion in Section II(C); Office of the U.N. High Comm’r for Human Rights, *Rep. on the Question of Human Rights in Cyprus*, ¶¶ 5–11, U.N. Doc. A/HRC/25/21 (Jan. 22, 2014).

112. *Id.* ¶ 11.

113. See U.N. Doc. CCPR/C/101/D/1642–1741/2007, *supra* note 71; U.N. Doc. CCPR/C/106/D/1786/2008, *supra* note 71; U.N. Doc. CCPR/C/104/D/1853–1854/2008, *supra* note 71; *Rep. of the Working Group on Arbitrary Detention*, ¶ 60(b), U.N. Doc. A/HRC/42/39 (July 16, 2019); *Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-Sixth Sess., 18–22 Nov. 2019: Opinion No. 84/2019 Concerning Avraham Lederman, Pinbas Freiman and Mordechai Brizel (Israel)*, ¶ 42, U.N. Doc. A/HRC/WGAD/2019/84 (Feb. 17, 2020); Letter from Three U.N. Special Rapporteurs to the Government of Turkmenistan (Dec. 10, 2020), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25740>.

114. *Bayatyan v. Armenia*, *supra* note 99, ¶ 112; *Adyan and others v. Armenia*, App. No. 75604/11, ¶ 72 (Oct. 12, 2017), <https://hudoc.echr.coe.int/eng?i=001-177429>; *Aghanyan and others v. Armenia*, App. Nos. 58070/12, ¶ 13, <https://hudoc.echr.coe.int/eng?i=001-198793>.

excludes the possibility of any restrictions, while in the *forum externum* approach the burden of justifying limitations lies with the State (or de facto authority). It seems difficult to justify restricting a conscientious objector's freedom to manifest his religion or belief without unnecessarily vitiating or jeopardizing the right's essence.¹¹⁵ In a similar vein, the Quaker United Nations Office noted in March 2022 that, so far, the *forum externum* position of the European Court of Human Rights "has not resulted in it finding that any of the permissible limitations on manifestation of religion or belief have been applicable in the cases that it has considered."¹¹⁶

C. Republic of Moldova (Transnistrian Region)

The human rights of conscientious objectors in the Transnistrian region of the Republic of Moldova have also been addressed by several UN independent experts. In 2012, Special Rapporteur Heiner Bielefeldt reported that the Transnistrian region unilaterally declared independence from the Republic of Moldova in 1991, but has not been recognized as an independent State by the United Nations, nonetheless he noted that the region is outside the *de facto* control of the Republic of Moldova.¹¹⁷ Bielefeldt expressed concern about the custodial sentence in a Transnistrian penitentiary of a Jehovah's Witness as a result of repeated refusals to undertake military service on the grounds of conscientious objection.¹¹⁸ At the time of the special rapporteur's mission, there was no provision for exemption from service or alternative service in the Transnistrian region, and all young men who refused military service were subject to criminal sanction such as a fine or deprivation of liberty.¹¹⁹ In the Transnistrian region of the Republic of Moldova, the special rapporteur met with the "Minister for Justice" and the de facto authorities indicated to him that—as a compromise—conscientious objectors were offered "to serve in the army without direct involvement in the use of weapons."¹²⁰ However, Bielefeldt pointed in his mission report to a resolution

115. HEINER BIELEFELDT & MICHAEL WIENER, RELIGIOUS FREEDOM UNDER SCRUTINY 163 (2019).

116. Quaker United Nations Office, *Input for OHCHR Rep. on Conscientious Objection to Military Service* 6 (Mar. 2022), <https://www.ohchr.org/sites/default/files/2022-05/QUNO-HRC50.pdf>.

117. *Rep. of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, Addendum: Mission to the Republic of Moldova*, ¶ 6, U.N. Doc. A/HRC/19/60/Add.2 (Jan. 27, 2012).

118. *Id.* ¶¶ 41, 69.

119. *Id.* ¶ 53.

120. *Id.* ¶¶ 6, 54.

from the UN Commission on Human Rights stressing that alternative service should be “compatible with the reasons for conscientious objection, of a non-combatant or civilian character, in the public interest and not of a punitive nature.”¹²¹ He also quoted the Human Rights Committee to reiterate that there should neither be differentiation among conscientious objectors on the basis of the nature of their particular beliefs nor discrimination against conscientious objectors because they had failed to perform military service.¹²² Bielefeldt also explicitly urged the de facto authorities “[t]o cease without delay practices of detaining persons objecting on grounds of religion or conscience to military service, as well as to develop rules for alternative service for such conscientious objectors.”¹²³

In a separate, yet related initiative, the United Nations engaged a senior expert on human rights in Transnistria, Thomas Hammarberg, who established a dialogue with the relevant office holders during three fact-finding visits and presented his first report in 2013. With regard to the prosecution and imprisonment of conscientious objectors, in particular Jehovah’s Witnesses, the senior expert was informed by the de facto authorities that “no attempts have been made in recent months to conscript members of this community to military service and that a court recently awarded compensation to a member of the community who had previously been prosecuted for refusing military service.”¹²⁴ Thomas Hammarberg recommended to the de facto authorities that “[t]he law on military conscription should be amended to allow for a civil alternative for those whose conscience [or belief] prevent[s] them from [taking part in] military activities.”¹²⁵ The UN Human Rights Committee, in its concluding observations on the Republic of Moldova, referred to his recommendations, calling on the State party to “review its policies and take all measures appropriate to ensure that individuals in

121. *Id.* ¶ 54 (referring to Comm’n on Human Rights Res. 1998/77, operative ¶ 4, U.N. Doc. E/CN.4/RES/1998/77 (Apr. 22, 1998)).

122. *Rep. of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, Addendum: Mission to the Republic of Moldova, supra* note 117, ¶ 54 (referring to U.N. Doc. CCPR/C/21/Rev.1/Add.4, *supra* note 96, ¶ 11).

123. *Rep. of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, Addendum: Mission to the Republic of Moldova, supra* note 122, ¶ 87(c); see further about follow-up visits in 2014, Heiner Bielefeldt, *Interim Rep. of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 20, U.N. Doc. A/69/261 (Aug. 5, 2014).

124. Thomas Hammarberg, *Rep. on Human Rights in the Transnistrian Region of the Republic of Moldova* 39 (Feb. 14, 2013), https://childhub.org/sites/default/files/library/attachments/1583_Senior_Expert_Hammarberg_Report_TN_Human_Rights_original.pdf.

125. *Id.* at 9, 40, 47.

Transnistria can effectively enjoy their rights guaranteed under the Covenant.”¹²⁶

In May–June 2018, Hammarberg conducted a follow-up visit in order to assess progress in the implementation process since his first report. After the visit, he published the updated observation that “[o]ne of the most notable positive developments during the past five years is the adoption of the Law on alternative civil military service, allowing the conscientious objectors to serve alternative military service.”¹²⁷ The Office of Public Information of Jehovah’s Witnesses also commended that the Transnistrian region had amended its “laws to provide an alternative civilian service option for conscientious objectors.”¹²⁸ Since February 2018, however, conscientious objectors who visit the Transnistrian region have reportedly been required to perform military service, even though they no longer live in the region, and another amendment of December 2019 gives priority to the personnel needs of the de facto authorities.¹²⁹

Even though the implementation of freedom of conscientious objection is not perfect in the Transnistrian region, civil society organizations have noted that “recognition of conscientious objection is also beginning to reach places which are not internationally-recognised—most notably Transdnies-tria [sic].”¹³⁰ This example has been used to illustrate the possibility of persuading entities that are unrecognized, or whose status is disputed, to abide by international legal standards.¹³¹ The concerted efforts by civil society, UN independent experts, and OHCHR have arguably contributed to addressing

126. Human Rights Comm., *Concluding Observations on the Third Periodic Rep. of the Republic of Moldova*, ¶ 6, U.N. Doc. CCPR/C/MDA/CO/3 (Nov. 16, 2016).

127. Thomas Hammarberg, *Follow-Up Rep. on Human Rights in the Transnistrian Region* 31 (2018) (on file with authors); see also Press Release, *The UN Human Rights Senior Expert, Thomas Hammarberg Presents his Follow-Up Report on Human Rights in the Transnistrian Region on 5 February 2019*, UNITED NATIONS MOLDOVA (Feb. 5, 2019), <https://moldova.un.org/en/14666-un-human-rights-senior-expert-thomas-hammarberg-presents-his-follow-report-human-rights>.

128. Jehovah’s Witnesses, Office of Public Information, *Information on Conscientious Objection to Military Service Involving Jehovah’s Witnesses* 1 (Mar. 21, 2022), <https://www.ohchr.org/sites/default/files/2022-05/OPIJW-HRC50.pdf>.

129. *Id.* at 19. See also U.N. Doc. A/HRC/50/43, *supra* note 16, ¶ 51.

130. European Bureau for Conscientious Objection, *Annual Rep.: Conscientious Objection to Military Service in Europe 2021*, at 76 (Mar. 21, 2022), <https://www.ohchr.org/sites/default/files/2022-05/EBCO-HRC50.pdf>.

131. Conscience and Peace Tax International (CPTI) Submission [sic] for the Thematic Rep. by the Office of the U.N. High Comm’r for Human Rights, 2022, *supra* note 104, at 2.

the legal limbo faced by conscientious objectors who live in a territory that is no longer under effective control of the territorial State.

D. Azerbaijan (Nagorno-Karabakh Region)

With regard to Jehovah's Witnesses living in Nagorno-Karabakh who were arrested by the "local police" in 2010, the special rapporteur on freedom of religion or belief submitted a communication to the Government of Azerbaijan with the request "to transmit the allegation letter to the relevant authorities and to take all necessary measures to guarantee that the rights and freedoms of the members of Jehovah's Witnesses are respected."¹³² The Government of Azerbaijan responded that it "was unable to fulfill its obligations in respect to human rights in the occupied territories," which were "under control of the Republic of Armenia and the illegal separatist regime." It stated that the Republic of Armenia, as "an occupying power, was fully responsible for the protection of human rights and freedoms as well as norms and principles of international humanitarian law in these territories."¹³³ Special Rapporteur Heiner Bielefeldt observed in his report to the Human Rights Council that "[t]he international community, Member States and all relevant de facto entities exercising government like functions should direct all their efforts to ensure that there are no human rights protection gaps and that all persons can effectively enjoy their fundamental rights wherever they live."¹³⁴

Interestingly, during the Council's interactive dialogue in Geneva, this formulation was repeated verbatim by the Armenian delegate, who added that Armenia "sincerely hope[s] that the Special Rapporteur's clear message will be heard by the appropriate duty bearer in that particular case."¹³⁵ Subsequently, Heiner Bielefeldt was informed that upon appeal of the Jehovah's Witnesses living in the Nagorno-Karabakh region, "the de facto 'courts' overturned the initial administrative convictions, relying on the International Covenant on Civil and Political Rights and the Special Rapporteur's

132. *Rep. of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, Addendum: Summary of Cases Transmitted to Governments and Replies Received*, ¶ 13, U.N. Doc. A/HRC/16/53/Add.1 (Feb. 14, 2011).

133. *Id.* ¶¶ 15–16.

134. *Id.* ¶ 24.

135. Statement of Armenia, *Interactive Dialogue with the Special Rapporteur on Freedom of Religion or Belief 2* (Mar. 10, 2011), <https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/16thSession/OralStatements/100311/Tab2/Item3-ID-Armenia.pdf>.

observations that registration cannot be a precondition for holding peaceful religious meetings.”¹³⁶

At the regional level, in its judgment in *Avanesyan v. Armenia*, the European Court of Human Rights decided a case of another Jehovah’s Witness and conscientious objector from the same region. Artur Avanesyan was born in a town situated in the unrecognized “Nagorno Karabakh Republic” (abbreviated as “NKR” in the judgment of the European Court of Human Rights), and he has held an Armenian passport since 2012.¹³⁷ Following a summons, he was arrested in Armenia’s capital Yerevan, handed over to “NKR” police, transported to “NKR,” and sentenced in 2014 to two and a half years’ imprisonment.¹³⁸

In its judgment of July 20, 2021, the European Court of Human Rights found no particular circumstances in this case that would require it to depart from its findings in previous judgments, which held that at the relevant time Armenia exercised effective control over the “NKR” and the surrounding territories and that “by doing so, Armenia was under an obligation to secure in that area the rights and freedoms set out in the Convention.”¹³⁹ The European Court noted that while alternative civilian service was available in Armenia to conscientious objectors like the applicant, he was not able to take advantage of that option because he was apparently considered liable for military service in the “NKR,” which, unlike Armenia, did not recognize the right to conscientious objection.¹⁴⁰

The European Court held that, even assuming that the applicant was a “citizen” of the “NKR” as argued by the government, “Armenia was responsible for the acts and omissions of the ‘NKR’ authorities and was under an obligation to secure in that area the rights and freedoms set out in the Convention.”¹⁴¹

On the substance of the complaint, the Court found that interference with the freedom to manifest one’s religion or belief was not necessary in a democratic society:

136. *Rep. of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, Addendum: Mission to Cyprus*, *supra* note 94, ¶ 43 n.16.

137. *Avanesyan v. Armenia*, *supra* note 55, ¶ 5.

138. *Id.* ¶¶ 17–19.

139. *Id.* ¶¶ 36–37.

140. *Id.* ¶ 57.

141. *Id.* ¶ 58.

This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. . . .

...

[I]n so far as the Court has had an opportunity to consider the issue at hand, it has made clear that a State which has not introduced alternatives to compulsory military service in order to reconcile the possible conflict between individual conscience and military obligations enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any interference. In particular, it must demonstrate that the interference corresponds to a “pressing social need”

The Court has also held that any system of compulsory military service imposes a heavy burden on citizens. It will be acceptable if it is shared in an equitable manner and if exemptions from this duty are based on solid and convincing grounds. However, a system which imposes on citizens an obligation which has potentially serious implications for conscientious objectors, such as the obligation to serve in the army, without making allowances for the exigencies of an individual’s conscience and beliefs and with imposition of penalties in case of refusal, will fail to strike a fair balance between the interests of society as a whole and those of the individual.¹⁴²

Artur Avanesyan was imprisoned for more than two years until his release on September 6, 2016, following a general amnesty declared by the de facto authorities,¹⁴³ albeit without recognizing conscientious objection or offering alternative civilian service. Such provisions would have saved Artur Avanesyan and other conscientious objectors from being convicted and imprisoned by the de facto authorities. It also would have avoided the

142. *Id.* ¶¶ 53, 55–56. The Court has not clearly identified what would constitute a legitimate aim for a restriction of freedom to manifest a belief in this context. In *Teliatnikov v. Lithuania*, App. No. 51914/19, ¶ 94 (June 7, 2022), <https://hudoc.echr.coe.int/eng?i=001-217607>, it comes close to suggesting that public safety or the protection of the rights of others could provide legitimate aims:

Although it does not appear to have been explicitly argued by the Government, that constitutional duty [of a citizen to perform mandatory military service or alternative national defence service] could be seen as having been aimed at the protection of public safety as well as the rights and freedoms of others. Be that as it may, the Court considers it unnecessary to determine conclusively whether that aim was legitimate for the purposes of Article 9 § 2 [of the European Convention on Human Rights].

143. *Jehovah’s Witnesses*, *supra* note 128, at 18.

Strasbourg judgment that found Armenia in violation of the European Convention of Human Rights and liable for non-pecuniary damage as well as costs and expenses. Preventing embarrassing condemnations and escaping financial risks may, one might hope, be convincing incentives for the involved States and non-State actors to address the underlying human rights concerns of conscientious objectors in such situations.

IV. DEVELOPING A GRADATED FRAMEWORK BASED ON CAPACITY

As illustrated in the above-mentioned examples involving several de facto authorities, some of them have been exercising effective control over territory and population for decades, whereas others only recently resumed power. In addition, other armed non-State actors, even if they do not reach the level of a de facto authority, may also impact to varying degrees the human rights of individuals. As Special Rapporteur Agnès Callamard noted, “the content and extent of the armed non-State actors’ human rights obligations are determined by three interlinked indicators: (a) the nature and extent of their control; (b) the level of their governance; and (c) consequently, the extent of their capacity.”¹⁴⁴ Focusing on their control, governance, and capacity, she has suggested a context-dependent, actor-specific, and graduated approach to the right to life,¹⁴⁵ which could also be useful as a legal approach in the context of conscientious objection.

For this purpose, we will adapt—by tailoring to the specificities of armed non-State actors and de facto authorities—the eighteen points that were suggested in the 2022 analytical report of OHCHR as guidance for bringing “national laws, policies and practices relating to conscientious objection to military service” in line with international human rights norms and standards.¹⁴⁶ While this formulation may not at first glance seem to be addressed to non-State entities, the report did highlight that: “many individuals seeking to exercise the right to conscientious objection to military service continue to face violations of that and other rights, because some States and de facto

144. Callamard, *supra* note 65, ¶ 52.

145. *Id.* ¶¶ 66–77 (referring to the principle of non-discrimination and the armed non-State actors’ obligation to respect the right to life, their obligation to protect, prevent, and investigate all forms of violence against women and their obligation to fulfil minimum survival requirements).

146. U.N. Doc. A/HRC/50/43, *supra* note 16, ¶ 57.

authorities do not recognize that right or fail to ensure its full implementation in practice.”¹⁴⁷

Therefore, it seems advisable to follow a graduated approach, which provides for differentiated obligations based on the capacities of the relevant States, de facto authorities with exclusive control over territory, and armed non-State actors.

In the first category (Annex A, below), States are bound by their treaty-based and customary law obligations relating to international armed conflict and the related war crimes that prohibit compelling prisoners of war or other protected persons from serving in the forces of a hostile power, as well as compelling the nationals of a hostile State from taking part in the operations of war directed against their own State, even if they were in the belligerent’s service before the commencement of the inter-State war.¹⁴⁸

States should aim to fulfill all eighteen points as detailed in the 2022 OHCHR report.¹⁴⁹ Furthermore, it has been suggested that States should avoid forced conscription of persons who “clearly demonstrate allegiance to the armed non-state actor against which the State is fighting, in particular where such allegiance is determined by ethnic or religious affiliations,” because arguably “it would amount to an outrage upon personal dignity to force such persons to engage in military operations against that group.”¹⁵⁰

De facto authorities and armed groups should abide by an adjusted version of the eighteen points of the 2022 OHCHR report on conscientious objection set out in Annex B, below. With regard to the terminology used in the annexed guidelines for de facto authorities and armed groups, the term “military service” is replaced by “armed service.” Similarly, the annexed list uses the terms “coerced recruits” or “voluntary members” within the de facto authorities’ armed service, instead of the terms “conscripts” or

147. *Id.* 1, ¶ 56.

148. Rome Statute of the Int’l Criminal Court arts. 8(2)(a)(v), 8(2)(b)(xv), July 17, 1998, 2187 U.N.T.S. 90. For details on the scope of the customary rule and on national legislation, see 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW ¶¶ 1905–2044 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); see also Convention No. IV Respecting the Laws and Customs of War on Land art. 23(h), Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

149. U.N. Doc. A/HRC/50/43, *supra* note 16, ¶ 57.

150. MATIAS THOMSEN & SOPHIE RONDEAU, FORCIBLE RECRUITMENT OF ADULTS BY NON-STATE ARMED GROUPS IN NON-INTERNATIONAL ARMED CONFLICT 23–24 (2019) (applying the reasoning related to the allegiance test developed by the International Criminal Tribunal for the former Yugoslavia in Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 166, (Int’l Crim. Trib. for the former Yugoslavia, July 15, 1999)).

“professional members of the armed forces.” While States may sign, ratify, accede, or succeed to the International Covenant on Civil and Political Rights (including its Article 18), the obligations of de facto authorities related to freedom of thought, conscience, religion, and belief are based on the principle underlying that article and Article 18 of the Universal Declaration of Human Rights, which is reflected in customary international law.¹⁵¹

In human rights law, military service that contradicts an internally held strong belief would be a violation of freedom of conscience and of customary international law. As William Schabas explains in his recent study of customary international human rights law:

in some countries compulsory military service has been refused by individuals who argue that it is incompatible with their religion or belief. If the refusal amounts to manifesting their religion, the State may contend that the right is not unrestricted. But if the individual can claim this is part of the *forum internum*, then there can be no limitation.¹⁵²

Thus, the annexed guidance for de facto authorities and non-State armed groups, even those without exclusive control over territory, demands respect of the right to freedom of thought, conscience, religion, and belief, as well as of the prohibition of any coercion.

Ultimately, everyone’s freedom of conscientious objection and right to refuse to kill must be fully and equally protected, irrespective of whether the conscientious objectors happen to live in a territory that is under the control of a State or when their human rights are negatively affected through the acts and omissions of a de facto authority or an armed non-State actor.

151. WILLIAM A. SCHABAS, *THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS* 200–7 (2021).

152. *Id.* at 206.

ANNEXES

A. Guidance for States on Conscientious Objection to Military Service

States should bring their national laws, policies, and practices relating to conscientious objection to military service into line with international humanitarian law and international human rights law, norms, and standards through abiding by the following:

(a) In occupied territory the occupying State is forbidden under Article 51 of the Fourth Geneva Convention (1949)¹⁵³ from compelling protected persons to serve in its armed forces. Similarly, under Article 40, protected persons of enemy nationality in a State's own territory may not be compelled to do work directly related to the conduct of military operations in an international armed conflict with the State of the individual's nationality.

(b) Compelling a prisoner of war, or a protected person mentioned in the previous paragraph, to serve in the forces of the hostile power is a grave breach of the Third Geneva Convention (1949),¹⁵⁴ a war crime, and a crime under the Statute of the International Criminal Court.¹⁵⁵

(c) It is forbidden to compel the nationals of the hostile party in an international armed conflict to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war. Such an act constitutes a war crime under the Statute of the International Criminal Court.¹⁵⁶

(d) Beyond the situations in paragraphs a, b, and c, States that do not accept claims of conscientious objection as valid without an inquiry should establish independent and impartial bodies under the full control of the civilian authorities.

153. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

154. Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

155. Rome Statute of the Int'l Criminal Court, *supra* note 148, art. 8(2)(a)(v).

156. *Id.* art. 8(2)(b)(xv).

(e) No inquiry process is required by international law and consideration should be given to accepting claims of conscientious objection to military service as valid without such a process.

B. Guidance for States, De Facto Authorities and Armed Groups on Conscientious Objection to Armed Service

(a) States, de facto authorities, and armed groups should not forcibly recruit persons who clearly demonstrate an allegiance, including through ethnic or religious affiliations, to the other party to the conflict.

(b) The right to conscientious objection to armed service derives from the right to freedom of thought, conscience, religion, and belief pursuant to Article 18 of the Universal Declaration of Human Rights¹⁵⁷ as well as the prohibition of coercion pursuant to Article 18 of the International Covenant on Civil and Political Rights.¹⁵⁸

(c) All persons affected by armed service should have access to information about the right to conscientious objection and the means of acquiring objector status.

(d) The process of applying for status as a conscientious objector should be free and there should be no charge for any part of the procedure.

(e) The application procedure should be available to all persons affected by armed service, including coerced recruits, voluntary members, and reservists.

(f) The right to object applies both to pacifists and to selective objectors who believe that the use of force is justified in some circumstances but not in others.

(g) Alternative service arrangements should be accessible to all conscientious objectors without discrimination as to the nature of their religious or non-religious beliefs.

157. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 18, (Dec. 10, 1948).

158. International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171.

(h) Coerced recruits and volunteers should be able to object before the commencement of armed service, or at any stage during or after armed service.

(i) After any decision on conscientious objector status, there should always be a right to appeal to an independent civilian body.

(j) The personal information of conscientious objectors should not be disclosed publicly by the State, de facto authority, or armed group, and their records should be expunged.

(k) Application procedures should be based on reasonable and relevant criteria and should avoid imposing any conditions that would result in automatically disqualifying applicants.

(l) The process for consideration of any claim of conscientious objection should be timely and all duties involving the bearing of arms should be suspended pending the decision.

(m) Conscientious objectors should not be repeatedly punished for not having obeyed a renewed order of armed service.

(n) Individuals who are imprisoned or detained solely based on their conscientious objection to armed service should be released.

(o) Alternative service must be compatible with the reasons for conscientious objection, be of a non-combatant or civilian character, be in the public interest, and not be of a punitive character.

(p) Any longer duration of alternative service in comparison to armed service is permissible only if additional time for alternative service is based on reasonable and objective criteria.

(q) Those who support conscientious objectors or who promote the right to conscientious objection to armed service should fully enjoy their freedom of expression.