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ARTICLE

A Transcivilizational Call to Factor in the Practice of Asian States and Peoples in Customary International Law and Treaty Interpretation: Conscientious Objection as a Case Study

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Abstract

International law has been predominantly shaped by the West. Despite decolonization, insufficient attention has been paid to non-Western civilizations' practices, including Asian civilizations. This article examines this insufficiency in relation to treaty interpretation and customary international law identification. To do so, it uses the notion of conscientious objection to military service as a case study. Despite particularly adverse state practice, chiefly in Asia, the International Covenant on Civil and Political Rights (ICCPR) treaty body and UN organs began affirming in the 1990s that the Covenant includes a right to conscientious objection to military service. The first part analyzes whether such a right can be implied from the ICCPR, *inter alia*, by assessing the practice of Asian states. The second part endeavours to explain the gap between the international human rights machinery's pronouncements and non-Western practice by discussing the Western-centrism and individual-centrism of interpretations adopted by human rights bodies and organs.

Keywords: dispute settlement; history and theory of international law; human rights; other areas of international law

One of the most common reproaches directed at international law is that it might not be so *international* but rather a by-product of Western societies. This criticism strongly resonates when considering that consensualism is one of the most cardinal principles underlying public international law (PIL), which is created for and by states and the peoples who inhabit them. Unlike in domestic legal systems, the consent of legal subjects – namely, the states – is always necessary, in one way or another, for positive international law norms to exist.[1]

[1] Under the doctrine of sources of international law, to produce legal effects, practice must always be matched by the intention to create legal effects through explicit commitments (treaties/authentic interpretation and

As such, PIL sources, chiefly multilateral treaties and customary international law (CIL), reflect the intent, will, and consent of the community of nations,[2] which encompasses all continents and civilizations.

Most criticism concerning the alleged Western-centrism of PIL relates to CIL. Many scholars deem that most existing CIL norms are Western-centric. Allegedly, existing CIL rules still serve the interests of the "capitalist states", that is, Western states.[3] This Western-centrism criticism focuses on practice, since Western practice constitutes the bulk of the practice factored in by international lawyers to assess whether a customary norm exists. Indeed, over the centuries, it is clear that Western states "dominated the process of creation of 'customary' international law",[4] while a "great body of customary international law was made by remarkably few States".[5] In contrast, non-Western state practice appears to have been "neglected", which indeed makes international law look like a Western by-product.[6] For instance, within the field of human rights, since the 1980s, Onuma has been calling for a "transcivilizational" or "intercivilizational" perspective, which some rather call "multi-civilizational",[7] in international law, that is, a perspective that would fully consider non-Western states and peoples.

Nevertheless, CIL is not the only PIL source posing problems, as Western practice also holds sway over the operation and interpretation of treaties. This is particularly worrying in light of the "treaty-making revolution".[8] Indeed, since the 1960s, treaty-making has been seen by newly independent states as the PIL source being most respectful of

unilateral acts), legal conviction (custom), or acquiescence. Even general principles of law must be *recognized* by nations; domestic legal systems are a reflection of the state will. See Humphrey WALDOCK, *General Course on Public International Law* (The Hague, RCADI, 1962) at 56–7. According to Waldock such principles must be *already recognized* as law, given the drafters of the Statute rejected the possibility for the International Court of Justice to "have an actual power of legislation".

[2] This formula of "community of nations" has originally been used by the ILC in its draft conclusions (provisionally adopted on first reading) on general principles of law. See International Law Commission, *Report of the International Law Commission, Seventy-Fourth Session* (24 April–2 June and 3 July–4 August 2023), UN GAOR, 78th sess, Supp No 10, UN Doc A/78/10, 11.

[3] BS CHIMNI, "Customary International Law: A Third World Perspective" (2018) 112 American Journal of International Law 1 at 4, 21; Yasuaki ONUMA, *Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century* (The Hague: RCADI, 2010) at 261–2.

[4] Onuma, *supra* note 3.

[5] Oscar SCHACHTER, "New Custom: Power, Opinio Juris and Contrary Practice" in Jerzy MAKARCZYK, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Brill: Nijhoff, 1996) at 536. See also Onuma, *supra* note 3 at 238.

[6] Chimni, *supra* note 3 at 20.

[7] BS CHIMNI, "Asian Civilizations and International Law: Some Reflections" (2011) 1 Asian Journal of International Law 39 at 39, 41; Onuma, *supra* note 3; Yasuaki ONUMA, "Toward an Intercivilizational Approach to Human Rights" in J.R. BAUER and D.A. BELL, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999). Dupuy also used civilization as a relevant concept in relation to the world's pluricultural character while holding that the human rights field best exemplifies the tension between the "North" and the "South". Besson refers to either "inter" or "trans" civilizational law and considers that customary international law is likely the most transcivilizational PIL source. See Pierre-Marie DUPUY, "Le droit international dans un monde pluriculturel" (1986) 38 Revue internationale de droit comparé 583 at 590; Samantha BESSON, "Du droit de civilisation européen au droit international des civilisations : instituer un monde des régions", (2021) 31 Swiss Review of International and European Law 373 at 377, 390, 397; Samantha BESSON "Adopter du droit international universel dans un plurivers de civilisations : le rôle de la concertation intra- et inter-régionale" in Samantha BESSON, *Le droit international des régions* (Paris: Collège de France, 2025), online: <https://www.college-de-france.fr/fr/agenda/cours/le-droit-international-des-regions/adopter-du-droit-international-universel-dans-un-plurivers-de-civilisations-le-role-de-la>.

[8] Edward KEENE, "The Treaty-Making Revolution of the Nineteenth Century" (2012) 34 International History Review 475.

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their newly acquired sovereignty by opposition to CIL.[9] While newly independent states remained bound by existing custom, drafting new treaties allowed them to maintain greater stability in their legal relations while retaining maximum *control* by "owning" treaties.[10] Still, as it will be evinced below, even within the field of treaty law, Western-centrism is coming back through the backdoor.

This article aims to deal with the *problématique* of Western-centrism in PIL by engaging with the treatment of Asian peoples' practice, through the examination of a case study.[11] This case study relates to conscientious objection – the refusal to engage in a specific activity – to military service. About 40, mostly Western, countries recognize a right to conscientious objection. Yet, most Asian and many African states steadily reject the idea that conscientious objection constitutes a right under international law. It has never been enshrined in any universal human rights treaty, but it is present in two regional instruments in Europe and Latin America, albeit only regarding people under 24 years old in the latter case.[12]

The crux of the problem is that despite the lack of state consensus on the inclusion of such a principle in either the Universal Declaration on Human Rights (UDHR) or in the International Covenant on Civil and Political Rights (ICCPR),[13] UN organs and the Human Rights Committee (HRCommittee), the ICCPR's treaty body, affirm that conscientious objection is a right. Indeed, since 1989, the Human Rights Commission (HRCommission), which is the Human Rights Council's (HRCouncil) predecessor, have affirmed that conscientious objection is a right under both the UDHR and the ICCPR. According to the Office of the High Commissioner for Human Rights (OHCHR), although "not a right *per se*" (since no legal instrument "make[s] a direct reference" to it), conscientious objection constitutes a "right that is *derived from an interpretation*" of Articles 18 UDHR and 18 ICCPR on the right to freedom of thought, conscience, and religion.[14]

[9] S Prakash SINHA, "Perspective of the Newly Independent States on the Binding Quality of International Law" (1965) 14 The International and Comparative Law Quarterly 121 at 122–4. However, before the Second World War, treaties have often been used to impose unequal obligations on countries and many Asian countries suffered from this practice, including China. See Anne PETERS, "Treaties, Unequal", *Max Planck Encyclopedia of Public International Law* (2018); Charles ALEXANDROWICZ, *Treaty and Diplomatic Relations Between European and South Asian Powers in the Seventeenth and Eighteenth Centuries* (The Hague: RCADI, 1960) at 278 and f.

[10] As Crawford put it, states are the "owners" of treaties. See James CRAWFORD, "Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties" in Georg NOLTE, ed., *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013) at 31.

[11] The practice of Asia has been used as the main study material given Asian peoples make out an important share of the world's population and since their practice in relation to thwe case study was readily available. The practice of other non-Western regions such as Africa would be equally relevant and is indeed mentioned in passing through the text to strengthen the underlying argument that there is a Western-centrism problem within international law. In addition, according to Besson,"les organes universels [...] ignorent superbement pour l'heure la pratique intra régionale des droits de l'homme de ces deux autres régions [Asia and the Arab World]". See Samantha BESSON "L'universalité régionalisée : le cas particulier du droit international des droits de l'Homme" in Samantha BESSON, *Le droit international des régions* (Paris: Collège de France, 2025), online: <https://www.college-de-france.fr/fr/agenda/cours/le-droit-international-des-regions/universalite-regionalisee-le-cas-particulier-du-droit-international-des-droits-de-homme>.

[12] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007, 2707 U.N.T.S. 47938 (entered into force 1 December 2009), arts. 6, 10. The EU Charter was adopted by the European Parliament and has been incorporated by reference in the Lisbon Treaty. See also *Convención Iberoamericana de Derechos de los Jóvenes*, 11 October 2005, [not registered] (entered into force 1 March 2008), art. 12.

[13] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S 171 (entered into force 23 March 1976) [ICCPR].

[14] Office of the United Nations High Commissioner for Human Rights, "Conscientious Objection to Military Service" (2012), online: OHCHR Brochure 7 <https://perma.cc/J52K-GZL2>. *Emphasis added.*

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The HRCommittee has affirmed the same in relation to the ICCPR since its 1993 General Comment 22 (GC22).[15] The HRCommittee in *Yoon et al. v. Korea* – a communication which overruled previous HRCommittee communications which deemed conscientious objection was not a protected right – simply noted that this right came from a *new* "understanding" of Article 18 ICCPR which could evolve "as that of any other guarantee of the Covenant over time".[16] What is more, despite scant state support, the HRCommittee began to affirm in 2011 in *Jeong et al. v. Korea*[17] that conscientious objection is not only a right (as it had affirmed since 1993), but that it is an absolute right which cannot suffer any derogation as part of an individual's *forum internum*. Indeed, as traditionally understood,[18] the freedom of thought, conscience, and religion as such (*forum internum*) is absolute and can bear no legal restrictions. By contrast, the freedom to manifest (*forum externum*) either of such convictions is not absolute and "might be subject to legitimate limitations".[19] As Puppinck put it, "*forum internum* pertains to the being of the person, and *forum externum* to the person's doings".[20]

Despite the HRCommission and HRCommittee's pronouncements (as will be discussed below), the reading in of conscientious objection into Article 18 ICCPR had been explicitly rejected by states when negotiating the ICCPR and was not contemplated when the UDHR was adopted (by a very limited number of states) in 1948. While many Western states consider conscientious objection a right, this article undertakes to show that its recognition beyond the West is neither widespread nor representative. The pronouncements from UN Organs and the HRCommittee instead appear to be symptomatic of the tendency of human rights bodies to consider any norm in force in the West to be automatically applicable worldwide.

To demonstrate so, this article focuses on the practice of Asian countries, which is of paramount importance. Indeed, Asian practice prominently stands in the way of implying a right to conscientious objection from the ICCPR.[21] Most countries imposing compulsory

[15] Human Rights Committee, General Comment 22 (Art. 18), UN Doc. CCPR/21/Rev.1/Add.4 (1993); *Conscientious Objection to Military Service*, Commission on Human Rights (CHR) Res. 1989/59, (1989).

[16] Human Rights Committee, *Yoon and others v. Republic of Korea*, Communications Nos. 1321/2004 and 1322/2004 (2006) at 14. For a concise summary of the history of the HRCommission and HRCouncil positioning on conscientious objections see *UNHCHR*, Analytical Report on Conscientious Objection to Military Service Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/23/22 (2013).

[17] Human Rights Committee, *Jeong et al. v. Republic of Korea*, Communications Nos. 1642–1741/2007 (2011) at para. 7; Heiner BIELEFELDT, Nazila GHANEA and Michael WIENER, *Freedom of Religion or Belief: An International Law Commentary* (Oxford: Oxford University Press, 2016) at 267.

[18] Including by state delegates who negotiated the ICCPR.

[19] Marc J. BOSSUYT, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Leiden: Brill Nijhoff, 1987) at 355.

[20] Grégor PUPPINCK, "Conscientious Objection & Human Rights, a Systematic Analysis" (2017) 1 Brill Research Perspectives in Law and Religion 1 at 10; Grégor PUPPINCK, "Objection de conscience et droits de l'homme. Essai d'analyse systématique" (2016) 6 Société, droit et religion 209 at 221. This distinction between these two facets of the exercise of the right to freedom of thought, conscience and religion originates from canonical law but has been adopted *mutatis mutandis* in human rights law. See also Bielefeldt, Ghanea and Wiener, supra note 17 at 259; Leonard M. HAMMER, "The International Human Right to Freedom of Conscience: An Approach to Its Application and Development" (London: School of Oriental and African Studies, University of London, 1997) at 61; Jean-Pierre SCHOUPPE, *La dimension institutionnelle de la liberté de religion dans la jurisprudence de la Cour européenne des droits de l'Homme* (Paris: Editions A Pedone, 2015) at 174.

[21] See for instance, Letter Dated 24 April 2002 from the Permanent Representative of Singapore to the United Nations Office at Geneva Addressed to the Chairperson of the Fifty-Eighth Session of the Commission on Human Rights: Joint Statement on Conscientious Objection to Military Service by Singapore Co-Signed by China, Bangladesh, Botswana, Egypt, Eritrea, Iran, Iraq, Lebanon, Myanmar, Rwanda, Sudan, Syria, Tanzania, Thailand and Vietnam, UN Doc. E/CN.4/2002/188 (2002).

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military service without providing for conscientious objection exemptions are Asian. In addition, Asian practice should always be considered, since Asia is the world's largest and most populous region, making it of cardinal importance for the fashioning of international law.

Notwithstanding the importance of this region, the diversity of Asia's practice in terms of international law does not seem to have been fully factored into the international legal system,[22] with conscientious objection being only one example. In turn, it must be recalled that Asia is not a monolithic block and is made of multiple civilizations.[23] For instance, Onuma identified four main civilizations in Asia: Confucian, Buddhist, Islamic, and Hindu.[24] Nonetheless, Asian countries and civilizations share commonalities, including within international law.

This Western-centrism problem will be addressed in two ways: first (I) by verifying whether conscientious objection is a right under the ICCPR or general PIL. Overall, this article argues that although the notion of freedom of thought, conscience, and religion certainly can evolve, it has not, in fact, evolved to include a right to conscientious objection to military service – however desirable this outcome might be. In turn, the lack of consideration for non-Western practice juxtaposed to human rights bodies' pronouncements evinces the insufficient factoring in of Asian states' practice. Second (II), this article exposes the significant shift from the non-recognition of conscientious objection as a right by the HRCommittee to its recent characterization of conscientious objection as a non-derogable right. This part also addresses the underlying *material* and policy reasons why the HRCommittee might have read in such a right in Article 18 despite the absence of sufficient and converging state practice. Finally (III), the conclusion highlights the importance of working towards the achievement of truly a transcivilizational international law by considering the practice of all civilizations at the time of assessing the scope of PIL.

I. Is conscientious objection a right under international law?

To verify whether conscientious objection is a right under international law, the first section of this part will (A) briefly evince the scope of Article 18 when the ICCPR was signed in 1966, showing there was initially no right to conscientious objection under the ICCPR. The second part (B) will then assess whether sufficient international practice supports an *a posteriori* "derivation" of such a right.

A. Article 18 ICCPR's original meaning

To identify Article 18's original meaning, the following elements need to be factored in: the provision's ordinary meaning, context, as well as object and purpose. Preparatory works can also shed light on the scope of provisions that remain obscure.[25]

First, as the OHCHR observes, a right to conscientious objection does not appear textually within the ICCPR.[26] In 1984, the HRCommittee in *L.T.K. v. Finland* deemed that the "[t]he

[22] Chimni, *supra* note 7 at 42.

[23] *Ibid.*

[24] Onuma, *supra* note 3 at 136, 401.

[25] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S 331 (entered into force 27 January 1980), arts. 31–2. Although the VCLT as such does not apply retroactively, the International Court of Justice has relied on Arts. 31–3 VCLT to interpret treaties which were concluded before the VCLT was signed in 1969. See for instance *Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction of the Court, Judgment*, I.C.J. Rep. 2020, p. 455 at 70.

[26] Office of the United Nations High Commissioner for Human Rights, supra note 14 at 7.

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Covenant does not provide for the right to conscientious objection".[27] Second, Article 8(3) ICCPR concerning the prohibition of "forced or compulsory labor" constitutes the most relevant context when assessing whether conscientious objection forms part of the ICCPR. As noted by the HRCommittee in *L.T.K. v. Finland*, Article 8(3)(c) provides for elements which shall not be considered to be forced or compulsory labour, including "any service of a military character, and, *in countries where conscientious objection is recognized*, any national service required by law of conscientious objectors".[28] This led the HRCommittee in *L.T.K. v. Finland* to conclude that nothing in the Covenant could "be construed as implying that right".[29]

Third, the object and purpose must also be considered. However, the ICCPR's preamble does not flesh out the content of rights, although parties recognize that the rights contained therein "derive from the inherent dignity of the human person". In addition, the preamble recalls that individuals have duties to others and their community.[30] This very generic object and purpose does not *prima facie* support a right to conscientious objection. It might even be the opposite. HRCommittee member Wedgwood, who dissented in *Yoon v. Korea*, opined that "article 18 does not suggest that a person motivated by religious belief has a protected right to withdraw *from the otherwise legitimate requirements of a shared society*", that is, participation in military service which should not be considered differently from obligations towards the community, for example, paying taxes.[31]

Although the above-mentioned interpretation of Article 18 leaves little doubt about the provision's scope, it is apposite to consider the ICCPR's drafting history. Indeed, some might still consider the scope of this provision obscure.[32] In her above-mentioned dissenting opinion in *Yoon v. Korea*, Wedgwood affirmed that the HRCommittee should have considered the "Covenant's negotiating history".[33]

In fact, the ICCPR's drafting history shows that the parties completely ruled out that conscientious objection, conceived as a right, could form part of Article 18 or any other ICCPR provision.[34] Although some authors argue that Wedgwood was wrong in saying that conscientious objection had not been "contemplated",[35] it is clear the inclusion of the right was not accepted as part of the Covenant.

On the one hand, in April 1950, Meniez (Philippines) proposed to add a reference to conscientious objection in what would become Article 18, that is, that "persons who conscientiously object to war as being contrary to their religion shall be exempt from military service".[36] The majority of representatives refused.[37] Even delegates who "expressed complete sympathy" to the idea, such as the representative of the United States (US), held that the question of military service "was nevertheless outside the scope of article 16"

[27] Human Rights Committee, *L.T.K v. Finland*, 9 July 1985, Communication No. 185/1984 at 242.

[28] ICCPR, art. 8. *Emphasis added*.

[29] *L. T. K. v Finland*, supra note 27 at 242.

[30] ICCPR, preambular para. 4.

[31] *Yoon v. Korea*, supra note 16 at 14. *Emphasis added*. According to Hennebel, the HRCommittee went beyond the letter of Article 18 in relation to conscientious objection. See Ludovic HENNEBEL, "Les organes de protection des droits de l'Homme des Nations Unies face à la religion" in Robert Uerpmann-Wittzack and others, eds., *Religion and International Law* (The Hague: Brill, 2018) at 114.

[32] At any rate, Art. 32 VCLT on supplementary means of interpretation can be resorted to confirm a meaning obtained through the application of Art. 31 VCLT.

[33] *Yoon v. Korea, supra* note 16 at 14.

[34] See in general Bossuyt, *supra* note 19 at 177–8.

[35] *Contra* Bielefeldt, Ghanea and Wiener, *supra* note 17 at 289.

[36] *United Nations Economic and Social Council, Commission on Human Rights*, UN Doc. E/CN.SR.16 (1950) at 11.

[37] *Ibid*., at 12.

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(now Article 18), which also led the representatives of the United Kingdom (UK) and Australia, Bowie and Whitman, to oppose the proposal even though their countries recognized conscientious objection.[38] In the end, Meniez withdrew his proposal.[39]

On the other hand, the words "in countries where conscientious objection is recognized" were added to Article 8(3) in relation to the prohibition on forced labour which mentioned that military service or national service required by law is not to be considered forced labour. This proposal was made by Cassin (France) to ensure that all governments could ratify the convention. Representatives such as Fontaina (Uruguay), deemed that the question of military service was one "of the defence of the sovereignty of the country".[40] Iran and Egypt's representatives said they would only vote in favour of a provision mentioning conscientious objection if the French amendment was adopted. According to Egypt, the French proposal would not encroach on the rights of states while granting "deference to the legislation of other countries" that recognized such a ground.[41] Similarly, Chile supported the idea, although it held it would have preferred to omit any reference to conscientious objection.[42] The Chinese representative noted that very few countries recognized conscientious objection.[43] Other delegates, like those from the Philippines or Uruguay, noted that this provision was linked to the provision on freedom of thought, conscience, and religion.[44] Perforce, the French amendment, which aimed to make clear that the reference to a conscientious objector was only relevant in countries recognizing such an exemption ground, was adopted.[45]

In conclusion, an interpretation of Article 18 ICCPR taken in its context, considering the ICCPR's object and purpose, and drafting history, makes clear that conscientious objection was not envisaged as an implied right. This original understanding has been labelled as the "traditional approach" until the late 1980s.[46]

B. *Can conscientious objection be derived from the UDHR or the ICCPR: Asian practice as a limitation on evolutive interpretation*

The previous section showed that a right to conscientious objection was not considered part of the original realm of Article 18 ICCPR. The same can be said about the UDHR, which did not contemplate such a right given that military service and conscription were generalized in 1948.

Not all manifestations of one's beliefs or religion are protected under Article 18 ICCPR; some manifestations fall outside this provision's scope. Indeed, Article 18(1) ICCPR only protects the freedom to "manifest [one's] religion or belief in worship, observance, practice, and teaching", for example, by constructing a place of worship or attending religious service. Not all manifestations will be protected, although the category of "practices" remains broad.

[38] *United Nations Economic and Social Council, Commission on Human Rights*, E/CN.SR.161 (1950) at 11–12. It must also be noted that these delegates also refused proposals which in their opinion might have hampered the rights of conscientious objectors, see United Nations Economic and Social Council, Commission on Human Rights, E/CNAC.SR.9, 3 July 1947, at 3.

[39] *Ibid.*

[40] *United Nations Economic and Social Council, Commission on Human Rights*, UN Doc. E/CN.4/SR104 (1949) at 6.

[41] *Ibid.*

[42] *United Nations Economic and Social Council, Commission on Human Rights*, UN Doc. E/CN.4/SR104 (1949) at 8.

[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid.*

[46] Bielefeldt, Ghanea and Wiener, *supra* note 17 at 288.

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As the HRCommittee noted in *J. P. v. Canada*, Article 18 ICCPR protects the right to "hold, express and disseminate opinions and convictions, including conscientious objection…".[47] Yet, the scope of protected manifestations is not unlimited. In this case, an individual, J.P., partly refused to pay taxes to the Canadian government, which corresponded to the percentage of Canada's military expenditure. Instead, she gave the resulting amount to a non-governmental organization (NGO). The HRCommittee held that the "refusal to pay taxes on grounds of conscientious objection *clearly falls outside the scope of protection of this article*".[48] This case illustrates that not every act dictated by personal convictions can form part of the protected scope of *forum externum* under Article 18 ICCPR.

Indeed, virtually *anything* done to satisfy beliefs or religious commandments could theoretically be deemed to form part of one's freedoms under Article 18 ICCPR. In principle, nothing distinguishes the obligation to pay taxes to a government[49] from the desire not to participate in military service. One could also imagine a believer refusing to pay interest on a loan, or fundamentalists from many religions (the three main monotheist religions' sacred books prescribe stoning for a whole array of offences) insisting that based on an originalist interpretation of their sacred book, they have the duty to stone someone and thus manifest their religious observance in that way. The last example might seem far-fetched and is not to be compared with conscientious objection, but it shows that not just *anything* is protected under Article 18 ICCPR. A contextual reading of the ICCPR enables the interpreter to omit from the protected *forum externum* any manifestation that would encroach on other protected rights and be unjustifiable under any given circumstances, for example, honour crimes.[50]

In the case of conscientious objection, there is no such contextual bar: refusing to serve in the military for conscientious reasons does not encroach on other protected rights. Conscientious objection could thus *eventually* form part of protected manifestations under Article 18 ICCPR since nothing bars its meaning from evolving.

Although the HRCommission and the HRCommittee did not clearly explain how they "derived" such a right from the ICCPR from 1989 onwards, the key seems to be subsequent state practice. This is because in GC22, the HRCommittee explained that a "growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service".[51] Still, the derivation of such a right appears surprising given that two years before, in 1987, the HRCommission merely "appealed" to

[47] Human Rights Committee, *J.P. v. Canada*, 7 November 1991, Communication No. 446/1991 at 4.2.

[48] *Ibid. Emphasis added*. See also *L. T. K. v. Finland, supra* note 27 at 242.

[49] For references to domestic cases relating to conscientious objectors refusing to pay taxes in the United States see Esra Demir GURSEL, "The Distinction between the Freedom of Religion and the Right to Manifest Religion: A Legal Medium to Regulate Subjectivities" (2013) 22 Social & Legal Studies 377 at 379. For a European example see *Bouessel du Borg v France*, ECtHR, Application No. 20747/92, February 1993.

[50] For instance, the prohibition of killing under all circumstances, save for legitimate defence cases, is not a limitation of rights that would need to be justified (although it could unmistakably be justified) as it falls outside the scope of protected manifestations under Art. 18 ICCPR. José Manuel Santos Pais, now vice-president of the HRCommittee, recalled in his dissenting opinion in the Yaker case that in the past the HRCommittee refused to consider as protected any practice contrary to human rights such as genital mutilation, honour crimes, ritual murder and so forth. See Dissenting individual opinion of Committee member José Manuel Santos Pais in *Sonia Yaker v. France*, 17 July 2018, Communication No. 2747/2016, at para. 5. In the same case, Yadh Ben Achour, a former HRCommittee member, highlighted that practices such as polygamy, genital mutilation, gender inequality in laws governing inheritance, etc., could not be protected under the ICCPR. See Dissenting individual opinion of Committee member Yadh Ben Achour in *Sonia Yaker v. France*, 17 July 2018, Communication No. 2747/2016 at para. 6.

[51] Human Rights Committee, *supra* note 15 at para. 11.

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states to "recognize that conscientious objection to military service *should be considered* a legitimate exercise" of rights under Articles 18 ICCPR and UDHR.[52]

Legally speaking, the only way to "derive" a right from a treaty,[53] that is, to identify a "new" understanding, is through evolutive interpretation, which at any rate remains linked to the parties' intention.[54] Once terms have been deemed to be of an evolutive nature, a new or evolutionary meaning can be ascribed either via the consideration of subsequent practice,[55] or through the consideration of other rules of international law applicable between the parties.[56] In principle, subsequent practice, which is a way in which parties can manifest their agreement to change,[57] can shed light on both the parties' original intentions and their current understanding of a treaty.[58]

In both cases, the key element is practice, which can either inform the evolution of the ordinary meaning of terms, for example, what does the word "commerce" encompass or legal concepts, for example, what the territory of a state comprises.[59] Both subsequent practice and CIL evince sociological changes on the international plane,[60] which reflect the parties' agreement.[61] On the one hand, the word "commerce" in a treaty concluded between Costa Rica and Nicaragua was deemed susceptible to evolution as it was "generic", while the treaty was made to be "of continuing duration". In this case, the ordinary meaning of "commerce" evolved to encompass fluvial tourism, including by resorting to the parties' practice and dictionaries, which, again, aim to reflect linguistically accepted *norms*. Indeed, the parties had not *explicitly* rejected the idea that tourism could be part of "commerce", that is, tourism through fluvial cruises, for the mere reason it did not exist at the time of drafting the treaty.[62] On the other hand, an expression such as "the territorial status of Greece" was also susceptible to evolution, being generic, and was considered to reflect the corresponding meaning of "territorial status" under general international law at any given

[52] *Conscientious objection to military service*, UN Commission on Human Rights, Res. 1987/46 (1987). *Emphasis added*.

[53] There could also be a formal subsequent agreement between the parties, in what is commonly referred to as "authentic interpretation". See *International Law Commission*, Yearbook 1966, vol. II, at 221; Georg NOLTE, "Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties (First Report)" (International Law Commission, 2013) at 67. See also VCLT art 31(3)(a). The scenario of a subsequent agreement under Article 31(3)(a) VCLT is not applicable here and will thus not be examined.

[54] Eirik BJORGE, "Evolutionary Interpretation in International Law: Some Short and Less than Trail- Blazing Reflections" in Georges ABI-SAAB and others, eds., *Time Present and Time Past: The Intention of the Parties and the Evolutionary Interpretation of Treaties* (Oxford: Hart Publishing, 2019) at 35–7. See International Law Commission, "Conclusions on Identification of Customary International Law, Yearbook of the International Law Commission", vol. II, Part Two, at 90, 70th session, Conclusion 8.

[55] VCLT art. 31(3)(b).

[56] *Ibid*., at (c).

[57] *Ibid*., at (b).

[58] Luigi CREMA, "Subsequent Agreements and Subsequent Practice Within and Outside the Vienna Convention" in Georg NOLTE, ed., *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013) at 23.

[59] Julian ARATO, "Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences" (2010) 9 The Law & Practice of International Courts and Tribunals 443 at 471–2.

[60] International Law Commission, "Commentaries on the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties", Yearbook 2018, vol. II, Part Two, UN Doc. A/73/10 42 (2018) 62, 68; Irina BUGA, *Modification of Treaties by Subsequent Practice* (Oxford: Oxford University Press, 2018) at 24, 29, 93.

[61] Robert KOLB, "Evolutionary Interpretation in International Law: Some Short and Less than Trail- Blazing Reflections" in Georges ABI-SAAB et al., eds., *Evolutionary Interpretation and International Law* (Oxford: Hart Publishing 2019) at 16–17.

[62] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, [2009] I.C.J. Rep. 213, at 64–71.

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time, although it included elements, for example, the continental shelf, that were not yet part of the law when the legal instrument at stake had been drafted.[63]

In any event, evolutive interpretation can only "result from the ordinary process of treaty interpretation".[64] As Arato put it "at the very least, the content of evolutive terms should be keyed to subsequent changes in the meaning of those terms as enshrined in international law".[65] The HRCommittee and HRCouncil also seem to agree that state practice is an essential ingredient of evolutive interpretation since they referred to the "increasing" or "growing" number of ICCPR parties recognizing conscientious objection in their reasoning.

What is at stake here is the required threshold for treaties to evolve, which is higher when parties initially rejected a given interpretation. Unless there is a subsequent agreement which would enable the parties to overcome the initial refusal to include a given notion within a treaty provision, there cannot be evolutionary interpretation.[66] As the ICJ put it, there can be "a departure from the original intent *on the basis of a tacit agreement* between the parties".[67] Even in relation to human rights instruments, the European Court of Human Rights (ECtHR), which is known for its frequent recourse to evolutionary interpretations,[68] relies on such evolution. It takes into account the "near consensus" or the "great majority of the member states of the Council of Europe" to determine whether a treaty provision has evolved,[69] that is, this human rights court still links its interpretation to state consent. For instance, it ruled that a right to divorce could not be read into a provision on the right to marry based in large part on the fact that this omission to include divorce was *deliberate* and, therefore, that the ECtHR, absent a change in the "present-day" conditions, could not derive the right to divorce from the applicable provision on marriage.[70]

Again, it is clear that the general framing of the right to freedom of thought, conscience, and religion in light of the ICCPR's object and purpose, is *capable* of evolving over time, being generic.[71] However, the fact that terms are to be interpreted in an evolutionary fashion does not mean that just anything can be read into them. Indeed, evolutionary interpretation must be framed together with state practice *largo sensu* (including custom), which is the only element capable of evincing social evolution in relation to quasi-universal treaties. Whether a provision is of an evolutive character is only the first step. The second step is to determine

[63] *Aegean Sea Continental Shelf (Greece v. Turkey)*, [1978] I.C.J. Rep. 3 at 77.

[64] International Law Commission, "Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties", Yearbook 2018, vol. II, Part Two, UN Doc. A/73/10 (2018) at 66.

[65] Arato, *supra* note 59 at 471.

[66] At the level of the European Courts of Human rights, it is interesting to note that in the famous *Golder* case, the Court ruled on an issue which the parties had not explicitly rejected when negotiating the treaty. See Robert KOLB, *Interprétation et création du droit international: esquisses d'une herméneutique juridique moderne pour le droit international public* (Brussels: Bruylant, 2006) at 382.

[67] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, [2009] I.C.J. Rep. 213 at 64. *Emphasis added.*

[68] George LETSAS, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" (2010) 21 European Journal of International Law 509 at 512 and f.

[69] Indeed, even the European Court of Human Rights, which is known for its evolutionary interpretation, recognizes that evolutive interpretation is assessed against the backdrop of "near consensus" in the "great majority of the member states of the Council of Europe" or of a generalized practice among members. See for instance *Schalk and Kopf v. Austria*, ECtHR, 30141/04, No 24062010, November 2010 at para. 58; *Chapman v. The United Kingdom*, ECtHR, 27238/95, No 18012001, January 2001 at para. 93; *Dudgeon v. The United Kingdom, ECtHR, 7525/76, No 22101981, October 1981* [60]. See also International Law Commission, "ILC Subsequent Agreement/Practice Draft Conclusions", *supra* note 60 at 42, 44, 62, 68; Buga, *supra* note 60 at 29.

[70] *Johnston and others v. Ireland*, EctHR, 9697/82, 18121986, December 1986 [51–4]; Arato, *supra* note 59 at 457.

[71] *Aegean Sea Continental Shelf (Greece v. Turkey)*, [1978] I.C.J. Rep. 3 at 77.

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whether there has been such an evolution which requires a benchmark. Otherwise, state consent could be voided.

Although it has been argued that subsequent practice could lead to a *modification* of a treaty,[72] this article will only address the issue of the impact of subsequent practice on treaty interpretation, as in any event, the outcome would be identical in substance.[73] As there has been no formal agreement on the question of conscientious objection between ICCPR parties, this section will first (1) deal with the subsequent practice of ICCPR parties, before (2) briefly addressing whether other rules of international law could be relevant. The practice of Asian states will constitute the crux of the analysis since, given their importance, rejection by an important share of Asian countries would prevent any evolution of either the ICCPR or CIL.

1. Is there subsequent practice supporting a derivative right to conscientious objection among ICCPR parties?

First and foremost, it must be recalled that subsequent practice must be shared among *all* the parties to a treaty to be of relevance.[74] Contrary practice by only one or a few parties could be sufficient to impede the evolution of a treaty. Special Rapporteur Nolte clarified in his final report on the *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* (DCSASPractice) that to be characterized as subsequent practice under Article 31(3) VCLT, an agreement or practice needs to be shared by "all the parties".[75] Even an agreement by "almost" all the parties "is *not* subsequent practice".[76] In the 1960s, the International Law Commission (ILC) held that to qualify as relevant subsequent practice, a set of practice had to "embrac[e] all the parties and showing their common understanding of the meaning of the treaty", which is "analogous to an interpretative agreement".[77] A lack of consistency between the parties can indeed "prevent the concretization of the meaning of a rule or term".[78] For instance, in the *Whaling* case, the ICJ deemed that International Whaling Commission's resolutions adopted without the "support of all states parties to the Conventions", could not constitute subsequent practice within the meaning of Article 31(3)(a)(b) VCLT.[79]

[72] See Buga *supra* note 60 at 107 and f; Georg NOLTE, *Treaties and Their Practice – Symptoms of Their Rise or Decline* (The Hague: RCADI, 2018), 353–4. Buga for instance considers a modification can either alter or supplement a treaty provision with a "novel element or direction as opposed to a mere clarification".

[73] On the difference between interpretation and modification see Buga, *supra* note 60 at 166 and f. On the relationship between the two notions and dynamic/evolutionary interpretation, see Arato, *supra* note 59 at 452.

[74] Crawford, *supra* note 10 at 30

[75] Special Rapporteur NOLTE further insisted that the word "all" was not added as the expression "the parties" made it "sufficiently clear that the agreement of all parties is required". However, under the DCSASPractice, when practice is not common to all the parties, it can nonetheless be considered under Article 32 VCLT. See Georg NOLTE, "Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties (Fifth Report)", International Law Commission, 2018, Fifth Report at para. 93.

[76] Nolte, *supra* note 72 at 340.

[77] Nolte, *supra* note 75 at para. 87. See *International Law Commission*, Yearbook 1964, vol. II at 204; *International Law Commission*, Yearbook 1966, vol. II at 221–2. See also *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, Judgment of 18 November 1960, [1960] I.C.J. Rep. 192 at 206–7; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits,* Judgment of 15 June 1962, [1962] I.C.J. Rep. 6, at 33–5; *Kasikili/Sedudu Island (Botswana/Namibia)*, [1999] I.C.J. Rep. 1045 at paras. 79–80.

[78] Buga *supra* note 60 at 29.

[79] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, [2014] I.C.J. Rep. 226 at para. 83. In the *Kasikili/Sedudu Island* case, the ICJ made clear that practice, to be considered under Article 31(3)(b) VCLT, must be reflective of a "belief [on the part of authorities]" matched with the awareness and acceptance "as a confirmation" of this belief. See *Kasikili/Sedudu Island (Botswana/Namibia) Judgment*, [1999] I.C.J. Rep. 1045, at para. 74.

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The practice of parties must be considered holistically.[80] The principle of consensualism, which is the "cornerstone" of treaties,[81] keeps playing a paramount role in assessing treaties' evolution. *A minima*, the practice at stake must be "concordant, common, and consistent",[82] and made with "awareness (belief, fully aware)" of its consequences.[83] Relevant practice can take any form, for instance, "executive, legislative, judicial or [emanating from] other functions",[84] be either effective, that is, acts, or declaratory, that is, statements.[85] A type of practice that is particularly important relates to whether national laws, including decisions of domestic tribunals,[86] are in line with alleged international norms.[87]

In the case of multilateral treaties, a practice can be characterized as subsequent practice under Article 31 VCLT when some parties follow it while the other parties remain silent, thus acquiescing.[88] However, mere silence only constitutes acquiescence when a reaction is warranted under given circumstances.[89] As the ICJ put it, "silence may also speak, but only if the conduct of the other state calls for a response".[90]

In relation to Asia, Onuma has noted that silence and acquiescence have "often been used to camouflage the lack of generality" of international practice, which disadvantaged non-Western states.[91] Caution is necessary, as developing states do not have the same resources as developed states to analyze – and *a fortiori* to react to – the prolific normative production and reports produced by the international machinery. Considering the unequal reaction capacity of states, documents produced and adopted by intergovernmental bodies or experts must thus be dealt with great care. This is echoed by the DCSASPractice, which holds that expert treaty bodies, such as the HRCommittee, "may give rise" to subsequent practice, while a party's silence is not to be presumed as an acceptance of treaty bodies' pronouncements.[92] In addition, the same stands in relation to resolutions of organs that include a limited number of parties, such as the HRCouncil and its predecessor, the HRCommission.[93]

[80] Marcelo G. KOHEN, "La pratique et la théorie des sources du droit international" in Gionata Piero BUZZINI, Laurence BOISSON DE CHAZOURNES and Marcelo KOHEN, eds., *La pratique et le droit international: colloque de Genève* (Paris: Pedone, 2004), 97.

[81] Yoram DINSTEIN, *The Interaction Between Customary International Law and Treaties* (The Hague: RCADI, 2006), 328.

[82] Laurence BOISSON DE CHAZOURNES, "Subsequent Practice, Practices, and 'Family-Resemblance': Towards Embedding Subsequent Practice in Its Operative Milieu" in Georg NOLTE, ed., *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013), 56; Ian SINCLAIR, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), 137–8.

[83] Crema, *supra* note 58 at 17.

[84] International Law Commission, *supra* note 64 at 5–6.

[85] Kohen, *supra* note 80 at 89.

[86] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, [2012] I.C.J. Rep. 99 at para. 55.

[87] Antonio Remiro BROTÓNS et al., *Derecho internacional* (Valencia: Tirant lo Blanch, 2007), 650.

[88] Buga, *supra* note 60 at 61.

[89] Marcelo G. KOHEN, "Desuetude and Obsolescence of Treaties" in Ennio CANNIZZARO, ed., *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011), 350. See also Buga, *supra* note 60 at 63. Many states commenting on the DCSASPractice conclusions also "advised caution" regarding the consideration of state silence. See Nolte, supra note 75 at 94.

[90] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment of 23 May 2008, [2008] I.C.J. Rep. 12, at para. 121.

[91] Onuma, *supra* note 3 at 238.

[92] Nolte, *supra* note 75 at 12.

[93] In fact, the DCSASPractice commentaries explicitly refer to resolutions of the HRCouncil as being relevant under Art. 32 VCLT, given its limited membership. See International Law Commission, *supra* note 60, Commentary on Conclusion 13 at 16; Commentary on Conclusion 11 at 3.

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In light of the preceding explanations, the next subsections will deal with (a) institutional, (b) effective, and (c) declaratory state practice, including before the HRCommittee, as well as (d) Western state practice, *vis-à-vis* conscientious objection.

(a) Institutional United Nations and ICCPR Practice: The first element of institutional practice to consider is the HRCommission's 1989 resolution, which recognized a right to conscientious objection under both the UDHR and the ICCPR.[94] As seen above, the practice of the HRCommission can only be assessed through the prism of supplementary means of interpretation,[95] since it only had 42 Member States in 1989.[96] Although the resolution was adopted without a vote, it is a mere *aspirational* resolution given that in 1989, refusing to participate in military service was illegal in many states sitting at the HRCommission at the time, including the Soviet Union (USSR).[97] States such as China, Cuba, Ethiopia, Mexico, the USSR, and Yugoslavia "expressed reservations" after the adoption of this resolution, and some countries stated that, had a vote been conducted, they would either have abstained (e.g., China or the USSR), or voted against it (e.g., Iraq).[98]

The second relevant element of institutional practice relates to the practice of the HRCommittee, including GC22, which "derived" a right to conscientious objection from Article 18 ICCPR. The HRCommittee is not composed of states but rather of individual expert members and can only act as a *proxy* for state consent. The HRCommittee's set of institutional practice would only be relevant if states had at least tacitly acquiesced.

The only institutional practice that could be characterized as universal and which likely constitutes CIL is United Nations General Assembly Resolution 33/165, which recognized that there is a right to selective objection from serving in an army enforcing an apartheid regime.[99] Since there have never been statements at least implicitly endorsed by all ICCPR parties or by the United Nations General Assembly on conscientious objection in general, there is no sufficient institutional practice to support that such a right exists either under the ICCPR or CIL.

(b) Effective Asian practice: This section will broach the military service and conscientious objection practice of 18 ICCPR state parties belonging to the UN Asia-Pacific States Group,[100] which have legislation providing for compulsory military service or its possibility.

East Asia

[94] *Commission on Human Rights*, Res. 1989/59 (1989) at 1–3.

[95] VCLT, art. 32. Instances of regional practice, e.g., before the European Court of Human Rights, will be dealt with *infra* in the section on Western practice.

[96] Argentina, Bangladesh, Belgium, Botswana, Brazil, Bulgaria, Canada, China, Colombia, Cuba, Cyprus, Ethiopia, France, Federal Germany, Gambia, German Democratic Republic, India, Iraq, Italy, Japan, Mexico, Morocco, Nigeria, Pakistan, Panama, Peru, Philippines, Portugal, Rwanda, Senegal, Somalia, Spain, Sri Lanka, Swaziland, Sweden, Togo, Union of Soviet Socialist Republics, Ukrainian Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland, the United States of America, Yugoslavia and Venezuela. See *Commission on Human Rights*, Report on the Forty-Fifth Session (30 January–10 March 1989), UN Doc. E/1989/20, Supplement No. 2 (1989) at 187.

[97] Anton BEBLER, "Conscientious Objection in Socialist States: A Comparative Perspective" (1991) 24 Studies in Comparative Communism 103 at 105. See also the facts in *V Arfolomejev v. Finland*, European Commission of Human Rights, no 17811/91, 2 September 1991.

[98] Reed BRODY and David WEISSBRODT, "Major Developments at the 1989 Session of the UN Commission on Human Rights" (1989) 11 Human Rights Quarterly 586 at 609; Bruno COPPIETERS, "Conscientious Objection Policies and the Soviet National Ethos" (1992) 8 Journal of Communist Studies 186 at 195.

[99] *Status of persons refusing service in military or police forces used to enforce Apartheid*, GA Res. 33/165, UN Doc. A/RES/33/165 (1978); See also Human Rights Committee, Approaches and challenges with regard to application procedures for obtaining the status of conscientious objector to military service in accordance with human rights standards, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/41/23 (2019).

[100] Following the regional subdivisions of the United Nations Statistics Division.

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The Chinese constitution provides for the "honourable duty of citizens of the People's Republic of China to perform military service in accordance with the law",[101] and the *Military Service Law of the People's Republic of China* proclaims the "obligation to perform military service" which in principle can be extended to all citizens "regardless of ethnic status, race, occupation, family background, religious belief, and education". The law provides for some exemptions, for example, for people suffering from serious "physical defects" or "deformities", as well as other types of exemption, for example, if one is a family's sole breadwinner.[102] No exemption ground exists for conscientious objectors.

In North Korea, military service is mandatory for all. It flows from the constitution, which provides that "[n]ational defence is the supreme duty and honour of citizens", who must "serve in the army as required by law". There exists no exemption ground.[103] South Korea, which imposes a mandatory male military service, in turn, has been repeatedly condemned by the HRCommittee for jailing conscientious objectors.[104] However, South Korea established an alternative service in 2019 following a decision from its Supreme Court and is now one of the only countries in the region to offer such a service.[105] As the alternative service is comparatively more burdensome (36 rather than 18 months) than the regular military service, NGOs affirm it breaches international standards.[106] In fact, conscientious objectors initially had to perform alternative service in prison.[107]

South East Asia

Cambodia imposed compulsory military service in 2006. This obligation exists "without distinction as to religious belief" under the Compulsory Military Service Act. It flows from the constitution, which provides for the duty of all citizens to "defend the motherland".[108] All citizens between 18 and 30 years old must perform service.[109] No conscientious objection ground exists.

In Indonesia, the law on the Management of National Resources for National Defense provides for the "right and obligation" of citizens to participate in state defence, which flows from Indonesia's Constitution.[110] The state can impose many duties under this law, including civic education, "[c]ompulsory basic military training" or "[s]ervice as a soldier

[101] China, Constitution of the People's Republic of China, (1982, as amended in 2018), Art 55. See Oxford Constitutions of the World, "Constitution of the People's Republic of China: 4 December 1982" (n.d.), online: OCW <https://oxcon.ouplaw.com/display/10.1093/law/law-ocw-cd929.regGroup.1/law-ocw-cd929?prd = OCW#law-ocw-cd929-mainText-1>.

[102] China, Military Service Law of the People's Republic of China (1984, as amended in 2021), Arts. 1–3.

[103] North Korea, Constitution of the Democratic People's Republic of Korea, Art. 86. See Oxford Constitutions of the World, "Constitution of the Democratic People's Republic of Korea: 27 December 1972" (n.d.), online: OCW <https://oxcon.ouplaw.com/display/10.1093/law:ocw/law-ocw-cd1096.regGroup.1/law-ocw-cd1096?prd = OCW#law-ocw-cd1096-div1-7>. According to Smith, the last codification of military obligations in North Korea was done in 2003. See generally James MINNICH and Robert WORDEN, "National Security", *North Korea: A Country Study*, 5th ed. (Washington, DC: US Government Printing Office, 2008); Hazel SMITH, *North Korea: Markets and Military Rule* (Cambridge: Cambridge University Press, 2015).

[104] See for instance *Yoon v. Korea, supra* note 16; *Jeong v. Korea, supra* note 17.

[105] Amnesty International, *Republic of Korea: Discrimination Persisting and Left Unaddressed* (27 December 1972), online: Amnesty International <https://perma.cc/5QKA-M4FT>.

[106] *Ibid.*

[107] UNHCHR, *Conscientious Objection to Military Service Analytical Report*, UN Doc. A/HRC/50/43 (2022) at para. 47.

[108] Cambodia, Constitution of the Kingdom of Cambodia, Art. 49. See Constitute Project, "Cambodia 1993 (rev. 2008)" (n.d.), online: CP <https://perma.cc/BSV9-GHXF>.

[109] Conscience and Peace Tax International, *Submission to the 134th Session of the Human Rights Committee, Cambodia* (January 2022), online: CPTI <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno = INT%2FCCPR%2FCSS%2FBRA%2F52846&Lang = en>.

[110] Indonesia, Constitution of the Republic of Indonesia, Art. 30. See Oxford Constitutions of the World, "Constitution of the Republic of Indonesia: 18 August 1945" (1993, as amended in 2002), online: OCW

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of the Indonesian National Army voluntarily or compulsorily",[111] but no exception exists for conscientious objectors when service is imposed.

In Laos, the Law of National Defense Obligations provides for the "obligation to serve in the national defence forces" of men and this "without discrimination in terms of race, ethnic origin, economic and social status, beliefs, educational background, and residence". This duty flows from the constitution.[112] This law provides several exemption grounds, such as insanity, a handicap, a serious illness, or being an only child.[113] Service can be postponed for medical reasons, studies, or prison time.[114] No exemption ground exists for conscientious objectors.

In Thailand, the Military Service Act provides mandatory military service for drafted men and provides for the equal treatment of all men of Thai nationality.[115] This obligation flows from the constitution.[116] Exemption grounds exist for people with certain health problems, who are criminals, who are monks or priests of any religion, and so on.[117] This law provides no exemption ground for conscientious objectors, who have been jailed.[118]

In Vietnam, the Military Service Law provides for the obligation of men to complete military service when called up, "regardless of ethnicity, faith, religion, education level, occupations or residence".[119] This obligation flows from the constitution, which provides for the "sacred duty and the noble right" of citizens to defend their country.[120] The law specifically prohibits the "evasion of" or the "opposition or obstacle to the performance" of military service.[121] Although several exemption grounds exist, for example, disability,[122] no exemption ground exists for conscientious objectors.

West Asia

Iran mandates compulsory military service for all men. This obligation flows from the constitution and no exemption exists for objectors.[123] Other countries recently reintroduced service. For instance, Kuwait reintroduced mandatory military service through its

<https://oxcon.ouplaw.com/display/10.1093/law:ocw/law-ocw-cd1047.regGroup.1/law-ocw-cd1047?rskey = DimHzI&result = 2&prd = OCW>; Law Concerning the Management of National Resources for National Defense of the Republic of Indonesia, Law No. 23 (2019), Preambular paragraph a; Art. 6.

[111] *Ibid.*, Art. 6.

[112] Laos, Law of National Defense Obligations, Law no. 02/90, Art. 2; Laos, Constitution of the Lao People's Democratic Republic. See Oxford Constitutions of the World, "Constitution of the Lao People's Democratic Republic: 14 August 1991" (n.d.), online: OCW <https://oxcon.ouplaw.com/display/10.1093/law:ocw/law-ocw-cd756-H1991.regGroup.1/law-ocw-cd756-H1991?rskey = cpIEVk&result = 1&prd = OCW>.

[113] Laos, Law of National Defense Obligations, Art. 9.

[114] *Ibid.*, at Art. 8.

[115] Thailand, Military Service Act, B.E. 2497 (amended Section 7) (1954), Section 1.

[116] Thailand, Constitution of the Kingdom of Thailand, Section 50. See Constitute Project, "Thailand 2017" (n.d.), online: CP <https://perma.cc/K2VU-HEP4>.

[117] Thailand, Military Service Act, Section 12.

[118] Rebecca RATCLIFFE, "Thai Conscientious Objector Risks Jail in Rare Refusal of Military Service" *The Observer* (2024), online: The Observer <https://perma.cc/5D6S-7GLX>; "Country Report: Thailand" *War Resisters' International* (2009), online: WRI <https://perma.cc/JD9J-3RBM>.

[119] Vietnam, Military Service Law, Law No. 78/2015/QH13 (2015).

[120] Viet Nam, Constitution of the Socialist Republic of Vietnam, (1992 as amended in 2013), Arts 45, 64. See Constitute Project, "Constitution of the Socialist Republic of Vietnam" (n.d.), online: CP: <https://perma.cc/275Y-2M5R>.

[121] Vietnam, Military Service Law, Art. 10.

[122] Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding observations of the Human Rights Committee: Viet Nam* (5 August 2002), online: HRC <https://perma.cc/Q8XJ-CEQJ>.

[123] Iran, Constitution of the Islamic Republic of Iran, Art. 2(11); Art 151. See Oxford Constitutions of the World, "Constitution of the Islamic Republic of Iran: 24 October 1979" (1979 as amended in 1988), online: OCW < <https://oxcon.ouplaw.com/display/10.1093/law:ocw/cd749.regGroup.1/law-ocw-cd749?rskey = 7lSLhj&result = 1&prd = OCW>; "Iran, Country Policy and Information Note on Military Service in Iran" *United Kingdom Publication* (2022), online: United Kingdom Publication <https://perma.cc/DM6V-HPAH>.

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2015 National Military Service Act,[124] after it was abolished in 2001. The country's constitution states that national defence is a "sacred duty",[125] and no exception exists for objectors.

Qatar likewise introduced mandatory military service for men through its Law on National Service in 2014, which flows from its constitution, providing that the defence of the "Homeland is a duty of every citizen".[126] Not performing service when called results in consequences such as ineligibility for government jobs or the impossibility of obtaining a business licence. No conscientious objection exemption ground exists, but there exists other grounds, for example, health.[127]

Turkey's Military Law imposes on male citizens the obligation to perform military service,[128] which flows from the constitution.[129] This law grants some exemptions, for example, for medical reasons, or even the possibility of paying a fee (provided quotas are filled).[130] However, no exemption ground exists for conscientious objectors who are regularly fined despite adverse rulings from the ECtHR.[131]

Central Asia

The Kazakh Military Duty and Military Service Act provides for the obligation of men to participate in military service. This obligation flows from the constitution, which states that the country's defence is the "sacred duty and responsibility of every citizen".[132] Some exceptions exist for members of recognized religious organizations,[133] for example, Jehovah's Witnesses (JW), but the law provides no general exemption ground for conscientious objectors.[134] This possibility is not an individual right but a possibility afforded to recognized religious organizations.

The Kyrgyz framework is similar to the Kazakh one, as there is mandatory military service for men under the Law about General Conscription of Citizens of the Kyrgyz Republic about Military and Alternative Services,[135] which flows from the constitution

[124] Kuwait, National Military Service Act, No. 20/2015 (2015).

[125] Kuwait, Constitution of the State of Kuwait, Art. 47. See Oxford Constitutions of the World, "Constitution of the State of Kuwait: November 11" (1962), online: OCW <https://oxcon.ouplaw.com/display/10.1093/law:ocw/law-ocw-cd754.regGroup.1/law-ocw-cd754?rskey = PsZjOC&result = 1&prd = OCW>.

[126] Qatar, Constitution of the State of Qatar, Art. 53. See Oxford Constitutions of the World, "Constitution of the State of Qatar: 29 April 2003" (n.d.), online: OCW <https://oxcon.ouplaw.com/display/10.1093/law:ocw/law-ocw-cd780.regGroup.1/law-ocw-cd780?rskey = UEVnGQ&result = 8&prd = OCW>.

[127] Qatar, Law on National Service, 2014, No. 5/2014.

[128] Turkey, Military Law, 1927, Law No. 1111/1927, Art. 1.

[129] Turkey, Constitution of the Republic of Türkiye, Art. 72. See Constitute Project "Turkey 1982 (rev. 2017)" (n.d.), online: CP <https://perma.cc/B68D-86Y3>.

[130] *Ibid.*, at Art. 13.

[131] "Country policy and information note: military service, Turkey", *United Kingdom Publications* (2023), online: United Kingdom Publications: <https://perma.cc/AQ5U-PHMJ>. See also *Savda v. Turkey*, ECtHR, 42730/05, no. 12062012, Merits and Just Satisfaction, June 2012.

[132] Kazakhstan, Constitution of the Republic of Kazakhstan, 1995 (as amended in 1998). See Oxford Constitutions of the World, "Constitution of the Republic of Kazakhstan: 30 August 1995" (n.d.), online: OCW <https://oxcon.ouplaw.com/display/10.1093/law:ocw/cd752-H1998.regGroup.1/law-ocw-cd752-H1998?rskey = EsOoWL&result = 1&prd = OCW>.

[133] Kazakhstan, Military Duty and Military Service Act (1992, as amended in 2005), Art. 27; International Fellowship of Reconciliation, "Submission to the 115th Session of the Human Rights Committee for the Attention of the Country Report Task Force on Kazakhstan: Military Service, Conscientious Objection and Related Issues" (2015), online: IFR <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key = 7V6eNxUaYUyrXKr3/TFgbh1ZQCTmCPfObJ5iGGXRDTI1hph57 + UPkgZ8DwWkucd2>.

[134] U.S. Department of State, "2022 Report on International Religious Freedom: Kazakhstan" (2022), online: U.S. Department of State <https://perma.cc/LA8N-K95S>.

[135] Kyrgyz Republic, Law About general conscription of citizens of the Kyrgyz Republic about military and alternative services, 2009 (as amended in 2023), No. 43, Art. 3.

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providing that citizens have the "right and duty to defend the Motherland".[136] Certain exemptions exist for health reasons or marital status, and there is an alternative service for recognized religious groups.[137] The grounds for religious exemption do not constitute the recognition of an individual right,[138] and men have been prosecuted for objecting to service.[139]

Mongolia imposes mandatory male military service as laid down in its constitution.[140] The Law on Military Duty of Mongolian Citizens and the Legal Status of Military Personnel specifies an alternative service for "religious, moral, ethnic and other types of reasons determined by law".[141] Yet, the HRCommittee and religious organizations such as the JWs criticize this alternative service, claiming that as it is "placed under the supervision and control of the military", and that as such, it "cannot be considered as a genuine alternative civilian service of a non-punitive nature".[142]

There is mandatory male military service in Tajikistan, which flows from the constitution, which states that the country's defence is the "sacred duty of a citizen".[143] Although there are possibilities to escape service, for example, paying a fine,[144] conscientious objectors cannot avoid service. Likewise, the Turkmen Constitution provides that participating in the country's defence is the "sacred duty" of all citizens, while military service is mandatory for men.[145] Although an alternative service law was proposed in 2013, there is no indication that it will formally be adopted.[146] Objectors have been jailed in the past.[147]

Finally, the Uzbek constitution provides for the obligation to perform male military or alternative service "in the procedure prescribed by law".[148] The Uzbek Law on Universal Military Service provides universal military service, although, as in some other

[136] Kyrgyz Republic, Constitution of the Kyrgyz Republic (1993, as amended in 1998), Art. 24. See Oxford Constitutions of the World, "Constitution of the Kyrgyz Republic: 5 May 1993" (n.d.), online: OCW <https://oxcon.ouplaw.com/display/10.1093/law:ocw/law-ocw-cd755-H1998.regGroup.1/law-ocw-cd755-H1998?rskey = 3Gg1go&result = 1&prd = OCW>.

[137] Kyrgyz Republic, Law About general conscription of citizens of the Kyrgyz Republic about military and alternative services, Art. 1.

[138] International Fellowship of Reconciliation and Conscience and Peace Tax International, "Submission to the 108th Session of the Human Rights Committee for the Attention of the Country Report Task Force on Kyrgyzstan" (2013), online: IFR <https://perma.cc/SKG3-ZPL9>.

[139] UNHCHR, *supra* note 16 at 58.

[140] Mongolia, Constitution of Mongolia (1992, as amended in 2001), Art. 17(4). See Oxford Constitutions of the World, "Constitution of Mongolia: 13 January 1992" (n.d.), online: OCW <https://oxcon.ouplaw.com/display/10.1093/law:ocw/law-ocw-cd1107-H1992.regGroup.1/law-ocw-cd1107-H1992?rskey = FUrufq&result = 1&prd = OCW>.

[141] Mongolia, Law on Military Duty of Mongolian Citizens and the Legal Status of Military Personnel (1992), Art. 12(5). See International Labour Organization, "Compulsory Military Service and Conscript Labour in Mongolia" (2016), online: ILO www.ilo.org/sites/default/files/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-beijing/documents/publication/wcms_497515.pdf.

[142] Human Rights Committee, "Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee" (2011), online: HRC <https://perma.cc/C8PT-FFKT>.

[143] Tajikistan, Constitution of the Republic of Tajikistan (1994, as amended in 2016), Art 43. See Constitute Project, "Tajikistan 1994 (rev. 2016)" (n.d.), online: CP <https://perma.cc/AT8T-D483>.

[144] U.S. Department of State, "2022 Report on International Religious Freedom: Tajikistan" (2022), online: U.S. Department of State <https://perma.cc/UZY2-JTXZ>.

[145] Turkmenistan, Constitution of Turkmenistan (1992, as amended in 2016), Art. 58. See Constitute Project, "Turkmenistan 2008 (rev. 2016)" (n.d.), online: CP www.constituteproject.org/constitution/Turkmenistan_2016.

[146] UNHCHR, *supra* note 107 at para. 34.

[147] UNHCHR, *supra* note 16 at para. 61; Felix CORLEY, "Tajikistan: Three and a Half Years' Jail for 'Illegal' Conscientious Objection" *War Resisters' International* (2021), online: WRI <https://perma.cc/73DM-RRML>.

[148] Uzbekistan, Constitution of the Republic of Uzbekistan, 1992 (as amended in 2011), Art 52. See Constitute Project, "Uzbekistan 1992 (rev. 2011)" (n.d.), online: CP <https://perma.cc/TU7P-UYWX>.

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Central Asian countries, citizens belonging to "registered religious organizations" can be exempted.[149] As implemented, the alternative service means serving in the military without bearing weapons.[150] Therefore, as in Kazakhstan and Kyrgyzstan, there is no explicit legal recognition of a right to conscientious objection, as this possibility is only afforded to members of recognized religious groups.[151]

*

The effective practice of many Asian countries still imposing military service or the possibility thereof already shows there is no converging subsequent practice in relation to conscientious objection. Indeed, a large share of countries who are still imposing military service without providing for a conscientious exemption ground are Asian.[152] Out of those, none except South Korea and Taiwan[153] have a genuine alternative service in place for conscientious objectors. Mongolia also offers alternative services, which remain, in essence, military services without an obligation to bear weapons as those services are under the military's control. Likewise, the service implemented in South Korea remains subject to harsh criticism. Kazakhstan, Kyrgyzstan, and Uzbekistan also offer the possibility to benefit from an exemption for members of recognized religious groups, but this should not be conflated with a recognition of a right to conscientious objection as non-government-authorized beliefs cannot give rise to an exemption.

Although in some cases, conscription is not strictly applied or is by draft (therefore not applying to all men), for example, in China or Thailand, and while some of those countries may provide exemptions for other purposes, for example, studying, being a family's sole breadwinner, or medical conditions, what matters for the analysis is whether a ground for conscientious objection exists. It must also be noted that other Asian countries, such as Japan, do not impose any military obligations.

Finally, it is important to recall that most domestic laws analysed refer to the importance of treating their citizens equally *vis-à-vis* the obligation to perform military service *regardless* of their religion, social status, or beliefs, such as in Cambodia, China, Laos, or Vietnam.

(c) Declaratory Asian state practice: In addition to the above-mentioned effective practice, declaratory practice is also relevant. In 2002, sixteen African and Asian states[154] – all parties to the ICCPR except for Myanmar and Singapore – recalled they did not "recognize the universal applicability of conscientious objection, and therefore dissociate[d]" themselves from a 2002 draft HRCommission resolution on conscientious objection. They deemed that

[149] International Fellowship of Reconciliation, "Submission to the 128th Session of the Human Rights Committee: Uzbekistan, Military Service, Conscientious Objection and Related Issues" (2020), online: IFR <https://perma.cc/Y3GF-6D6P>.

[150] Immigration and Refugee Board of Canada, "Uzbekistan: Alternatives to military service, whether conscientious objection is recognized" (2008), online: IRBC <https://perma.cc/6K85-A3BY>.

[151] International Fellowship of Reconciliation, *supra* note 149.

[152] For instance, see the list provided by Amnesty International, which, although incomplete, is insightful. See Amnesty International, "The Right to Conscientious Objection to Military Service Amicus Curiae Opinion Submitted to the Constitutional Court of Korea" (2014), online Amnesty International <https://perma.cc/335G-FVHK> at 33–4.

[153] Taiwan is not an ICCPR party, although it declared itself bound by it. See Yu-Jie CHEN, "Isolated But Not Oblivious: Taiwan's Acceptance of the Two Major Human Rights Covenants" in Jerome Alan COHEN, William P. ALFORD and Chang-fa LO, eds., *Taiwan and International Human Rights: A Story of Transformation* (New York: Springer 2019).

[154] Bangladesh, Botswana, China, Egypt, Eritrea, Iran, Iraq, Lebanon, Myanmar, Rwanda, Singapore, Sudan, Syria, Tanzania, Thailand, and Vietnam. See the Declaration of Singapore et al, *supra* note 21.

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allowing such an exemption ground would "compromise the concept of collective responsibility for national defence, undermine national values and breach the principle of equal application of the law".[155]

Likewise, the lines of defence adduced by states before the HRCommittee are relevant declaratory practice. For instance, Turkey argued that conscientious objection could not be implied from the ICCPR and that those implying such a right were, in fact, committing an "abuse of right".[156] While agreeing that the ICCPR could evolve, Turkey held that any interpretation would need to respect the "letter and spirit of the treaty" and the parties' intention.[157] According to Turkey, states would need to amend the ICCPR to include protection for conscientious objectors.[158] Turkey, like other states, insisted on the importance of formal equality between citizens and between rights by reaffirming that the right to freedom of conscience "cannot be valued above the duty of military service" and the principle of non-discrimination laid down in its constitution.[159]

Similarly, in 2012, South Korea, although it recently implemented an alternative civilian service, reiterated it considered the decisions of the HRCommittee which derived a right to conscientious objection from Article 18 ICCPR, to be "erroneous" as states negotiating the ICCPR "had expressed reservations concerning" the inclusion of such a right.[160] Korea also harshly criticized the HRCommittee since the case *Min-Kyu Jeong et al. v. Korea* when the HRCommittee started considering that conscientious objection was part of an individual's *forum internum*, and thus a non-derogable right.[161] Korea even affirmed that it regretted that the HRCommittee's views were not settled when it acceded to ICCPR's Optional Protocol I in 1990,[162] which implied that it might not have become a party had this view been known. Korea, like Turkey, insisted on the "demand for equality in military service" among citizens and under its constitution, that is, formal equality among men who all need to perform military service regardless of their personal beliefs and the existence of a "national consensus" on the question.[163]

Likewise, before the HRCommittee, Turkmenistan insisted on the importance of military duty as a "sacred duty of every citizen", including conscription "for male citizens of Turkmenistan".[164] Finally, Kuwait, despite calls from the HRCommittee[165] to adopt legislation recognizing conscientious objection, chose to maintain its military service as such. In its third periodic report, Kuwait reiterated that it did not consider conscientious objection a right while insisting on its right to defend itself and on self-determination rights for refusing to allow conscientious objection.[166]

[155] *Ibid.*

[156] Human Rights Committee, *Atasoy and Sarkut v. Turkey*, 19 June 2012, Communications No, 1853–1854/2008 at paras. 7.4–7.15.

[157] *Ibid.*

[158] *Ibid.*

[159] *Ibid.*

[160] Human Rights Committee, *Young-kwan Kim et al v. Republic of Korea*, 15 October 2014, Communication Nos. 2179/2012 at paras. 4.1–4.2.

[161] *Ibid.*

[162] Human Rights Committee, *Min-Kyu Jeong et al v. Republic of Korea*, 24 March 2011, Communications Nos. 1642–1741/2007 para. 4.8.

[163] *Yoon v. Korea, supra* note 17 at paras. 4.5, 6.5.

[164] Human Rights Committee, *Ahmet Hudaybergenov v. Turkmenistan*, 29 October 2015, Communication No. 2222/2012 at para. 4.

[165] Human Rights Committee, "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant", Kuwait (2016), online: HRC <https://Perma.Cc/UWY2-J9FG>.

[166] *Ibid.*, at 20.

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(d) Practice in Europe, other western states, the Americas and Africa: While most countries with mandatory military service do not recognize conscientious objection, there is widespread support for such a right within the West.[167] In particular, in Europe, the ECtHR began to imply a right to conscientious objection in 2011 in *Bayatyan v. Armenia*,[168] as part of one's *forum externum*, which enables states to impose restrictions on this implied right, in contradiction with the HRCommittee's recent approach. In addition, six South American countries have recognized conscientious objection.[169]

Outside of Europe and the Americas, only seven countries have recognized conscientious objection: Angola, Armenia, Cape Verde, Georgia, North Macedonia, the Marshall Islands, and Mozambique.[170] However, it must be noted that in most countries, that is, 88 countries, including most European and American countries recognizing conscientious objection, no military service is in place.[171]

Moreover, 11 African ICCPR parties have laws providing for compulsory military service without recognizing conscientious objection.[172] In some countries like Morocco, military service has been re-established as recently as 2019.[173] In addition, despite some Latin American countries recognizing conscientious objection, the Inter-American Commission on Human Rights noted in 2005 that the Inter-American Convention on Human Rights did not require states to provide for a conscientious objection exemption ground.[174]

Regardless of such converging Western practice, as seen above, the threshold for subsequent practice is virtual unanimity among parties. Although this portrait is not exhaustive, the number of countries included in the analysis suffices to reveal Asian practice, and incidentally African practice, that globally contradicts the pronouncements of the HRCouncil and HRCommittee, which in turn appear to be essentially supported by Western states which for the most part do not impose military service.

2. Is there a customary rule of international law supporting a right to conscientious objection?

Subsequent ICCPR practice is not the only way the ICCPR's meaning could evolve. In addition, other applicable IL rules between the parties can be factored in to assess whether Article 18 ICCPR now encompasses a right to conscientious objection. The number of ICCPR parties being consequent,[175] CIL would likely be the only corpus of law applicable in the relations between *all* parties.

[167] Most countries are Western European and Other States and Eastern European States as per the UN classification: Albania, Australia, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Moldova, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and the United States. See Amnesty International, *supra* note 152 at 29–30.

[168] *Bayatyan v. Armenia*, ECtHR, 23459/03, No 772011, July 2011.

[169] Argentina, Brazil, Ecuador, Guatemala, and Paraguay. See Amnesty International, *supra* note 152 at 29–30.

[170] Although Amnesty International lists countries that have limited religious exemption grounds, some did not explicitly recognize a right to conscientious objection, and in some instances, only members of certain religious groups can be exempted from military service. In this article, Uzbekistan and Kyrgyzstan have not been included as countries recognizing conscientious objection for this reason. The same is true for Belarus, whose constitution opens the door to alternative service "as provided by law" but, *in fine*, does not provide for alternative service. Similarly, Ukraine, in peace times, has a *de jure* exemption ground for religious objectors, but these are not available for non-religious beliefs. See UNHCHR, *supra* note 107 at para. 35.

[171] Amnesty International, *supra* note 152 at 33, footnote 48.

[172] Algeria, Benin, Egypt, Eritrea, Madagascar, Mali, Morocco, Sudan, Tunisia, Togo, and Yemen. See *ibid*., at 33–4.

[173] Amnesty International, "Les droits humains au Moyen-Orient et en Afrique du Nord", online: Amnesty International <https://perma.cc/4SHA-FEFH>.

[174] *Sahli Vera et al. v. Chile,* [2005] Inter-American Commission on Human Rights Report No. 43/05, Case 12,129, Merits.

[175] 167 parties in July 2024.

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For a CIL norm to arise, unanimity among states is not required, but an international consensus is, that is to say, there must be a large and *representative* number of states that follow a specific practice.[176] The ILC, in its conclusions on *Identification of Customary International Law* recalled that all states need not follow a practice, which rather needs to be "sufficiently widespread and representative as well as consistent".[177] Still, an appraisal of state practice must include the interests of specially affected states.[178] If specially affected states, *in casu* states imposing military obligations, do not participate in or reject a particular practice, it cannot become *general* CIL.[179] Nonetheless, such practice could still give rise to a *particular* or *regional* CIL among fewer states.[180]

However, even in cases where the international practice is considered "abundant and consistent", the ICJ adopted a cautious approach before declaring that such a practice has attained customary status, since corresponding *opinio juris* must also be established.[181] The threshold for CIL to exist, although lower than for subsequent practice, thus remains high as *opinio juris* needs to be evinced alongside practice. For instance, some countries that recently adopted alternative services did so following significant pressure from Western NGOs and religious organizations, such as South Korea, or Kazakhstan, which offer the possibility of an alternative service for members of registered religious organizations. Accordingly, it would be essential to assess whether a party's practice has been adopted because of the conviction it is the law or rather "for reasons of convenience or expediency".[182]

In casu, as seen in the previous section, the adverse practice of more than 15 Asian and almost as many African states would suffice to show no rule of CIL has arisen. Still, when assessing CIL, the practice of three non-ICCPR parties is also relevant. For instance, Singapore provides no grounds for conscientious objection under its *Enlistment Act*.[183] It unvaryingly held that the HRCouncil's position on conscientious objection went "beyond what is prescribed in international law and applicable human rights instruments". It reiterated that national defence is a "fundamental sovereign right under international law" while affirming that protecting its sovereignty is "only viable under the principle of universality … regardless of race or religion".[184] This country also spearheaded the 2002 declaration mentioned above,[185] holding that "allowing individuals to avoid military service or choose alternative forms is unfair to those who serve".[186] Likewise, the United Arab Emirates law

[176] Remiro Brotóns and others, *supra* note 87 at 505; Kohen, *supra* note 80 at 96. In addition, in the *North Sea Continental Shelf* case, the ICJ said the requirement had to be "both extensive and virtually uniform" while the Chamber in the Gulf of Maine case held that it had to be "sufficiently extensive and convincing". See *North Sea Continental Shelf*, [1969] I.C.J. Rep. 3 at 74; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, [1984] I.C.J. Rep. 305 at 111.

[177] International Law Commission, *supra* note 54.

[178] Maurice H. MENDELSON, *The Formation of Customary International Law* (The Hague: RCADI, 1998), 219–20. See also R.R. BAXTER, *Treaties and Custom* (The Hague: RCADI, 1970), 66.

[179] *North Sea Continental Shelf*, [1969] I.C.J. Rep. 3 at 73. See Kohen, supra note 80 at 89.

[180] Mendelson, *supra* note 178 at 226.

[181] Mathias FORTEAU, Alina MIRON and Alain PELLET, *Droit international public*, 9th ed. (Paris: LGDJ, 2022) no. 315; Kohen, *supra* note 80 at 110. For instance, the ICJ in *Diallo* did not recognize shareholder protection by substitution despite an "abundant and consistent" practice.

[182] Buga, *supra* note 27. Buga refers to the dissenting Opinion of Judge Winiarski, see *Certain Expenses Advisory Opinion*, Dissenting Opinion of President Winiarski, [1962] I.C.J. Rep. 227 at 232.

[183] Singapore, An Act to provide for the enlistment of persons in the armed forces of Singapore, the Singapore Police Force and the Singapore Civil Defence Force (1970, as amended in 2020).

[184] Singapore, "Singapore's Input to the Report of the High Commissioner for Human Rights on Conscientious Objection to Military Service at HRC-50" (2022) online: Singapore <https://perma.cc/PH52-TF3V>. See also the following report, which refers to Singapore's positions, UNHCHR, *supra* note 107 at para. 11

[185] *Ibid*.

[186] *Ibid*.

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introduced mandatory military service for all men in 2017,[187] while Myanmar introduced military service in 2010.[188] Although exemption grounds exist in those countries, none exists for conscientious objectors.

Considering the practice of more than 20 Asian states – including those that adhered to the 2002 declaration – in addition to states elsewhere, it is clear that, on the one hand, there is no converging subsequent practice, which could lead to an evolution of the ICCPR's scope. On the other hand, practice is not sufficiently widespread, representative, and consistent to lead to the emergence of CIL.[189] Indeed, it must be recalled that "[r]esolute opposition to a customary rule by a solid group of States is anathema to the building of general consensus".[190]

What appears striking about conscientious objection is that although numerous Asian and African countries reject it, it most certainly is a *particular* Western custom. Indeed, custom need not be restricted to a specific region to be "particular" or even "regional" *largo sensu*,[191] i.e., applicable between some like-minded states, in this case Western states.

Against this backdrop, HRCouncil and HRCommittee pronouncements regarding conscientious objection might increase the mistrust and even the defiance of Global South countries against the international human rights machinery while threatening the political viability of the ICCPR. Indeed, a treaty's political viability "depend on the recognition by the parties that the treaty continues to be the embodiment of their will".[192]

II. A genealogy of conscientious objection: the radicalization of a concept

This part aims to explain the genealogy of conscientious objection and what might be behind the turn taken by the HRCouncil and HRCommittee, which led them to declare conscientious objection a right despite strenuous opposition beyond the West.

The first (A) section outlines the shift within the HRCommittee from the non-recognition of conscientious objection to an understanding of conscientious objection as a direct emanation of rights (*forum internum*). The second (B) section discusses how the incremental radicalization of conscientious objection might be attributable to the development of a Western and Anglosphere-like[193] conceptualization of human rights, chiefly favouring individuals' rights over those of the community.

A. The incremental shift from an absence of rights to non-derogable rights

As discussed above, the traditional approach among states recognizing conscientious objection is to consider it a protected manifestation (*forum externum)* of one's right. As a reminder, the HRCommittee considered that Article 18 ICCPR excluded conscientious objection until

[187] UAE, Law Concerning the National Military Service and Reserve Force, Federal law 6, (2014), Art 44.

[188] Myanmar, People's Military Service Law, Law no, 27/2010. See Kelly NG, "Myanmar: Young People Attempt to Flee Ahead of Conscription Order" *BBC News* (2024), online: BBC News <https://perma.cc/U3XP-MCDF>.

[189] International Law Commission, *supra* note 54 at Conclusion 8.

[190] Dinstein, *supra* 81 at 282. CIL must be understood as the "*conviction juridique globale de la communauté internationale*", which is unmistakably missing in this case. See Peter HAGGENMACHER, "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour Internationale" (1986) RGDIP 101.

[191] Mendelson, *supra* 178 at 215–16.

[192] Nolte, *supra* note 72 at 221.

[193] This expression encompasses all the "core" Anglosphere countries: Australia, English-Speaking Canada, New Zealand, the United Kingdom, and the United States.

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the 1990s.[194] Then, between 1993 and 2010, it began considering it a protected manifestation (*forum externum*) under Article 18 ICCPR.[195] Finally, the HRCommittee adopted an incrementally activist understanding from 2011 onwards, as it not only declared conscientious objection to be a protected right under the ICCPR as in *Yoon v. Korea*, but since the cases *Jeong v. Korea*[196] and *Atasoy v. Turkey*,[197] the HRCommittee began to consider conscientious objection to be part of one's *forum internum*, making it a non-derogable right.[198] In fact, the HRCommittee "has fundamentally changed its position with regard to conscientious objection cases over three decades".[199]

It must also be noted that the shift from *externum* to *internum* has been contentious within the HRCommittee itself. On the one hand, this shift toward making conscientious objection a non-derogable right, even in the event of a war, has been advocated for by some HRCommittee members, for instance, Solari-Yrigoyen in *Yoon v. Korea* or Rodley, Thelin and Flinterman in *Atasoy v. Turkey.*[200] On the other hand, some HRCommittee members, such as Wedgwood, opposed the idea that conscientious objection was covered by Article 18.[201] Others have maintained that a right exists but remains subject to derogations under Article 18(3) ICCPR. For instance, Iwasawa, Neuman, and O'Flaherty held in *Jeong v. Korea* that the HRCommittee should still examine whether a state adduced sufficient evidence to prove the necessity of a measure restricting conscientious objection.[202] Likewise, they held in *Atasoy v. Turkey* that the HRCommittee had not provided "any convincing reason for treating conscientious objection … as if it were an instance of the absolutely protected right to hold a belief".[203]

At any rate, this shift is surprising given adverse practice in the non-Western world. What is more, within the West, where conscientious objection has been recognized, conscientious objection is mainly conceived as the manifestation of a right (*forum externum*). For instance, the ECtHR views conscientious objection to military service "as an external manifestation of an individual's religion or belief".[204] Council of Europe Member states can, in principle, restrict conscientious objection by successfully invoking one of the permissible grounds under the European Convention on Human Rights.[205] In fact, in most Western countries, even in early conscientious objection recognizers,

[194] Human Rights Committee, *Järvinen v. Finland*, 16 March 1988, Communication No. 295/1988 [6.2]

[195] Bielefeldt, Ghanea and Wiener, *supra* note 17 at 266.

[196] *Jeong v. Korea, supra* note 17.

[197] *Atasoy v. Turkey, supra* note 156.

[198] Bielefeldt, Ghanea and Wiener, *supra* note 17 at 267–8. See also Dominic MCGOLDRICK "Thought, Expression, Association and Assembly" in Daniel MOECKLI, Sangeeta SHAH and Sandesh SIVAKUMARAN, eds., *International Human Rights Law* (Oxford: Oxford University Press, 2018) at 216.

[199] *Ibid*., at 269.

[200] *Yoon v. Korea, supra* note 16 at 12; *Atasoy v. Turkey, supra* note 156 at 15; Bielefeldt, Ghanea and Wiener, *supra* note 17 at 289–90.

[201] *Yoon v. Korea, supra* note 16 at 14.

[202] *Jeong v. Korea, supra* note 17 at 25.

[203] *Atasoy v. Turkey, supra* note 156 at 13.

[204] *Bayatyan v. Armenia, supra* note 168. Even in the case of conscientious objection in relation to abortion (for medical personnel), the ECtHR considered that refusing to perform an abortion is protected, but only as a manifestation of one's beliefs under *forum externum*. It is thus subject to limitations. For instance, the ECtHR recently decided that the absence of a conscientious objection exception for Swedish medical personnel was justified under the ECHR. See *Grimmark v. Sweden*, ECtHR, 43726/17, No. 1122020, February 2020.

[205] The ECtHR recognized for the first time conscientious objection to military service be a protected *manifestation* of religious belief in *Bayatyan v. Armenia*, in 2011. See also *Bayatyan v. Armenia, supra* note 167; UNHCHR, *supra* note 106, para. 13; Özgür Heval ÇINAR, *Conscientious Objection to Military Service in International Human Rights Law* (New York: Palgrave Macmillan US, 2013) at 158.

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such as Canada and the United States,[206] the manifestations of religious beliefs can always be limited.[207] To give a further example, Ukraine, which recognizes conscientious objection in its constitution, decided to outlaw it following the war of aggression launched by Russia in 2022 on account of the need to ensure its national security and independence.[208]

B. A western conception of human rights which overly favours the individual over the community

Considering the above, one wonders what might explain the HRCommittee's and HRCouncil's readiness to affirm conscientious objection is now a protected right, nay a non-derogable one? This appears to be attributable, first, to the fact that conscientious objection has been developed in the West and, second, to an increasingly Western understanding of human rights,[209] and its *Americanization* – conceived as a Westernization subset – in particular. To explain the increasing disconnect between the HRCommittee, HRCouncil, and state practice, this section extends beyond conscientious objection and relies on a broader framework by referring to the protection of the right to freedom of religion. This analytical framework is particularly relevant. On the one hand, most cases of conscientious objection are based on religious freedom grounds. On the other, the debates between different conceptualizations of human rights often relates to the extent of religious freedom, which appears to be a conceptual benchmark *par excellence*.

An individual-centric, or individualistic, conceptualization favours individual freedoms and limits the restrictions or measures that can be undertaken by the community while a collective-rights, or *democratic*, conceptualization gives more leeway to the collective to take measures that have a limiting effect on individual freedoms, in the name of the community's common good. On the international plane, the Western conceptualization is

[206] The US has not applied its drafting law since 1973, although the relevant provisions, 50 U.S. Code Chapter 49 – Military Selective Service, still remain in force. Canada has not implemented conscription since World War II while military service has never been mandatory during peace times. Both countries recognize conscientious objection to some extent.

[207] While neither country does currently impose military service or conscription, under their domestic legal system there are no absolute rights in relation to manifestations, even in relation to religious freedoms, although limitations on religious manifestations are rarely upheld under the domestic law of those two countries. In the case of Canada see *Canadian Charter of Rights and Freedoms*, s. 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, art. 1. For a recent and concrete example in relation to a religious manifestation see *Montréal Gateway Terminals Partnership*, 2019 QCCA 1494, compare with *R. c. N.S.*, 2012 CSC 72, [2012] 3 R.C.S. 726. In the case of the US, see for instance *Goldman v. Weinberger*, 475 US Supreme Court, 503 (1986); *Reynolds v. United States*, 98 US Supreme Court 145 (1878). However, since the US Religious Freedom Restoration Act of 1993, the possibility to restrict religious freedom has been further circumscribed. See 107 Stat. 1488, Religious Freedom Restoration Act, which "[p]rohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest".

[208] Ukraine, Constitution of Ukraine, (1996), Art. 35. See Constitute Project, "Ukraine 1996 (rev. 2016)" (n.d.), online: CP <https://perma.cc/PC8W-58QJ>; President of Ukraine, "On the Imposition of Martial Law in Ukraine", Decree No 64/2022, (2022), online: President of Ukraine <https://perma.cc/39GV-AVWQ>. See also European Bureau for Conscientious Objection, "Ukraine", (n.d.) online: EB CO <https://perma.cc/5K4J-T2UB>.

[209] For instance, Dupuy holds that individuals, depending on their cultural system and values, will understand law and its content in very different ways. See Dupuy, *supra* note 7 at 599.

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individual-centric while the Asian conceptualization favours the collective over the individual and insists on the idea that individuals have duties towards their community.[210] One could also think of Africa, since the African Charter on Human and Peoples' Rights lays emphasis on the rights of peoples and on the duties of individuals towards society.[211] Of course, this is a spectrum. Under both conceptualizations, individuals are endowed with rights which can be limited under certain conditions in the name of the common good. This question is one of degree.

Historically, conscientious objection was chiefly developed in the UK and US, especially *vis-à-vis* Quakers[212] or Mennonites in the Netherlands.[213] The bulk of the conscientious objection modern movement started within the Anglosphere.[214] Then, this idea percolated through the rest of Europe as the danger of war appeared increasingly distant. This change was incremental; for instance, until the end of the Cold War, European states, including socialist ones, maintained a "long-standing tradition of conscription", a practice largely absent within the Anglosphere.[215]

Notwithstanding, the HRCommittee now portrays conscientious objection as a right which cannot suffer any restriction. This might be explained by the disproportionate influence of the Anglosphere and the ensuing *Americanization* of human rights, favouring the individual over the collective on the international plane, especially in relation to religious freedoms.[216] Although US law permits to restrict religious manifestations, the US is likely the country that has the broadest religious freedom protection in the world, including in relation to *manifestations*. Such a feature of the American conception has been attributed to the "widespread religiosity" in the US, making it "more open to accepting manifestations of religion in the public sphere".[217] For instance, the 1993 Religious Freedom

[210] See for instance, Kawamura AKIO, "Human Rights and the 'Asian' Perspective" *Hurights Osaka* (December 1997), online: Hurights Osaka <https://perma.cc/D5R5-DMYD>; Bilahari KAUSIKAN, "An Asian Approach to Human Rights" (1995) 89 Proceedings of the Annual Meeting (American Society of International Law) 146 at 147–50; Asoka D.E. ZGUNAWARDANA, "An Asian Perspective of Human Rights" (1994) Singapore Journal of Legal Studies 521; Daniel PHILPOTT, "Religious Freedom and the Undoing of the Westphalian State" (2004) Michigan Journal of International Law 981. One could also think of the 1993 Bangkok declaration, see UNESCO, "The Bangkok Declaration: Regional Meeting for Asia, 2 April 1993" (1994) online: UNESCO <https://unesdoc.unesco.org/ark:/48223/pf0000096120.locale = fr>.

[211] *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986), Arts. 27–9.

[212] The Militia Ballot Act of 1757 granted an exception for Quakers in the United Kingdom, see Constance BRAITHWAITE, "Legal Problems of Conscientious Objection to Various Compulsions Under British Law: Address to a Meeting of the Friends' Historical Society" (1968), online: SAS Open Journals <https://perma.cc/G3X6-5Q3K>. In relation to the United States, see Jr Witte JOHN, *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition* (Cambridge: Cambridge University Press 2021), 140–3, 147; Antoine HOBZA, *Questions de droit international concernant les religions* (The Hague: RCADI, 1924), 378. According to John, the religious protection and guarantees, including against military conscription were at "the heart of the American experiment" and remain so today. According to Hobza, the ideal of freedom of conscience was born in the seventeenth century in North America and has been later developed in Europe. For a brief historical record in the United States, see also *United States v. Seeger*, 380 U.S. 163 (1965), at 187

[213] Office of the United Nations High Commissioner for Human Rights, *supra* note 14 at 2.

[214] Australia, Canada, the United Kingdom and the United States. See *ibid*.

[215] Bebler, *supra* note 97 at 103.

[216] Dominique DECHERF, "Les États-Unis au secours des «droits de l'homme religieux»" (2002) 15 Critique internationale 15, 18; Philpott, *supra* note 210 at 987, 995–8.

[217] This law aimed to overrule a US Supreme Court decision, *Employment Division v. Smith*, which held that a law infringing on religious rights was legal, even if mandating the obligation for a person to act contrary to his or her beliefs, when a given law was not specifically directed against religious practice. For further explanations, see Ioanna TOURKOCHORITI, "The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the USA" (2012) 20 William & Mary Bill of Rights Journal 799, 851–2.

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Restoration Act imposed a very stringent test for any limitation on religious manifestations to be legal.[218] The US is also home to a particularly individualistic conception of human rights, which differs in essence from the conception introduced in the ICCPR in the 1960s, which had to be palatable to countries with very different social and economic systems.[219]

Over the past years, an increasingly American understanding of human rights has been gaining ground at the level of human rights bodies.[220] This incremental shift towards an Anglosphere-like conception of religious freedom, freedom of thought, and human rights might be attributable to the media or human rights defence groups that rely heavily on American law firms and doctrine.[221]

However, as hinted at above, the Western approach is far from universal. In fact, since their independence, Afro-Asian nations have emphasized collective rights and duties, which have been referred to in numerous international instruments, including the ICCPR, whose preamble refers to duties of individuals towards "other individuals and to the community to which" one belongs.[222] According to Onuma, many in Asia criticize the Western conception of human rights for its "excessive legalism and individual-centrism"[223] and the fact that often what is perceived as universal is not universal but, in fact, Western.[224] While the divide between the individual and the collectivity should not be exaggerated (both are intertwined), it remains true that Afro-Asian intellectuals emphasize collective rights more than Westerners do.[225]

Even in the West, the prevalence of an overly individualistic conception of human rights remains relatively recent and debated. For instance, although the European conception of human rights is rather individualistic, it is so to a lesser degree than the Anglosphere's conception, as the former factors in collective rights and aspirations to a greater extent.[226] In continental Europe, the notion of citizenship takes precedence over individuals to a greater extent than it does in the English-speaking world. In this more collectivist conception, there can be freedom through state action as a collective tool, while in the American conceptualization, freedom is obtained by constraining the state.[227] One could think of how human rights are conceived in the French and American legal systems,[228] which originated in different settings and took different directions as the French system favours a stronger

[218] See 107 Stat. 1488 – Religious Freedom Restoration Act. See also Tourkochoriti, *supra* note 217 at 816.

[219] Louis HENKIN, "Rights: American and Human" (1979) 79 Columbia Law Review 405 at 408–9, 415; Roseline LETTERON, "L'universalité des droits de l'homme: apparences et réalités" (2001) II Annuaire français de relations internationales 145 at 163–4. For a defence of this individualistic conception of human rights see William Bradford REYNOLDS, "Individualism vs. Group Rights: The Legacy of Brown" (1984) 93 The Yale Law Journal 995. See also Roseline LETTERON, "Le lobbying Anglo-Saxon contre la laïcité française" (2013) Libertés, libertés chéries, online: LC <https://perma.cc/HL3Z-U64T>.

[220] Roseline LETTERON, "Modèle français ou américain : les conceptions de la laïcité en Europe" *Vie publique* (2019), online: Vie Publique <https://perma.cc/LDR2-2JR2>. It must be noted that some Europeans also promote what could be labelled an absolutist vision of human rights, e.g., vis-à-vis the abolition of the distinction between *forum internum* and *externum*. See for instance Danièle LOCHAK, "For intérieur et liberté de conscience", in *Le for intérieur* (Paris: Presses Universitaires de France, 1994), 186.

[221] Letteron, *supra* note 220.

[222] Onuma, *supra* note 7 at 78.

[223] *Ibid*., at 27.

[224] *Ibid*., at 47.

[225] *Ibid*., at 59.

[226] *Ibid*., at 38, 59; Onuma, *supra* note 3 at 287, 384. See also Letteron, *supra* note 220 at 153.

[227] Tourkochoriti, *supra* note 217 at 794, 836; Henkin, *supra* note 219 at 410–11.

[228] That is to say, two conflicting universalisms, see Amandine BARB, "Incompréhensions transatlantiques: le discours américain sur la laïcité française" (2014) 23 Politique américaine 9 at 10.

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collective-rights approach than the US system.[229] As regards religious rights in the US, the emphasis is placed on how to "maximiz[e] the rights of religious actors" while the police powers of the state in regulating society will be chief concerns in France[230] and elsewhere as appears from the above-mentioned Asian practice. Indeed, whether it be through their domestic laws or statements before the international human rights machinery, many Asian states insist on the importance of mandatory service for all their citizens regardless of their origin, religion, or beliefs and on the collective dimension of such an obligation, including in relation to self-determination.

In this instance, given the lack of converging subsequent practice beyond, and even within the West (in relation to *forum internum*), the pronouncements of the HRCouncil and HRCommittee could be explained by the fact that their members adopted a more individualistic perspective on human rights which is prevalent within the West and the Anglosphere in particular. As such, considering conscientious objection a protected right at the international level seems to be an example of Western copy-pasting, that is, considering that a Western reality is universal.[231]

The fact that individual-centrism and rights absolutism[232] are increasingly influential on the international plane is worrying, since these conceptions have been rejected not only by many Afro-Asian nations, whose perspective puts greater emphasis on the community, but also by many peoples within the Western world.

III. Conclusion: a call for a truly transcivilizational international law

As seen above, the HRCommittee and UN organs started affirming conscientious objection could be read into the ICCPR as early as 1989 in the case of the HRCommission and 1993 in the case of the HRCommittee. However, the first part (I) of this article showed that such an affirmation was not in line with contemporary international law. The second (II) dealt with the radicalization of HRCouncil and HRCommittee's understanding of conscientious objection and endeavoured to explain what might be the reason they arrived at this understanding.

The first section of part I showed that Article 18 ICCPR's original meaning did not encompass conscientious objection as a protected right, including by analyzing the ICCPR's preparatory works. The second section concluded that Article 18 ICCPR, and incidentally

[229] For instance, an American understanding leads some thinkers and politicians to attack non-American conceptions, e.g., French conceptions (as well as Asian conceptions) as illegal, illiberal or discriminatory. As seen above, at any rate, legal restrictions are possible on religious rights, but remain truly exceptional in the Anglo-American world. It has been argued that laws which limit religious manifestations in Europe, which have been upheld by the ECtHR, would be unconstitutional in the US. See Tourkochoriti, *supra* note 217 at 820, 850–2; Barb, *supra* note 228 at 11, 18, 23; Brian KNOWLTON, "Bush Administration Intervenes to Allow Muslim Schoolgirl to Wear Scarf: U.S. Takes Opposite Tack from France" *New York Times* (2004), online: NYT www.nytimes.com/2004/04/02/news/bush-administration-intervenes-to-allow-muslim-schoolgirl-to-wear-scarf.html; Neville COX, "Pejorative Assertions, Human Rights Evaluation, and European Veiling Laws" (2022) 70 The American Journal of Comparative Law 695. In addition, France appears on the United States Commission on International Religious Freedom (USCIRF) – a bipartisan Democrat/Republican body – list among "Countries of Particular Concerns", i.e., countries outrageously violating religious rights, according to the United States. Likewise, The Office of International Religious Freedom, acting under the authority of the United States Department of State (the US foreign affairs ministry), often criticized France, chiefly for targeting sects, while the Americans consider sects must enjoy some protection in the name of religious freedom. See Letteron, *supra* note 220 at 153.

[230] Jeremy GUNN, "Religion and Law in France: Secularism, Separation, and State Intervention" (2009) 57 Drake Law Review 949 at 976.

[231] Onuma, *supra* note 3 at 218–19.

[232] On those two notions and their prevalence on the international plane see *ibid*., at 361, 382–7.

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Article 18 UDHR, could *in principle* evolve to encompass conscientious objection. However, for this conclusion to be warranted, sufficient practice would be needed to evince a societal consensus among the community of nations. This section thus analysed whether there was such consensus either in the form of subsequent practice under Article 31(3)(b) VCLT or in the form of customary international law under Article 31(3)(c) VCLT.

In relation to subsequent practice, the institutional practice of the HRCommission, HRCouncil, and HRCommittee was first analyzed to show that these organs and bodies' pronouncements do not constitute relevant subsequent practice given their limited membership or character as expert-bodies. Then, an analysis of effective state practice showed that more than 15 Asian states providing for military service *de jure* offer no exemptions on grounds of conscientious objection, ignoring calls from UN organs and ICCPR treaty bodies. In addition, the declaratory practice of such states matches their effective practice, including in relations to statements made before the HRCommittee. This adverse or contrary Asian practice is highly relevant as it is stable and consistent among specially affected states, that is, states that *de jure* provide for mandatory military service or the possibility thereof. In addition, many states have re-established military service in the past few years while not providing for a conscientious objection exemption ground or alternative service, showing there is no international consensus on this topical question. In addition, ICCPR parties, such as Turkey, are especially active in their opposition and take the time to – sometimes they are forced to do so – explain before those same bodies why they do not afford their population the opportunity to benefit from a conscientious objection exemption ground. The rationale offered by many Asian countries broadly refers to the importance of self-determination, collective interests, and non-discrimination, that is to say, there should be formal equality between citizens and no differentiated treatment for religious minorities in relation to compulsory service. Finally, this section addressed the practice of states beyond Asia, which evinced that the only civilization or region *largo sensu* which has embraced conscientious objection is the West. *In fine*, the sum of these practice sets demonstrates there is no converging subsequent practice that would meet Article 31 VCLT's threshold.

Then, this section addressed whether the ICCPR and UDHR have evolved through the emergence of new CIL. Against the backdrop of the above data, there is neither general practice nor *opinio juris* supporting a customary right to conscientious objection. In turn, a brief analysis of state practice beyond ICCPR parties, for example, Singapore, reinforced this conclusion. In total, more than 30 specially affected states oppose conscientious objection. However, a right to conscientious objection to military service appears to have attained the status of a *particular* custom within the West given the converging practice among Western states.

Factoring in the practice of Asian countries is of paramount importance on two grounds. On the one hand, Asia is one of the world's great civilizations, which must be subdivided into many sub-civilizations (as is the case in the West).[233] There cannot be CIL without converging Asian practice, especially if one adopts a perspective that considers the practice of countries with large populations carries significant weight.[234] In addition, among specially interested states which maintain *de jure* obligations to participate in mandatory military service, Asia is overrepresented.

The article's second part (II) addressed the material reasons that might explain why the interpretations of the HRCommission, HRCouncil and HRCommittee have been increasingly radical. This part's first section started by explaining the successive shifts within

[233] As indicated in the introduction, for instance, Onuma identified, four main civilizations in Asia, that is, the Confucian, the Buddhist, the Islamic and the Hindu civilizations. See *ibid*., at 136, 401.

[234] Mendelson, *supra* note 178 at 226–7.

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the HRCommittee which can be summarized as follows: there was no right to conscientious objection (1976–93), a right was deemed to exist (1993–2011), a right exists and is non-derogable (2011–now). Indeed, since 2011, the HRCommittee adopted an absolutist interpretation of human rights in relation to conscientious objection, which translates into considering conscientious objection as a right indissociable with individuals' *forum internum* and thus not subject to derogation.

The second section of this part endeavoured to explain the material reasons for this shift against the backdrop of largely adverse non-Western practice. The radical nature of these organs and bodies' interpretations appear to be attributable to the increased influence of Western, and in particular Anglosphere-like conceptualizations of human rights. On the one hand, the fact that the HRCommittee affirmed conscientious objection derives from the ICCPR despite adverse practice appears to be attributable to its Western-centrism. On the other hand, when adopting a more stringent understanding of conscientious objection by making it non-derogable, the HRCommittee adopted an utterly individualist understanding of human rights prevalent within the West and in the Anglosphere in particular.

This shift is especially worrying given that even within the Anglosphere, which has extremely high protection standards, conscientious objection remains a derogable right. In turn, this account shows the extent of the HRCommittee's absolutist conceptualization of the freedom of thought, conscience, and religion. This interpretation is unsubstantiated and appears to be attributable to the tendency to equate what is Western with what is universal.[235] Indeed, this absolutist reading ignores the practice of most countries whose perspectives and conceptions differ, e.g., continental European countries and Asian countries, which, to varying degrees, favour collective rights over individual rights to a greater extent than the Anglosphere's countries. For instance, in justifying compulsory military service, most Asian states insisted on the importance of treating their citizens equally and on the duties of individuals towards collectivity.

Absolutist readings endanger human rights as they might lower global adherence to the human rights regime and erode their protection.[236] The international human rights protection system should be international and reflect global realities. As such, the world should resist a steadily increasing Western and Anglosphere-borne understanding of human rights,[237] not because the Anglosphere's conceptualization is inherently flawed, but because it is not representative.

*

In sum, international law must truly be *international*, and even *transcivilizational* or *multicivilizational*, as Onuma and Chimni respectively put it.[238] One way to ensure this outcome is to apply the customary rules of interpretation reflected in Articles 31–3 VCLT and the ILC's methodology on CIL identification. In fact, a transcivilizational outcome will naturally be achieved if said rules are respected, as it would be impossible for a norm to become customary if there is strong opposition in one of the world's civilizational areas while the high VCLT subsequent practice threshold protects all state parties to a given treaty.

As such, to correctly interpret the ICCPR and the UDHR, one must adopt a transcivilizational interpretation of human rights, which "assumes the plural existence of value

[235] Onuma, *supra* note 3 at 218–19.

[236] Onuma for instance refers to the harm that is caused by "human rights inflation", i.e., the tendency to consider everything through the lenses of "rights". See *ibid*., at 361–2.

[237] Letteron, *supra* note 220 at 163.

[238] Onuma, *supra* note 7; Onuma, *supra* note 3; Chimni, *supra* note 7 at 41. Dupuy also insisted on the importance of finding a common language for international law given the various civilizational perspectives, especially in relation to human rights. See Dupuy, *supra* note 7 at 589–99.

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systems and views of humans, and seeks to integrate these differences in a discursive and dialectical manner" while avoiding "absolutism or fetichism of human rights" which would weaken their "normative nature".[239] The identification of "social ethics transcending civilizational boundaries"[240] must be achieved, which is akin to identifying a societal consensus on the international plane. This is essential when interpreting quasi-universal instruments and when seeking to identify CIL, including in matters relating to conscientious objection. Accordingly, the ICCPR must be interpreted holistically, and this includes considering the notion of duties and the right of people to self-determination, which many states have referred to in relation to conscientious objection, that is, the right to defend themselves, ensure their national security and to choose their own cultural, economic, political, and social system, as per Article 1 ICCPR.

This article showed that some interpretations of human rights treaties and CIL are flawed since they fail to factor in the practice of (enough) states and peoples in Asia and beyond. To avoid such flaws, particular attention should be paid to the practice of "non-Western cultures and civilizations" most of which have been "excluded from the prevalent North-Atlantic-centric [legal] discursive space" to fill the "legitimacy deficit in international law".[241] This deficit is attributable to the preponderance of Western practice in the historical development of international law. In particular, Western lawyers should be careful not to "tacitly equate what is Western with what is universal".[242] One must learn to accept that Western norms are not always universal and may rather reflect a *particular* custom. The international community must be careful not to widen the "gap" between non-Western practice and general international law.[243]

As such, PIL norms "with a universal validity must satisfy the highest degree of legitimacy in order to be accepted by all members of the international society, including non-state actors as well as various actors with diverse cultures and civilizations".[244] This legitimacy must not only be "international" but also "transcivilizational" or "multi-civilizational" to reflect the distinct contribution of all civilizations.[245] However, this quest for a transcivilizational PIL, which would enjoy heightened legitimacy, should not lead to adopting views that would reverse the current situation by adopting perspectives unduly favourable to other civilizations. The aim is to attain a representative system rather than moving from Western-centrism to Sinocentrism or Islamocentrism, for instance.[246]

Although refusing to read conscientious objection into the ICCPR might be seen as backtracking, it is important to recall that correctly assessing the obligations of states under international law should, in fact, not be considered backtracking but rather as a first step towards a fairer international legal system. Correctly assessing human rights *lex lata* by taking into account the practice of the non-Western world will increase the legitimacy of human rights, which are often seen as Western inventions and face harsh criticism in the developing world and beyond.

In turn, a more representative international law would foster the adhesion of new countries. Indeed, if human rights bodies were to adopt a transcivilizational perspective, this might lead to more states ratifying human rights instruments such as the ICCPR (about 25 states are not parties), for example, Singapore, which staunchly rejects

[239] Onuma, *supra* note 7 at 64.
[240] *Ibid*., at 80.
[241] Onuma, *supra* note 3 at 218; Dupuy, *supra* note 7 at 589–90.
[242] Onuma, *supra* note 3 at 218.
[243] *Ibid*., 239.
[244] *Ibid.*
[245] Chimni, *supra* note 7 at 42; Onuma, *supra* note 3 at 239.
[246] Chimni, *supra* note 7 at 43; Onuma, *supra* note 3 at 293–6.

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what it considers to be misguided activism from the HRCommittee. In addition, Asia is the region where the fewest ICCPR parties joined the ICCPR optional protocol I (HRCommittee's mandatory jurisdiction), which is no coincidence.[247] Worse still, among the few Asian states that adhered to this protocol, Korea indirectly held that it regretted adhering to this protocol, given the new views of the HRCommittee on conscientious objection.[248] As ICJ Judge Nolte put it, interpreters may contribute to the "decline" of treaties by applying them "in a way which provokes resistance, or which makes parties, or others, lose their identification with the treaty", which is not a mere possibility in the case of human rights treaties.[249] A transcivilizational approach would have the advantage of decreasing such resistance and even further adherence to human rights norms.

This analysis also demonstrated the importance of respecting fundamental principles of PIL, such as *pacta sunt servanda*. Caution is essential when interpreting a treaty, which represents what the contracting parties collectively agreed upon. Treaties are the purest expression of states' consent, which should not be bypassed. At any rate, jumping to conclusions on the existence of converging subsequent practice or CIL can be a double-edged sword as developed states produce the bulk of international practice since they are endowed with sufficient capacity to react and express their positions in multiple fora. Yet, developing nations often do not match this capacity to react, which disadvantages them in relation to subsequent practice and CIL development. Indeed, formerly colonized states paid a high price to maintain or acquire sovereignty, and the intention they embody in treaties should be ascertained rather than escaped.

One must also acknowledge that it is inherently difficult for academics or even NGOs to access non-Western practice, as sources are often only available in foreign languages or unavailable online.[250] Yet, international judicial and quasi-judicial bodies do not have such an excuse. Given their resources, they must analyse state practice beyond the confines of the West.

The importance of factoring in the practice of states, including non-Western states, is not to be understood as weakening the principle of *pacta sunt servanda*; it is quite the opposite. For instance, signing a treaty is a means of expressing consent in undertaking obligations that cannot be diminished just because some states – or even many – stopped respecting their commitments. One could think of Article 25(2) ICCPR on the right of individuals to "vote and to be elected at genuine periodic elections". Although many ICCPR parties fail to respect this obligation, they consented to it and cannot rely on their subsequent practice to challenge this right's existence as the parties directly laid it down in the treaty.

Finally, the author wishes to make clear he believes, as most do in Western countries (and many others elsewhere), that conscientious objection *should* be a right afforded to all individuals as a protected manifestation. Even though there is practice making a right to conscientious objection a *de lege ferenda* proposal at the international level, this practice would need to be general, that is, extend beyond the West. Again, what one deems

[247] UNHCHR, "Status of Ratification Interactive Dashboard: Optional Protocol to the International Covenant on Civil and Political Rights" (2023) online: UNHCHR <https://indicators.ohchr.org/>.

[248] "[South Korea] regrets that upon its accession to the Optional Protocol to the Covenant on 10 April 1990, the Committee had not provided a clear position on whether conscientious objection fell within the ambit of article 18". See Jeong and others, *supra* note 17 at 4.8.

[249] Nolte made clear that "concerns regarding a possible decline of human rights treaties need to be taken seriously". Nolte, *supra* note 72 at 333–4, 370.

[250] The author himself has been confronted with such a difficulty and had to rely on many secondary sources (NGO reports, international bodies and organs reports, country reports e.g., UK and US reports about other countries) when primary sources were not available (e.g., domestic laws).

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desirable should not automatically be conflated with positive law, and neither should what is Western automatically be considered universal. The work of many organs and bodies promoting conscientious objection needs to be commended, but their approach should be incentivizing, as it was until the late 1980s, rather than directive – at least in terms of international law – until an international consensus has emerged on the question.

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