THE STATUS OF CONSCIENTIOUS OBJECTION UNDER ARTICLE 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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I. INTRODUCTION

Conscientious objection may be defined in legal terms as an act of disobedience of a law, justified by a "conflict of conscience" between compliance with the law and observance of inmost ethical convictions. The typical behavior of "the objector" is characterized by a disagreeing and consequently contrary attitude, never violent or aversive in nature, being the expression of ethical, spiritual, or socio-political values. At a non-juridical level, conscientious objection is a manifestation of freedom of conscience, i.e., freedom to think and act according to one's own conscience, as well as freedom not to be psychologically forced in the formation and the declaration of one's thoughts. This freedom expresses the individual's right to self-determination, for instance, the claim to develop and manifest one's personal judgments and decisions about what is good or bad, right or wrong, true or false. In this respect, freedom of conscience is intimately related to the right to a personal identity, which includes the whole complex of qualities and attributes which makes a person unique.

Conscience is also linked to freedom of religion and freedom of thought: the former in fact presumes a freedom to choose, be it the choice of a particular religion or the adoption of a laic perception of life or of any belief; the latter implies the right to autonomously develop one's ideas, without restriction. The interrelationship among freedom of conscience, religion, and thought is also proved by different inter-

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national human rights treaties providing for their protection under the same article;[1] their direct influential role on the issue of recognition of a right to conscientious objection is apparent. However, other rights may add legitimacy to such recognition, i.e., right to life, right to liberty, freedom of association, freedom of expression, right to be free from forced or compulsory labor, and the right to peace.[2] Conscientious objection can potentially touch upon an unlimited spectrum of subjects, because there are unlimited possibilities where an individual may find a provision of the law going against the deepest dictates of her conscience.[3]

There has been an emerging trend on behalf of countries to recognize conscientious objection as a valid exemption to military conscription or military draft. While some countries have acknowledged conscientious objection since the early twentieth century, other countries within the Council of Europe have not.[4] In fact, the European Human Rights machin-

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1. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III), art.18, U.N. GAOR, 3d Sess., at 138, U.N. Doc. A/810 (1948) [hereinafter UDHR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 221, 230 (Eur.) [hereinafter ECHR]; American Convention on Human Rights, Nov. 22, 1969, art. 12 (freedom of conscience and religion), 1144 U.N.T.S. 123, 9 I.L.M. 673; African Charter on Human and Peoples' Rights, art. 8, OAU Doc. CAB/LEG/67/3 rev.5 (1981), 21 I.L.M. 58 (*entered into force* Oct. 21, 1986) (freedom of conscience and religion); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 18, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 178 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR], International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art.5(d)(vii) G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965), 660 U.N.T.S. 195, 222 (*entered into force* Jan. 4, 1969); Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, § VII, 14 I.L.M. 1292.

2. *See* Emily N. Marcus, Note, *Conscientious Objection as an Emerging Human Right*, 38 VA. J. INT'L L. 507, 517-24 (1998).

3. For example, medical staffs objecting to operate in cases of voluntary abortion, or an individual objecting to compulsory health services.

4. Out of the thirty-one states with a conscript army, only Albania, Turkey and the Former Yugoslav Republic of Macedonia do not recognize this right. *See* Council of Europe, Steering Committee for Human Rights, Group of Specialists on Conscientious Objection to Military Service, *Comparative Study of the Laws Governing Conscientious Objection to Military Service in the Member States of the Council of Europe*, DH-S-CO (98) 7, (1998) [hereinafter Council of Europe, *Comparative Study*]. For the world-wide situation, *see The Ques-*

ery in Strasbourg has been unwilling to find that a right to conscientious objection exists under the European Convention on Human Rights (the Convention). In particular, the European Commission of Human Rights (the Commission) has declined to find a violation of Article 9 in regard to conscientious objection. While Article 9 seems to be the most obvious article to deal with conscientious objection because it addresses freedom of thought, conscience, and religion,[5] the Commission has instead addressed conscientious objection through Article 4.[6] The Commission has adopted an approach concerning conscientious objection cases by interpreting Article 4, in effect, to supersede Article 9.

The Commission has always strictly interpreted the language of Article 4 thereby limiting the right to conscientious objection. However, did the drafters of the Convention intend for there to be no right to conscientious objection, or was it merely concern that alternative service would be considered slavery?

Part II of this Article explores the Convention by discussing its history and scope. This section will chart the historical development of Article 4 and will also demonstrate that it could not have been the drafters' intent to deny, or expressly accept, a right to conscientious objection. It will establish that the paragraph dealing with conscientious objection in Article 4 should be limited to forced labor. Part III of this Article will explore the ways in which the European Court of Human Rights may still determine the existence of a right to conscientious objection through alternative principles. Part IV will explore the Commission's interpretation of Article 4 and Article 9 in relation to cases concerning conscientious objection. These cases illustrate what the authors believe to be erroneous

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tion of Conscientious Objection to Military Service: Report of the Secretary-General Prepared Pursuant to the Commission Resolution 1995/83, U.N. ESCOR, 53d Sess., Provisional Agenda Item 23, U.N. Doc. E/CN.4/1997/99 (1997).

5. In particular Article 9 states that:

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

ECHR, *supra* note 1, art. 9, 213 U.N.T.S. at 230.

6. *See* discussion *infra* part IV.B.

reasoning by the Commission in light of the Convention and general international law. Part V will discuss the current international movement towards crystallizing the right to conscientious objection both regionally within the Council of Europe and internationally. In conclusion, the Article will definitively determine that a right to conscientious objection exists under the Convention.

II. European Convention on Human Rights

A. *Drafting History and Intent of the Convention*

During the first session of the Council of Europe Committee of Ministers, in mid-1949, the Ministers requested that the Consultative Assembly address the need for a human rights apparatus.[7] A month later, the Consultative Assembly adopted a resolution recommending that the Committee of Ministers draft a convention "as early as possible, provid[ing] a collective guarantee and designed to ensure, for all persons residing within their territories, the effective enjoyment of . . . fundamental freedoms."[8] In the initial discussion concerning the Consultative Assembly's draft, it was stated that, "the list [of rights] included in Article 2 is not intended to be anything like a complete or inclusive list of human rights. It is a selected list of rights which should be the subject of collective guarantee, and guaranteed now."[9] Moreover, when the Consultative Assembly's Committee on Legal and Administrative Questions began the drafting they considered it "preferable to limit the collective guarantee to those rights and essential freedoms which are practiced, after long usage and experience, in all the democratic countries."[10] Lastly, the original drafters did not believe in defining rights in a "code like" method.

> One cannot first draw up the code and then establish the Court. Experience shows that the Court comes first. For the Court deals with cases; it progressively establishes a jurisprudence. Confidence is inspired according to the value of this jurisprudence. In or-

7. *See* 4 Council of Europe, Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights 2 (1977) [hereinafter ECHR Travaux].

8. *Id.*

9. 2 ECHR Travaux, *supra* note 7, at 50.

10. 1 ECHR Travaux, *supra* note 7, at 266.

> der to develop this jurisprudence, the Court must, day after day, examine the law which it administers, following the practice and custom of the countries which it represents. And then, a long time afterwards, codification may be achieved; this will define and crystallise the results acquired by judicial experience.[11]

It is apparent that the Consultative Assembly never intended the Convention to be exhaustive or contain precisely defined rights. Clearly, the intent was for the Convention to grow and develop through the jurisprudence of a court. Therefore, it seems disingenuous for strict constructionists to argue that the current Convention Article 4 prohibits a right to conscientious objection. Such a position would be in contravention of the clear intent of the drafters, especially because Article 4 deals with slavery and forced labor and not the actual issue of freedom of conscience. Furthermore, across different drafts of the Convention, the scope of Article 9, which addresses the right to freedom of thought, conscience, and religion, changed very little.[12] There is no mention of conscientious objection in Article 9 even though this would be the most logical article of the Convention to either acknowledge or deny a right to conscientious objection. Based on the drafters' intent, views on the role of the court, and the final formulations of Articles 4 and 9, there is still an avenue for the Court to recognize a right to conscientious objection.

While the Consultative Assembly developed a draft convention based on the beliefs discussed above, other drafting bodies and various countries differed on drafting styles concerning rights.[13] This is one of the possible explanations why the current Article 4 seems to deny a right to conscientious objection unless one studies it closely.

B. *Theories of Constructing Legal Texts*

Just as Europe encompasses many different legal traditions, there are many different theories on how to draft a convention that guarantees fundamental human rights. At the

11. *Id.* at 276.
12. *See generally* 1-8 ECHR TRAVAUX, *supra* note 7.
13. *See* 3 ECHR TRAVAUX, *supra* note 7, at 6.

time the European Convention on Human Rights was drafted, "[t]he United Kingdom representative felt that it would be impossible for States to undertake to respect rights which had not been defined sufficiently precisely."[14] Particularly, the United Kingdom wanted a "precise definition of the rights to be safeguarded and the permitted limitations to those rights."[15] While the Consultative Assembly had drafted recommendations which it considered sufficient to form the basis of the Convention,[16] the United Kingdom felt that without "clear and precise" definitions it would be impossible for countries to accede to the Convention because they would not know what their obligations were.[17]

On the other side of the debate, Belgium, Italy, and France felt that there was sufficient clarity of the rights espoused for signatory states to recognize their responsibilities in protecting these rights.[18] There was clearly tension not only between different countries, but also between the different committees that were drafting different texts. The Committee of Ministers advised the Committee of Experts to follow the drafting of the anticipated United Nations Covenant.[19] The Committee of Experts, led by the Belgian, French, and Italian representatives, decided to use the original Convention draft that was developed by the Consultative Assembly. Additionally, they decided that all theories of legal drafting would be pursued.[20] Having been defeated on this point, the United Kingdom submitted a host of amendments to the document based on its theory of legal construction.[21]

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14. 4 ECHR TRAVAUX, *supra* note 7, at 8.

15. *Id.* at 10.

16. *See id.* at 2, 4, 10.

17. *See id.* at 10.

18. *See id.* at 12.

19. This was a particular reference to the UDHR and the future ICCPR. Whereas the Consultative Assembly wanted the draft to follow the UDHR, the United Kingdom pointed out that this was merely a declaration with no legal weight and that "a number of ideals which had not and were not intended to have legal effect" were present in the UDHR. *Id.* at 8, 10. In addition, the Committee of Ministers wanted the Committee of Experts to base their draft on the yet "incomplete" ICCPR. *Id.* at 14.

20. *See id.* at 14.

21. *See id.* at 14, 16.

A summary of this dichotomy is written by the Secretary-General to the Committee of Ministers in a letter in which he states:

> A perusal of the report shows that two main schools of thought were represented in the Committee. One section, subscribing to the ideas which underlie the Consultative Assembly's draft, signified agreement with its general form: enumeration of the rights and freedoms, referring for their definition to domestic legislation and to general principles of law, so that international supervisory institutions, namely a Commission and a Court of Human Rights, could be set up without delay. The other section, favouring the method at present followed by the guarantee, laid stress on the importance of defining the rights and their limitations before establishing any institutions.[22]

This statement gives some insight into the origins of the current Article 4 in the Convention. Furthermore, the next section of this paper will explore the first drafts of the Convention in an attempt to ascertain how the formulation of Article 4 progressed.

In late 1949, the Committee of Ministers requested the Secretary-General invite member states to appoint experts to assist in the drafting of the Convention.[23] By the end of 1949, a Committee of Experts had been formed. The Committee of Experts met in Strasbourg, in February of 1950 and began drafting.[24] The Committee of Experts also set up several subcommittees. Many drafts and amendments based on the enumeration or definition "schools of thought" were introduced during the Committee of Experts meetings.[25]

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22. Letter from the Secretary-General to the Foreign Ministers of Member States (March 17, 1950) (Ref. D. 49/6/50), *reprinted in* 4 ECHR TRAVAUX, *supra* note 7, at 82. **R**

23. 2 ECHR TRAVAUX, *supra* note 7, at 296. **R**

24. 3 ECHR TRAVAUX, *supra* note 7, at 180. **R**

25. *See* Letter from the Secretary-General to the Foreign Ministers of Member States, *supra* note 22. **R**

C. *Article 4: History and Scope of the Prohibition on Slavery*

The Committee of Experts began with the draft that the Consultative Assembly had sent to the Committee of Ministers. This draft dealt with slavery in the same way that the Universal Declaration of Human Rights (UDHR) had:

> Article 2
>
> In this Convention, the Member States shall undertake to ensure to all persons residing within their territories:
>
> . . . .
>
> 2) Exemption from slavery and servitude, in accordance with Article 4 of the United Nations Declaration;[26]

Because of the United Kingdom's opposition to a simple enumeration of rights, it submitted numerous amendments to the Consultative Assembly's draft.[27] In the end, these amendments became their own draft. In one of those amendments, the first divergence is seen from the formulation of anti-slavery based on Article 4 of the UDHR:[28]

> Article 2
>
> 1. No one shall be held in slavery; slavery and the slave trade shall be prohibited in all their forms.
> 2. No one shall be held in servitude.
> 3. No one shall be required to perform forced or compulsory labour except pursuant to a sentence to such punishment for a crime by a competent court.[29]

Still, there is no mention of conscientious objection in relation to this amendment of the anti-slavery article. While that amendment does not appear to have been adopted into the

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26. *Recommendation No. 38 to the Committee of Ministers Adopted 8th September 1949 on the Conclusion of the Debates*, Eur. Consult. Ass., 1st Sess., Doc. No. 108 (1949), *reprinted in* 2 ECHR TRAVAUX, *supra* note 7, at 274, 276. **R**

27. *See* 3 ECHR TRAVAUX, *supra* note 7, at 204, 206, 282, 320. **R**

28. UDHR, *supra* note 1, art. 4, at 73. **R**

29. *Amendments to Article 2 of the Recommendation of the Consultative Assembly Proposed by the Expert of the United Kingdom*, Comm. of Experts, Doc. A 798 (Feb. 6, 1950), *reprinted in* 3 ECHR TRAVAUX, *supra* note 7, 204, 206. **R**

next draft, the United Kingdom submitted more amendments dealing with the formulation of this anti-slavery article.[30]

In the next United Kingdom amendment addressing anti-slavery, there is another departure from the UDHR Article 4 language. This amendment is the first document to mention conscientious objection. The amendment states:

> Article 6
>
> 1. No one shall be held in slavery or servitude.
> 2. No one shall be required to perform forced or compulsory labour.
> 3. For the purpose of this article, the term "forced or compulsory labour" shall not include:
>   a. any work required to be done in the ordinary course of detention imposed by the lawful order of a court;
>   b. any service of a military character or service in the case of conscientious objectors exacted in virtue of compulsory military service laws;
>   c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
>   d. any work or service which forms part of normal civic obligations.[31]

This draft is important because it shows the first formulation of conscientious objection within the anti-slavery article. As paragraph 3(b) illustrates, there is no language which limits a right to conscientious objection. The paragraph simply excludes conscientious objection from being considered forced or compulsory labor. This formulation is understandable. States did not want compulsory military service to be deemed compulsory labor. Likewise, if a country had domestic laws which gave the option of conscientious objection but required

30. *See* 3 ECHR TRAVAUX, *supra* note 7, at 204, 206, 282, 320. R

31. *Amendment to Articles 1, 2, 4, 5, 6, 8, and 9 of the Committee's Preliminary Draft Proposed by the Expert of the United Kingdom*, Comm. of Experts, Doc. CM/WP 1 (50) 2; A 915 (Mar. 6, 1950), *reprinted in* 3 ECHR TRAVAUX, *supra* note 7, 280, 282. This amendment appears not to have been adopted, but it may have served as yet another basis of a later amendment that became part of Alternative B which was submitted to the Committee of Ministers. R

alternative service (usually of a civic nature), a state did not want this service classified as forced labor. One may argue that this clause is somewhat redundant considering paragraph 3(d). However, sometimes during the drafting certain contributors wanted to be very specific, and they were able to influence the scope of some articles, like Article 4. Yet in comparison, Article 9 remained fairly broad in scope limited only by a few conditions.

Because the United Kingdom draft differed so completely from the Consultative draft, the Committee of Experts did not believe that the texts could be combined, nor did they want to deal with the question of the establishment of a European Court of Human Rights.[32] The Committee of Experts felt that both these issues were of a political nature and not a legal one, therefore outside the scope of their activities.[33] The Committee of Experts proceeded to submit two drafts for consideration by the Committee of Ministers.[34] One of the drafts was based on the United Kingdom amendments:

> Article 5
>
> . . . .
>
> 3. For the purposes of this article, the term "forced or compulsory labour" shall not include:
>
> a. any work required to be done in the ordinary course of detention imposed by the lawful order; (of a court)[35]
>
> b. any service of a military character or service in the case of conscientious objectors exacted in virtue of compulsory military service laws;[36]

32. *See* 4 ECHR TRAVAUX, *supra* note 7, at 16.

33. *See id.*

34. *See id.* In actuality, the drafts that were sent to the Committee of Ministers were more complex because there were also options to adopt drafts which included the formation of a European Court of Human Rights. However, this discussion goes well beyond the scope of this Article.

35. The phrase "of a court" was deleted from the last amendment. *See* 3 ECHR TRAVAUX, *supra* note 7, at 282, 314.

36. *Preliminary Draft Convention*, Comm. of Experts, Doc. CM/WP 1 (50) 14; A 932 (Mar. 6-10, 1950), *reprinted in* 3 ECHR TRAVAUX, *supra* note 7, at 312, 314. R

The alternative retained the wording of the Consultative Assembly's draft, however, this article was also amended so as to be an exact replica of the UDHR Article 4.

Article 2(2)

> No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.[37]

The draft articles were amended again in the report that was sent to the Committee of Ministers. Alternative A "follows completely the main lines of the [Consultative] Assembly's Proposal."[38] The anti-slavery article in Alternative A was not amended from the version above, and hence preserved the wording of the UDHR verbatim. The other draft, Alternative B, encompassed the United Kingdom's "proposal concerning the definition of rights."[39] This version of the article concerning slavery was again amended before inclusion in the final report.

Article 5 [Alternative B]

> . . . .
>
> 3. For the purposes of this article, the term "forced or compulsory labour" shall not include:
>
> a. any work required to be done in the ordinary course of detention imposed by a lawful order;
>
> b. any service of a military character or, (service)[40] in the case of conscientious objectors, service[41] exacted instead (in virtue)[42] of compulsory military service laws;[43]

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37. 3 ECHR TRAVAUX, *supra* note 7, at 320.

38. 4 ECHR TRAVAUX, *supra* note 7, at 16.

39. *Id.*

40. The word "service" was deleted from the previous version. *See* 3 ECHR TRAVAUX, *supra* note 7, at 312. **R**

41. The word "service" was added from the previous version. *Id.*

42. The word "instead" was added in place of "in virtue" which was deleted from the previous version. *Id.*

43. *Appendix to the Report of the Committee of Experts on Human Rights: Draft Convention of Protection of Human Rights and Fundamental Freedoms*, Doc. CM/WP I (50) 15 appendix: CM/WP I (50) 14 revised, A 925 (Mar. 16, 1950) *reprinted in* 4 ECHR TRAVAUX, *supra* note 7, at 50, 58. **R**

These drafts were submitted as part of a report to the Committee of Ministers documenting and explaining the Experts work.[44] Under the section of the report entitled "Commentary on the Draft Convention General Construction of the Convention," the anti-slavery article of Alternative A was not discussed. However, when the report came to the article dealing with anti-slavery[45] in Alternative B it simply said, "Art. 3, 4, and 5. Require no comment."[46] Therefore, while Alternative A retained the wording of the UDHR, the language concerning conscientious objection within the United Kingdom draft has no explanation.

One possible basis for this language is that the United Kingdom was involved and submitted proposals in the drafting of Article 8 of the United Nations International Covenant on Civil and Political Rights (ICCPR),[47] and it was borrowed for the drafting of the Convention. Throughout the first four volumes of the *Travaux Préparatoires*, there is no reference to debates published about the rationale behind the different drafts of the anti-slavery article.[48] The *Travaux Préparatoires* merely notes each of the amendments to the anti-slavery article. Therefore, it is impossible to ascertain with any certainty the intent of the Committee of Experts or the United Kingdom amendments.

After reading the report of the Committee of Experts, the Committee of Ministers did not want to deal with the "political" questions put forth by the Experts.[49] The Committee of Ministers convened a "conference of high officials, under instructions from their Governments, . . . to prepare the ground

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44. *See Report to the Committee of Ministers Submitted by the Committee of Experts Instructed to Draw Up a Draft Convention of Collective Guarantee of Human Rights and Fundamental Freedoms*, Doc. CM/WP I (50) 15; A 924 (Mar. 16, 1950) *reprinted in* 4 ECHR TRAVAUX, *supra* note 7, at 2. R

45. This is current Convention Art. 4; in the U.K. Alternative B draft, it is Art. 5. *See* 4 ECHR TRAVAUX, *supra* note 7, at 58. R

46. *Id.* at 32.

47. ICCPR, *supra* note 1, art. 8, 999 U.N.T.S. at 175. MARC BOSSUYT, R GUIDE TO THE TRAVAUX PREPARATOIRES OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 161 (1987).

48. *See generally* 1-4 ECHR TRAVAUX, *supra* note 7.

49. *See Conclusions of the First Meeting of Advisers*, Doc. Comm. Min., 3d Sess., point VIII, at 78 (Mar. 29, 1950), *reprinted in* 4 ECHR TRAVAUX, *supra* note 7, at 84; *see also Minutes of the Meeting*, Doc. Comm. Min., 3d Sess., point R II, at 12 (Apr. 1, 1950) *reprinted in* 4 ECHR TRAVAUX, *supra* note 7, at 84.

for the political decisions to be taken by the Committee of Ministers."[50]

During the Conference of the Senior Officials in mid-1950, which was in charge of deciding which draft to accept or to attempt to reconcile the two into one common document, the United Kingdom representative stated that there could be no combining of the two sections of the documents that addressed rights.[51] Because Alternative A was a "mere list" of rights and Alternative B elucidated the rights through detailed definitions, the United Kingdom representative felt it would be impossible to forge a compromise.[52] In the end, the Conference of Senior Officials submitted a single draft convention. In this draft, it appears that the transformation of the current Article 4 was nearly complete. While in the earlier drafts the anti-slavery article was based exclusively on the UDHR Article 4, it now included clauses discussing conscientious objection that were less favorable to the existence of such a right.[53] The only explanation of the change in wording is in the Report of the Conference of Senior Officials.[54] The report states that the Conference attempted to combine Alternatives A and B, but essentially began operating from the Alternative B draft[55] and set forth adjusting the language of the anti-slavery article.

By adopting Alternative B, the Conference gave its tacit approval to the United Kingdom formulation of the anti-slavery article. Once again there is no discussion mentioned in the *Travaux Préparatoires* whether the anti-slavery article was considered. The new draft reads,

> Article 6
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> . . . .
>
> 3. For the purposes of this article, the term "forced or compulsory labour" shall not include:

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50. *Minutes of the Meeting*, 4 ECHR TRAVAUX, *supra* note 7, at 84. R

51. *See* 4 ECHR TRAVAUX, *supra* note 7, at 170. R

52. *Id.*

53. *See id.* at 218.

54. *See Text of the Report Submitted by the Conference to the Committee of Ministers*, (Doc. CM/WP 4 (50) 19; CM/WP 4 (50) 16 rev.; A 1431) *reprinted in* 4 ECHR TRAVAUX, *supra* note 7, at 242. R

55. *See* 4 ECHR TRAVAUX, *supra* note 7, at 258.

a. any work required to be done in the ordinary course of detention imposed by the lawful order of a court;[56]
b. any service of a military character or, in (the)[57] case of conscientious objectors in countries where they are recognized,[58] service exacted instead of compulsory military service (laws);[59]

This is the first draft that includes the language "in countries where they are recognized," which the Commission has interpreted to prohibit a right to conscientious objection.[60] Once again, the *Travaux Préparatoires* is completely silent as to whether there was any discussion about this development of the anti-slavery article. There is no guidance as to why these drafters included this new phrase. In the final draft, the Conference of Senior Officials changed the placement of the anti-slavery article and added a reference to Article 5.

Article 4[61]

. . . .

3. For the purposes of this article, the term "forced or compulsory labour" shall not include:
   a. any work required to be done in the ordinary course of detention imposed (by the lawful order of a court)[62] according to the provisions of article 5 hereafter;[63]
   b. any service of a military character or, in case of conscientious objectors in countries where they are recognized, service ex-

56. The phrase "of a court" is added back into this draft form a prior draft.

57. The word "the" is deleted.

58. The phrase "in countries where they are recognized" is added.

59. The word "laws" is deleted.

60. *See, e.g.*, X. v. Federal Republic of Germany, 32 Eur. Comm'n H.R. Dec. & Rep. 96-97 (1970), ECHR website, HUDOC reference number REF00002947 *available at* http://hudoc.echr.coe.int/ (last visited Feb. 21, 2001).

61. The number of the article changed from 5 to its current number 4.

62. The phrase "by the lawful order of a court" is deleted.

63. The phrase "according to the provisions of article 5 hereafter" was added.

> acted instead of compulsory military service;[64]

After the Conference of Senior Officials had finished amending the draft convention text, the draft along with a report was sent back to the Committee of Ministers where they too added some more amendments.[65] The final amendment to the draft left Article 4 as it appears today, but 4(3)(b) was not changed.

While Article 4 addresses conscientious objection in relation to slavery, Article 9 neglects the question altogether. The *Travaux Préparatoires* is inconclusive concerning the inclusion of conscientious objection within the scope of Article 9. In fact, Article 9 had a much different purpose than what it currently includes. However, the following section will illustrate that the scope of Article 9 does in fact include the right to conscientious objection.

D. *Article 9: Freedom of Thought, Conscience, and Religion*

1. *History*

The right to freedom of thought, conscience, and religion was adopted into the Convention from Article 18 of the UDHR, but conscience was not always vital in the drafting discussions. During the Consultative Assembly's debates about the drafting of the Convention, freedom of religion was seen as being an integral part of human rights.[66] In one of the earliest formulations of a draft Convention, "[f]reedom of religious practice and teaching, in accordance with Article 18 of the United Nations Declaration," was included.[67] The protection of thought was also seen as being a fundamental human right.[68] "Thought" and "conscience" were incorporated in a

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64. *Draft Convention Annexed to the Report*, (Doc. CM/WP 4 (50) 19 annexe; CM/WP 4 (50) 16 rev.; A 1452) *reprinted in* 4 ECHR TRAVAUX, *supra* note 7, at 274. R

65. *See Text of Amended Articles After Deliberation at the Sitting of 4th August 1950*, Doc. CM 1 (50) 9, *reprinted in* 5 ECHR TRAVAUX, *supra* note 7, at 74; *see also Draft Convention Adopted by the Sub-Committee*, Doc. CM (50) 52, A 1884, (Aug. 7, 1950) *reprinted in* 5 ECHR TRAVAUX, *supra* note 7, at 76. R R

66. *See* 1 ECHR TRAVAUX, *supra* note 7, at 86.

67. *Id.* at 168.

68. *See id.* at 134.

later draft citing its basis as Article 18 of the UDHR.[69] Similar to the development of Article 4, Article 9 was referenced to the corresponding UDHR article. The United Kingdom did not feel that there was sufficient clarity in the Consultative Assembly's draft.[70] Therefore, during the Committee of Experts meetings, the United Kingdom proposed an amendment to the Convention addressing the right to freedom of thought, conscience, and religion. In this amendment, the United Kingdom proposed the limitations that are in the present Convention.[71] So, while the preliminary drafts did not include this amendment, when the Conference of Senior Officials was convened and they accepted the United Kingdom's Alternative B draft, the amendment's wording was included.[72] The current formulation of Article 9 is substantially similar in both context and syntax.

2. *Scope of Article 9*

Article 9 of the Convention protects "the right to freedom of thought, conscience and religion," including freedom to change one's belief and freedom to manifest it "in worship, teaching, practice and observance."[73] "The right to freedom of thought, conscience, and religion is guaranteed in the Convention without qualification."[74] The terms "thought, conscience and religion" together cover "all possible attitudes of the individual toward the world, toward society, and toward that which determines his fate and the destiny of the world, be it a divinity, some superior being or just reason and rational-

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69. *See id.* at 206.

70. *See Letter of 10th February 1959 from the Secretary-General to the Foreign Ministers of Member States*, Ref. D 49/I/50, Doc. No. A 820, Comm. of Experts, (Feb. 10, 1950) *reprinted in* 3 ECHR TRAVAUX, *supra* note 7, at 234. **R**

71. *See Amendments to Article 2 of the Recommendation of the Consultative Assembly Proposed by the Expert of the United Kingdom*, *supra* note 31. **R**

72. *See supra* text accompanying notes 43-50; *Draft Convention Annexed to the Report*, Doc. Nos. CM/WP 4 (50) 19 annexe; CM/WP 4 (50) 16 rev.; A 1452 (June 17, 1950), *reprinted in* 4 ECHR TRAVAUX, *supra* note 7, at 274, 278 (this draft was the annex to the Conference of Senior Officials Report). **R**

73. ECHR, *supra* note 1, art. 9(1), 213 U.N.T.S. at 230. **R**

74. P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 397 (2d ed. 1990).

ism, or chance."[75] The Commission has interpreted "religion or belief" broadly so that, "any conviction can be brought under it."[76] The enjoyment of the rights covered by Article 9 is "a precious asset for atheists, agnostics, sceptics and the unconcerned,"[77] pacifists included.[78]

Article 9(2) allows states to interfere with the *forum externum*, that is the external manifestation of religion or belief, while the inner beliefs, or *forum internum*, are inviolable.[79] According to the well-established jurisprudence of the Commission and Court, interference is justified when it is "prescribed by law," it pursues a "legitimate aim," and it is "necessary in a democratic society."[80] The legitimate aims listed in Article 9(2) are "public safety, . . . protection of public order, health or morals," and "protection of the rights and freedoms of others."[81] Notably absent is an exception for national security which is found in Articles 8, 10, and 11.[82] These articles are similarly constructed to Article 9. This seems to suggest that the protection of Article 9 is greater than the protection of Articles 8, 10, and 11 because there are fewer justifiable interferences.

Yet, when interpreting conscientious objection under Article 9,

> [t]he Commission has taken the position that the Convention contains no obligation for the con-

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75. Martin Scheinin, *Article 18*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 379, 380 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999).

76. VAN DIJK & VAN HOOF, *supra* note 74, at 398. **R**

77. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 17 (1993).

78. *See* Arrowsmith v. United Kingdom, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. ¶¶ 69-71 (1978).

79. As the Court affirmed in the *Kokkinakis* case:

> The fundamental nature of the rights guaranteed in Article 9(1) is also reflected in the wording of the paragraph providing for limitations on them. Unlike the second paragraphs of Articles 8, 10 and 11, which cover all the rights mentioned in the first paragraphs of those Articles, that of Article 9 refers only to "freedom to manifest one's religion or belief."

260 Eur. Ct. H.R. (ser. A) at 18 (1993).

80. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 21-22 (1976).

81. ECHR, *supra* note 1, art. 9(2), 213 U.N.T.S. at 230. **R**

82. ECHR, *supra* note 1, arts. 8, 10, 11, 213 U.N.T.S. at 230-32. **R**

> tracting States to exempt conscientious objectors from compulsory military service. For its position the Commission refers to the words in Article 4(3)(b) 'conscientious objectors *in countries where they are recognized*.' The argument is evidently that, since the drafters of the Convention meant to leave the States free to recognize or not to recognize conscientious objections to military service, they cannot have intended to deprive them of this same freedom in another provision of the same Convention. But since military service has not been included as such among the restrictions of Article 9(2), some doubt seems justified as to whether an absolute freedom for the State on this point may really be inferred from Article 4(3)(b).[83]

It would seem correct to assume that the right to conscientious objection to military service, arising from the exercise of freedom of conscience or religion, is protected under Article 9. An example being pacifism recognised as a protected belief,[84] the refusal to use force or to perform military service should be interpreted as a manifestation of this belief and, consequently, any interference with this right should be justified under Article 9(2). However, as noted above, the Commission has taken a different view and interpreted conscientious objection under Article 4. It is clear to the authors that Article 4(3)(b) was not drafted to eliminate a right to conscientious objection, but rather to eliminate claims that alternative service is tantamount to slavery.

III. Arguments for the Right to Conscientious Objection Based on the Drafting of the Convention and the Existence of a European Consensus

If the drafters had intended Article 9 and conscientious objection to be limited by Article 4, why was there no clause inserted making this explicit? Article 4(3)(a) states that sentences which carry penalties that require work are not compulsory labor if the sentence is carried out in accordance with

83. Van Dijk & van Hoof, *supra* note 74, at 398-99 (footnotes omitted). **R**

84. *See Arrowsmith*, 19 Eur. Comm'n H.R. Dec. & Rep. ¶¶ 69-71.

Article 5, which deals with arrest and detention.[85] In addition, Article 15(2) explicitly states which articles cannot be derogated from, or under what condition the derogation may occur.[86] Furthermore, Article 16 excludes the rights granted in Articles 10, 11, and 14 from aliens.[87]

One can only deduce from these articles that had the drafters wanted Article 9 limited by Article 4(3)(b), one of the articles would have explicitly expressed it. Moreover, one can guess that the reason why states were afraid that compulsory military service would be considered forced labor, is that it would impede their ability to defend their countries. One can also see that in those countries in Europe that had conscientious objection in 1950, they would not want their alternative service seen as forced labor. If a state that granted conscientious objection could not require alternative service, there would be no benefit to the state for allowing this right. Moreover, there would be completely unequal treatment of people based on their belief. Lastly, if this situation occurred, the "floodgate" argument may actually hold true. That is to say, everyone would claim conscientious objection if they could opt out of service altogether.[88]

If the drafters believed that a right to conscientious objection would impede the ability of a state to raise an army, why is national defense not among the limitations placed on the right to freedom of thought, conscience, and religion under Article 9(2)?[89] It is the authors' belief that irrespective of the interpretation of Article 4 by the Commission, the drafters did not want to decide this question definitively either way. One must keep in mind that the drafters were seeking to develop a list of rights that were essential to ensure democracy and human dignity. They wanted the list to include only rights which were currently recognized by the countries of Europe.

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85. ECHR, *supra* note 1, arts. 4(3)(a), 5, 213 U.N.T.S. at 224-26. **R**

86. ECHR, *supra* note 1, art. 15(2), 213 U.N.T.S. at 232. **R**

87. ECHR, *supra* note 1, art. 16, 213 U.N.T.S. at 234. **R**

88. This argument was later stated in a Commission admissibility decision. *See* N. v. Sweden, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203, 207 (1984).

89. ECHR, *supra* note 1, art. 9(2), 213 U.N.T.S. at 230 states "[f]reedom to manifest one's religion or religious beliefs shall be subject only to such limitations as are prescribed by law and necessary in a democratic society . . . ." **R**

While none of the rights were supposed to be "aspirational," they did not want the Convention to be so narrow as to deprive rights either. Taking all these points into consideration, conscientious objection was an issue that the drafters probably wanted left to be decided at another time.

Pursuant to the Vienna Convention on the Law of Treaties, an interpretation of Article 4 in conjunction with Article 9 also leads to recognition of the right to conscientious objection to military service. Article 31(1) of the Vienna Convention states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[90] The "context" of Article 4 is personal freedom and not freedom of conscience. Also, since the "context" comprises the entire treaty, it is necessary to recall that the Preamble of the Convention states, first, that "the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms."[91] Secondly, the Preamble affirms the intention of the Member States "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration."[92] With regard to the "object and purpose" of the Convention, it must be reiterated what is found in the Preamble and, in particular, what the Court held in its judgements: "object and purpose" of the Convention is "the protection of individual human beings"[93] and the maintenance and promotion of the "ideals and values of a democratic society,"[94] such as "pluralism, tolerance and broadmindedness."[95]

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90. Vienna Convention on the Law of Treaties, art. 31(1), U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679, 691-92 (adopted May 23, 1969) [hereinafter Vienna Convention].

91. ECHR, *supra* note 1, pmbl., 213 U.N.T.S. at 222. **R**

92. *Id.* at 224.

93. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 34 (1989). *See also* Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium," 6 Eur. Ct. H.R. (ser. A) at 32 (1968).

94. Kjeldsen, Busk, Madsen, and Pedersen v. Denmark, 23 Eur. Ct. H.R. (ser. A) at 27 (1976).

95. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

Article 31(3) of the Vienna Convention further states that a correct interpretation of a provision must take "into account, together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[96] A combination of Article 31(3) together with the emphasis upon the "object and purpose" of the Convention, in particular "the collective enforcement" of the UDHR, the promotion of the "ideals and values of a democratic society," and the "achievement of greater unity between its Members," leads to the finding of the Court in *Tyrer v. United Kingdom*.[97] In *Tyrer*, the Court held the Convention is "a living instrument which . . . must be interpreted in the light of present day conditions. [The Court cannot help] but be influenced by the developments and commonly accepted standards . . . of the member states of the Council of Europe."[98] The idea of the Convention as a "living instrument" is vital for the convention to maintain its prominence. The "living instrument" concept has sometimes given the Court the opportunity to adopt a progressive interpretation and to strengthen the protection of certain rights. This occurred in *Marckx v. Belgium* when "the Court applied a new approach to the status of children born out of wedlock that had been adopted in the law of 'the great majority,' but certainly not all, of Council of Europe states."[99] Furthermore, in *Dudgeon v. United Kingdom*, the Court held that

> [A]s compared with the era when . . . legislation [criminalizing homosexual acts between consenting adults] was enacted, there is now a better understanding . . . of homosexual behaviour to the extent that in the great majority of the Member States . . . it is no longer considered to be . . . appropriate to treat homosexual practices of the kind . . . in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes . . . [which have] oc-

96. Vienna Convention, *supra* note 90, art. 31(3)(b), 8 I.L.M. at 692. **R**

97. Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) (1978).

98. *Id.* at 15-16.

99. DAVID J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 9 (1995).

> curred in this regard in the domestic law of the Member States."[100]

Mutatis mutandis, it can be argued that these situations reflect the developments in domestic law of many Member States with regard to conscientious objection.

Today, conscientious objection is recognized in the domestic legislation of almost all Member States of the Council of Europe. While Turkey, Albania, and the Former Yugoslav Republic of Macedonia do not recognize conscientious objection in their legislation,[101] numerous other states have not only recognized conscientious objection but have abolished conscription altogether or have no army.[102] Many states have enshrined the right to conscientious objection in their constitutions, making clear its importance.[103] The reasons for which an individual may be granted conscientious objector status range from a very limited enumeration of grounds of objection to a very broad conception of conscience.[104] "In some countries, a potential objector must articulate an aversion of conscience to participation in armed conflict between states. In other countries, almost any religious, pacifist or political reasons will suffice to justify an application for release from military service."[105]

While a strong "European consensus" gives a positive interpretation of the right to conscientious objection, Article 4(3)(b) is the only possible obstacle. Fawcett comments that "no explanations of the amendments and additions are given [in the *travaux préparatoires*], but it is possible that the rewording of paragraph 3(b) [on conscientious objection] was de-

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100. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981).

101. *See* Council of Europe, *Comparative Study*, *supra* note 4. **R**

102. See, for example, Andorra, Belgium, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, San Marino and United Kingdom (by 2003 France and Netherlands). Council of Europe, *Comparative Study*, *supra* note 4; *The Question of Conscientious Objection to Military Service: Report of the Secretary General prepared pursuant to Commission Resolution* 1995/83, Comm'n on H.R., 53rd Sess., Annex 1, Agenda Item 23, U.N. Doc. E/CN.4/1997/99 (1997). **R**

103. See, for example, Bulgaria, Croatia, Czech Republic, Estonia, Germany, Hungary, Lithuania, The Netherlands, Russian Federation, Portugal, Spain, Slovakia, Slovenia, and Ukraine. Council of Europe, *Comparative Study*, *supra* note 4, at 11, 15, 25, 33, 46, 58, 71, 79, 97, 91, 106, 100, 103, 121. **R**

104. *See generally* Council of Europe, *Comparative Study*, *supra* note 4. **R**

105. *See id.* at 126.

signed to avoid any inference that the Convention required contracting States to recognise conscientious objection to military service as such."[106] Assuming that Fawcett's interpretation is accurate, at the drafting of the Convention, the provision for a conscript army with no alternative had to be allowed because of the political situation in Western Europe. However, practice has changed radically since then, to the point where that generally accepted rule is now very much the exception.

Even if Fawcett's assertion is true, the Court has held that practice of Member States can lead to a de facto amendment to the Convention, provided that the Convention does not directly preclude the existence of such a right. In *Soering v. United Kingdom*, Amnesty International argued in its amicus curiae brief that "the evolving standards in Western Europe regarding the existence and use of death penalty required that the penalty should now be considered as inhumane and degrading punishment."[107] The Court admitted that "subsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, could be taken as establishing the agreement of the contracting states to abrogate the exception provided for under Article 2(1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3."[108] The Court found that the adoption of the Sixth Protocol, "Concerning the abolition of the death penalty," which the United Kingdom had not adopted, showed the intention of the Contracting Parties "to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and

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106. JAMES E. S. FAWCETT, APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 55 (2d ed. 1987). An analogous process is to be found in Article 8 of the ICCPR, equivalent to Article 4 of the ECHR, where, again,

> The drafting history does not provide an explanation for the discrepancy between [art.4 UDHR and art.8 ICCPR] when it comes to forced or compulsory labour. The main concern was most likely one of technical nature . . . [i]t was not the intention of the CCPR to change or oppose in substance the understanding of the drafters of the UDHR, namely that forced or compulsory labour constitute forms of slavery or servitude.

Nina Lassen, *Article 4*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 103, 110 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999).

107. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 40 (1989).

108. *Id.*

. . . to do so by an optional instrument. . . ."[109] However, it is not absolutely sure that this would always be the final decision of the Court, since in *Ekbatani v. Sweden*, the Court stated that the addition of a right in a Protocol was not to be taken as limiting the scope of the meaning of the original Convention guarantee.[110] While the "European consensus" is very important guidance in the interpretation of the Convention, other factors can influence the Court's decisions.

Article 32 of the Vienna Convention states that "recourse may be had to supplementary means of interpretation, including the preparatory work, in order to confirm the meaning resulting from the application of Article 31."[111] However, Harris, O'Boyle, and Warbrick justify the Strasbourg authorities' "only occasional use of the *travaux préparatoires* . . . partly because of the emphasis upon a dynamic and generally teleological interpretation of the Convention that focuses where relevant upon current European standards rather than the particular intentions of the drafting states."[112] An apparent threat to this argument comes from *Johnston v. Ireland* where the Court held that Article 12 (the right to marry)[113] could not be interpreted as including a right to divorce, even though such a right was generally recognised in European states.[114] The particular finding is justified by the *very explicit* intention to exclude this right in the *travaux préparatoires* and probably also by the particular sensitivity of the matter in Catholic Ireland. In fact, the Court held that, although it was true that the drafters based Article 12 on Article 16 of the UDHR, which provided also for equal rights of men and women in regards to dissolution of marriage,[115] the *travaux préparatoires* contained a very clear explanation:

> [I]n mentioning the particular Article of the Universal Declaration, we [Consultative Assembly] have used only that part of the paragraph of the Article which affirms the right to marry and to found a fam-

109. *Id.* at 41.
110. Ekbatani v. Sweden, 134 Eur. Ct. H.R. (ser. A) at 13 (1988).
111. Vienna Convention, *supra* note 90, art. 32, 8 I.L.M. at 692. **R**
112. HARRIS, *supra* note 99, at 17 (citing two cases in which the Court used the *traveaux préparatoires* only to reject the evidence that it found). **R**
113. ECHR, *supra* note 1, art. 12, 213 U.N.T.S. at 232. **R**
114. *See generally* Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) (1986).
115. UDHR, *supra* note 1, art. 16. **R**

> ily, but not the subsequent provisions of the Article concerning equal rights after marriage, since we only guarantee the right to marry.[116]

As noted in Part II.C, this would not be the case with Article 4 of the Convention, whose *travaux préparatoires* do not contain anything similar to a radical exclusion of the right to conscientious objection.[117]

Therefore, it seems that a plausible interpretation of the Convention pursuant to Articles 31 and 32 of the Vienna Convention does not exclude the possibility for the Court to recognise a right to conscientious objection, either with an inquiry into the drafting history or on the basis of an established "European consensus" on the matter. However, the Commission has come to an opposite conclusion based purely on Article 4(3)(b).

IV. Conscientious Objection as Interpreted by the Commission

A. *The Ambiguity of Conscientious Objection*

At the time of the drafting of the Convention, it can be reasonably inferred that the language neither included nor excluded the right to conscientious objection based on the intent and goals of the drafters. At the time of the Convention's drafting, conscientious objection was not as widely accepted as it is today. For the drafters to have included conscientious objection specifically as a right would have been to include a right which was more aspirational than currently recognized in 1950.

As the Court has stated, the rights guaranteed by the Convention were intended to be of a "practical and effective" nature and not "theoretical or illusory."[118] Additionally, the Convention has been interpreted in such a way as not to frustrate the "object and purpose" which is to guarantee effective protection of the rights within the Convention.[119] It seems that the Commission should have taken into account the in-

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116. Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) at 24 (1986).

117. Fawcett, *supra* note 106, at 55. R

118. Harris, *supra* note 99, at 15 (1995) *quoting* Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) at para. 33 (1980). R

119. *See id.*

tent of the drafters, so as not to rule out the future realization of the right to conscientious objection. The Commission, in numerous admissibility decisions, has squarely denied a right to conscientious objection under Article 9 based on the "in countries where they are recognized" language of Article 4(3)(b).[120]

While the Commission believes that the language is quite clear, they are not taking into account the Convention's structural implications. Even the Commission's earlier admissibility decisions leave some possibility for future recognition of a right to conscientious objection under Article 9.

B. *Commission Decisions*

All the cases discussed below focus on the same basic issues, and they do not directly deal with conscientious objection.[121] *Grandrath v. F.R.G.*, in 1966, was the first Commission case to state outright that the Convention did not call for recognition of a right to conscientious objection.[122] Notably, not all members of the Commission have agreed. In *Grandrath*, Commissioner Eusthadiades pointed out that the majority's argument did not lead to the conclusion that Article 9 was inapplicable "but rather that the necessity for compulsory military or alternative service falls to be considered under art. 9(2), and that the margin of appreciation is extended as a result of art. 4(3)b."[123] This suggests that the issue of conscientious objection should be dealt with only under Article 9, allowing a state to interfere only when the above mentioned threefold test is met. First, it probably would be difficult to justify such a limitation of an Article 9 right, given that Article 9(2) does not include "national security" as a legitimate aim.[124] Second, the requirement of necessity in a democratic society would require the state to show that the interference corresponds to a "pressing social need"[125] and that it is "proportionate to the legiti-

120. ECHR, *supra* note 1, art. 4(3)(b), 213 U.N.T.S. at 224. **R**

121. The following argument comes out of discussion with Prof. Kevin Boyle, D. Christopher Decker, Lucia Fresa, and Raymond J. Toney on Mar. 24, 1999.

122. *See* HARRIS, *supra* note 99, at 369. **R**

123. Grandrath v. United Kingdom, 1966 Y.B. Eur. Conv. on H.R. 626, 692 (Eur. Comm'n on H.R.).

124. ECHR, *supra* note 1, art. 9(2), 213 U.N.T.S. at 230. **R**

125. HARRIS, *supra* note 99, at 411. **R**

mate aim pursued."[126] All of the cases dealing with conscientious objection have one of two similarities present. Namely, that all the applicants were absolutists, meaning that they rejected even alternative service and/or that their claims alleged violations of non-discrimination (Article 14)[127] in conjunction with Article 9.

If one accepts that *Grandrath* is the basis of over thirty years of jurisprudence concerning conscientious objection, what are the realistic chances that the Court would now be willing to reverse the Commission's decision? The chances are excellent. The following cases are only tangentially connected to the central question of recognizing a right to conscientious objection. Since all the other cases allege violations of one or more of the following: Articles 4, 5, 6, 8, and 9 with 14,[128] the Commission has never decided the question of conscientious objection. In every case before the Commission, the respondent State granted conscientious objection, but the applicant was challenging some function of the alternative service. Because a right to conscientious objection has never been the central issue, all the Commission's statements about the absence of a right to conscientious objection are dicta. In a future case, the Court must decide what weight to give those dicta.

In *X. v. F.R.G.*, a German law not only allowed conscientious objectors alternative service, but it took into account Jehovah's Witnesses' religious restriction which does not allow them to take part in civilian service because there is an "element of compulsion."[129] The law allowed an exemption from civilian service if one "is working or about to work on the basis of a freely negotiated service agreement . . ." in the health field.[130] Although the applicant attempted to obtain an agreement he was unable to do so due to a poor job market.[131] The applicant was convicted and sentenced to time in prison.[132] Importantly, the Commission stated that this law was an alter-

126. *Id.* at 11.

127. ECHR, *supra* note 1, art. 14, 213 U.N.T.S. at 232. **R**

128. ECHR, *supra* note 1, arts. 4, 5, 6, 8, 9, 14, 213 U.N.T.S. at 224-32. **R**

129. X. v. Federal Republic of Germany, App. No. 7705/76, 9 Eur. Comm'n H.R. Dec. & Rep. 196, 201 (1978).

130. *Id.*

131. *See id.* at 201-02.

132. *See id.* at 201-02.

native to the alternative, and by providing this option, the Federal Republic of Germany "seems to have gone beyond the obligations imposed on a State by Article 9 of the Convention read in conjunction with Article 4."[133]

This statement is extremely important because it proves that the Commission considers that conscientious objection issues must be decided under Article 9 rather than Article 4. More importantly, the Commission decided that the State has an obligation under Article 9 with regard to conscientious objection. Furthermore, the Commission has acknowledged that the right to conscientious objection is not completely absent under Article 9. "The Commission accepts that the applicant's complaint falls into the realm of at least Article 9 of the Convention, although the Convention does not guarantee as such a right to conscientious objection."[134]

In *Johansen v. Norway*, the applicant was an absolutist who refused any form of alternative service.[135] While Norway has observed conscientious objection since 1922, it did require alternative civilian service, which the applicant refused to perform.[136] The Commission stated, "The Convention does not oblige the Contracting States to make available for conscientious objectors to military service any substitute civilian service."[137] The Commission was faced with an Article 9 question in this case, but did not even address Article 9. Instead the Commission stated:

> When interpreting this provision, the Commission has taken into consideration Article 4 para. 3(b) of the Convention which *inter alia* provides that "service extracted instead of compulsory military service" should not be included in the concept of "forced or compulsory labor." Since the Convention thus expressly recognizes that conscientious objectors may be required to perform civilian service it is clear that

133. *Id.* at 204.

134. N. v. Sweden, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203, 207 (1985).

135. Johansen v. Norway, App. No. 10600/83, 44 Eur. Comm'n H.R. Dec. & Rep. 155, 156 (1985).

136. *See id.* at 158.

137. *Id.* at 162.

> the Convention does not guarantee a right to be exempted from civilian service.[138]

Therefore, even when there was an alleged violation of Article 9, the Commission did not actually analyze Article 9, but instead shifted to Article 4.

In its strongest statement since *Grandrath*, the Commission flatly stated that due to the wording of Article 4(3)(b):

> [T]he Convention does not give conscientious objectors the right to exemption from military service, but leaves each contracting state to decide whether or not to grant such a right. This being so, neither the sentence passed on the applicant for refusing to perform military service nor the fact of its not being suspended can constitute a breach of Article 9 of the Convention.[139]

However, the applicant was not asking the Commission to find a right to conscientious objection. The applicant complained that the military court, which sentenced him to four months in prison, failed to suspend his sentence in violation of Articles 5, 7, 9, and 14.[140] Once again, the Commission went far beyond the very narrow complaint alleged by the applicant. This dictum by the Commission laid down yet another decision that, on its face, would appear to rule out the right to conscientious objection.

In a Dutch case, *G. v. The Netherlands*, the applicant was asserting that there was a violation of the Convention under Article 9, and 4 with 14 because the period for civilian service was longer than that for military service.[141] While discussing the allegations under Article 4 with 14, the Commission made a startling statement: "Although the Netherlands were not obliged under Article 4 of the Convention to recognize the applicant as a conscientious objector, the applicant's com-

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138. *Id.* at 165.

139. A. v. Switzerland, App. No. 10640/83, 38 Eur. Comm'n H.R. Dec. & Rep. 219, 223 (1984).

140. *See id.* at 222.

141. *See* G. v. The Netherlands, App. No. 11850/85, 51 Eur. Comm'n H.R. Dec. & Rep. 180, 181 (1987); *see also* Van Buitenen v. The Netherlands, App. No. 11775/85 (Eur. Comm'n on H.R. 1987), *at* http://www.echr.coe.int (last visited Jan. 25, 2001).

plaints nevertheless fall within the ambit of that Article, and Article 14 of the Convention is therefore applicable."[142]

This implies that the Commission, that once saw conscientious objection as addressed by Article 9, now strictly governs conscientious objection by Article 4. This cannot be possible. How is it that this body can diverge so much from its earlier rulings? If the Commission can change which Articles uphold rights nothing should have prevented it from finding that a complete right to conscientious objection exists under Article 9.

The next major development in the Commission jurisprudence was a Greek case involving Jehovah's Witnesses ministers that were not exempted from military service while members of other religious clergy were exempted.[143] Because the Commission found a violation of Article 14 with 9, the Commission considered it unnecessary to examine Article 9 on its own.[144]

Commissioner Liddy dissented concerning Article 9. She stated:

> A separate issue arises because if the applicants had undertaken military service they would have been acting contrary to a fundamental tenant of their religion. The alternative for them was to refuse to enlist and risk prosecution and detention, thus depriving them of the opportunity to manifest their religion in community with others and in public, in worship, teaching, practice and observance. In their dilemma they opted for the latter course and were, in the events, subjected to lengthy periods of detention. It may be assumed that this course of action represented, to them, a lesser evil than performing military service.[145]

Moreover, Liddy believes that *Grandrath* does not make Article 9 moot, as Commission decisions have insinuated.[146]

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142. G. v. The Netherlands, 51 Eur. Comm'n H.R. Dec. & Rep. at 182; Van Buitenen v. The Netherlands, App. No. 11775/85 at Laws, Section 1.

143. *See* Tsirlis and Kouloumpas v. Greece, App. Nos. 19233/91 and 19234/91, 25 Eur. H. R. Rep. 198 (1997).

144. *See id.* at 221-22.

145. *Id.* at 224.

146. *See id.* at 224.

Recognizing Eusthadiades's concurring opinion from *Grandrath*, Liddy argues that "the necessity for compulsory military or alternative service falls to be considered under paragraph 2 of Article 9, and that the margin of appreciation is extended as a result of Article 4(3)(b)."[147] The following brief dissent by Liddy opens the door for many future arguments:

> First, the savers in Article 4 are for the purposes of the right specifically guaranteed by Article 4. Secondly, the Convention does not purport to recognise that States may arbitrarily impose compulsory military service or alternative service. The Court has found a violation of Article 14 in conjunction with Article 4(3)(d) where a financial burden ensuing from a provision for compulsory service in the fire brigade involved a difference of treatment on the ground of sex. Thirdly, the Commission in the above mentioned case had been of the opinion that there had also been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1. In the event, the Court did not find it necessary to examine the complaint. This represents a significant evolution of the law since the *Grandrath* Case: neither the Commission nor the Court adopted the view that the saver in Article 4(3)(b) had the effect of rendering Article 1 of Protocol No. 1 inapplicable. Fourthly, the formulation of Article 4(3)(b) . . . makes it clear that the framers of the Convention did not assume that every country had a need for compulsory military service, but allowed (without prejudging any issue under other provisions of the Convention) for the fact that not every country gave recognition to conscientious objectors. Finally, Article 9 contains no express saver for compulsory military or alternative service in its first paragraph, notwithstanding the recognition in Article 4(3)(b) that questions of conscience could arise concerning military service, and notwithstanding the deliberate insertion of a third "saving" sentence in the first paragraph of Article 10.[148]

147. *Id.* at 225.

In Liddy's first point, the right protected and limited in Article 4 is not freedom of conscience, but personal freedom. This is strongly supported by an analysis of the drafting debates of Article 4 UDHR[149] upon which Article 4 ECHR[150] is based. There is no mention of freedom of conscience in the debates on Article 4 UDHR. Forced or compulsory labor, as witnessed in Nazi work camps, was considered to be a "new form of slavery or servitude," and therefore prohibited.[151] In her last point, Liddy is referring to Article 10(1) which states: "This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[152] If the drafters intended to exclude *in toto* conscientious objection from Article 9, they should have included an "express saver" in Article 9(1) prohibiting it. Furthermore:

> The formulation of [Article 4(3)(b)] . . . does not exclude that a State, when it does not recognise this exercise of the freedom of conscience, needs to justify this by reference to one of the restriction grounds in [art.9(2)] . . . . The position of the Commission in fact amounts to the recognition of an "inherent limitation" in a provision containing explicit restrictions, a construction which was rejected by the Court in another context.[153]

The *Tsirlis* case came before the Court, but the Court declined to address the argument of Article 14 with 9.[154] Instead they found violations of Article 5.[155] The Court also dealt with a case in 2000 concerning a conscientious objector's claim under Article 14 in conjunction with Article 9, however the Court refrained from deciding the question of conscientious objection.[156] The next case that comes to the Court could fi-

149. UDHR, *supra* note 1, art. 4, at 73. R

150. ECHR, *supra* note 1, art. 4, 213 U.N.T.S. at 224-26. R

151. *See* Lassen, *supra* note 106, at 110. R

152. ECHR, *supra* note 1, art. 10(1), 213 U.N.T.S. at 230. R

153. VAN DIJK & VAN HOOF, *supra* note 74, at 399. In other words, Article 4(3)b "can only be interpreted to indicate that *all* States where conscription exists are not under *all* circumstances obliged to recognise the right to object." Scheinin, *supra* note 75, at 389. R R

154. *Tsirlis*, 25 Eur. H. R. Rep. at 200.

155. *Id.* at 198-99.

156. *See* Thlimmenos v. Greece, App. No. 34369/97 (Eur.Ct. H.R. 2000), *available at* http://www.echr.coe.int (last visited Mar. 14, 2001). In the *Thlim-*

nally settle the question. While there is a general trend in the Commission's decisions to deny a right to conscientious objection (some decisions more definitively than others) there is still room for the Court to find that the right exists. There is a considerable state practice and international commentary that the Court could look to for guidance.

V. General International Law and the Council of Europe's Position on Conscientious Objection

A. *The United Nations Effort to Recognize Conscientious Objection*

Even if a right to conscientious objection is not clear within the Convention, the Convention does not exclude such a right, and based on the current trends of state practice, the right to conscientious objection does in fact exist. This section will look at sources outside the Convention and Commission to which the Court could look that add weight to the existence of a right to conscientious objection.

The United Nations Commission on Human Rights adopted an initial resolution on conscientious objection in 1987.[157] This was an appeal to states to recognize a right to conscientious objection based upon "profound convictions,

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menos case, the applicant, a Jehovah's Witness, was denied a job as an accountant because he had been convicted of a felony, namely not wearing a military uniform during general mobilization. *See id.* ¶ 7. The Court stated:

> In essence, the applicant's argument amounts to saying that he is discriminated against in the exercise of his freedom of religion, as guaranteed by Article 9 of the Convention, in that he was treated like any other person convicted of a felony although his own conviction resulted from the very exercise of this freedom.

Id. ¶ 42. While the Court decided that this constituted a violation of Article 14 with Article 9, some progress was made. When the Court briefly discussed the issue of conscientious objection, it did so under the heading of Article 9 (paragraphs 50-51) although the Court found it unnecessary "to consider whether there has been a violation of Article 9 on its own." *Id.* ¶ 53.

157. The Commission previously requested the Sub-Commission (Res.40 XXXVII of 12/03/81), to study the question and, in particular, the implementation of GA Res. 33/165 of 20/12/78, which recognized the right of all persons to refuse service in military or police forces used to enforce apartheid, and called upon Member States to grant asylum or safe transit to another state to persons compelled to leave their own countries solely because of their conscientious objection to assisting in the enforcement of apartheid through service in military or police forces.

arising from religious, ethical, moral or similar motives."[158] In 1989 the Commission expressly recognized that "conscientious objection . . . derives from principles and reasons of conscience, including profound convictions, arising from religious or similar motives;"[159] the grounds of justification are therefore expanded and they are solely based on conscience. Consequently, "the right of everyone to have conscientious objection to military service" was recognised "as a legitimate exercise of the right to freedom of thought, conscience and religion as laid down in Article 18 of the Universal Declaration of Human Rights as well as Article 18 of the International Covenant on Civil and Political Rights."[160] States with a system of compulsory military service are recommended to "introduce . . . various forms of alternative service which are compatible with the reasons for conscientious objection" and to "refrain from subjecting such persons [conscientious objectors] to imprisonment."[161] These points were reiterated in a 1993 resolution, where the Human Rights Commission appealed to states to establish "independent and impartial decision-making bodies" in their domestic legal systems to determine the validity of the objectors' claims.[162]

The most authoritative source is the 1993 General Comment of the Human Rights Committee on Article 18 ICCPR.[163] The Comment states that "the Covenant does not explicitly refer to a right of conscientious objection, but the Committee believes that such a right can be derived from art.18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."[164] This is a very important statement also for the interpretation of the Convention, considering that Article 18 ICCPR is very similar to Article 9 of the Convention and

158. E.S.C. Res. 46, U.N. ESCOR, 43d Sess., Supp. No. 5, at 109, U.N. Doc. E/1987/18 (1987).

159. E.S.C. Res. 59, U.N. ESCOR, 45th Sess., Supp. No. 2, at 141, U.N. Doc. E/CN4/1989/59 (1989).

160. *See id.*

161. *See id.*

162. E.S.C. Res. 84, U.N. ESCOR, 49th Sess., Supp. No. 3, at 7, ¶ 7, U.N. Doc. E/CN4/1993/122 (1993).

163. ICCPR, *supra* note 1, art. 18; Human Rights Committee, General Comment on Article 18 of the Covenant, U.N. Doc. CCPR/C/48/CRP.2/Rev. 1 (1993) [hereinafter 1993 General Comment]. R

164. *Id.* ¶ 11.

that the Human Rights Committee has always interpreted Article 18 in conjunction with Article 8,[165] which is very similar to Article 4 of the Convention.[166] The Human Rights Committee also added that "there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service."[167] Following the General Comment, the Human Rights Committee held in 1993 that "the exemption of only one group of conscientious objectors and the inapplicability of exemption for all others cannot be considered reasonable."[168]

The U.N. Commission on Human Rights passed a new resolution in 1995, reiterating its 1993 statement and incorporating the non-discrimination clause adopted by the General Comment. It is worth noting that the resolution clearly states "persons performing military service may develop conscientious objections" and therefore they "should not be excluded from the right" to be exempted from the service they are performing.[169] The Secretary-General echoed many of these comments in a 1997 report.[170] In addition, there have been nu-

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165. L.T.K. v. Finland, U.N. GAOR Hum. Rts. Comm., 25th Sess., at 61 ¶ 5.2, U.N. Doc. CCPR/C/OP/1 (1985).

166. *Compare* ICCPR, *supra* note 1, art. 18, 999 U.N.T.S. at 718, *with* ECHR, *supra* note 1, art. 9, 213 U.N.T.S. at 230; *compare* ICCPR, *supra* note 1, art. 8, 999 U.N.T.S. at 175, *with* ECHR, *supra* note 1, art. 4, 213 U.N.T.S. at 224-226. **R** **R** **R**

167. 1993 General Comment, *supra* note 163, ¶ 11.

168. Report of the Human Rights Committee, H.A.G.M. Brinkhof v. Netherlands, Comm. 402/1990, para. 9.3, U.N. Doc. A/48/40 (Part II) (1993). In the particular case, the Committee adopted its views on a Communication brought by a Dutchman who claimed, *inter alia*, a violation of Article 26 ICCPR, on the grounds that while conscientious objectors may be prosecuted under the Dutch Military Penal Code for refusing to perform military service, Jehovah's Witnesses may not. The Committee held that there was no violation of Article 26 because the author had not shown that his convictions were incompatible with the system of alternative civil service in the Netherlands "or that the privileged treatment accorded to Jehovah's Witnesses adversely affected his rights as a conscientious objector." *Id.*

169. U.N. ESCOR Commission on Human Rights, 62nd mtg., Conscientious Objection to Military Service, U.N. Doc. E/CN.4/RES/1995/83 (1995).

170. *See The Question of Conscientious Objection to Military Service: Report of the Secretary-General Prepared Pursuant to the Commission Resolution* 1995/83, *supra* note 102, ¶ 49. **R**

merous studies on the right including surveys relating to the acceptance of conscientious objection.[171]

Out of the 162 states studied in the Secretary-General's report, 114 recognize some form of conscientious objection, and eighty-four of those states do not require any alternative service.[172] These figures demonstrate that state practice internationally seems to be moving toward a general acceptance of a right to conscientious objection. Furthermore, of the forty-eight countries that did not accept conscientious objection, a handful either have recently recognized or have draft laws.[173] In 1998, the latest resolution adopted by the Human Rights Commission reiterates previous statements and added "states should . . . refrain from subjecting conscientious objectors . . . to repeated punishment for failure to perform military service."[174] It also encouraged states "to consider granting asylum to those conscientious objectors compelled to leave their country of origin because they fear persecution owing to their refusal to perform military service . . . ."[175] While international legal trends are persuasive, since the Court is a regional one, it is more significant to look at the commentaries and state practice of the Council of Europe.

B. *Council of Europe's Effort to Recognize Conscientious Objection*

At the European level, the Parliamentary Assembly of the Council of Europe stated in its first resolution on conscientious objection, that "reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives" create a personal right to be

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171. *See* Asbjørn Eide & Chama Mubanga-Chipoya, Question of Conscientious Objection to Military Service, U.N. ESCOR Sub-Comm'n on the Prevention of Discrimination and Protection of Minorities, 36th Sess., Provisional Agenda Item 16, U.N. Doc. E/CN.4/Sub.2/1983/30 (1983). The 1997 report of the Secretary-General updated this report. *See also* Council of Europe, *Comparative Study*, *supra* note 4. R

172. *See* Marcus, *supra* note 2, at 529. R

173. These states include Greece and Romania. *See* Council of Europe, *Comparative Study*, *supra* note 4, at 54, 96. R

174. U.N. Comm'n on Human Rights Res. 1998/77, U.N. ESCOR, Supp No. 3, at 253, 254, U.N. Doc. E/1998/23 (1998).

175. *Id.* *See also* UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, *available at* http://www.unhcr.ch/refworld/legal/handbook/handeng/hbtoc.htm (last visited Feb. 2, 2001).

released from the obligation to perform military service.[176] It is certainly worth noting that this right is said to "logically" derive "from fundamental rights of the individual in democratic rule of law states guaranteed in art. 9" of the Convention.[177] The Parliamentary Assembly restated this position in 1977, recommending that the Committee of Ministers:

> a. Urge the Governments of member States, insofar as they have not already done so, to bring their legislation into line with the principles adopted by the Assembly [principles contained in Resolution 337 and appended to Recommendation 816];
> b. introduce the right of conscientious objection to military service into the European Convention on Human Rights.[178]

A Recommendation of the Committee of Ministers on the subject does not refer to Article 9,[179] but the definition of conscientious objector set therein could again be "logically inferred" by Article 9. In fact, the "Basic Principle" to which all governments are recommended to adhere, says that "anyone liable to conscription for military service who, *for compelling reasons of conscience*, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service."[180] The Recommendation further sets procedural rules to be followed in deciding each case, e.g., states may require a "suitable procedure" for the assessment of the "genuineness" of the applicant or simply accept his declaration;[181]

> • the applicant must have the right to appeal to an authority which is separate from the military one;[182]

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176. *Resolution on the Right of Conscientious Objection*, Eur. Consult. Ass., 18th Sess., Res. 337A(1) (1967).

177. *Id.*

178. Eur. Parl. Doc. (Rec. 816) (1977).

179. *See Recommendation of the Comm. of Ministers R(87)8*, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 338 (1994) [hereinafter *CM Recommendation R(87)8*].

180. *See id.* para. 1 (emphasis added).

181. *See id.* para. 2.

182. *See id.* paras. 6, 7.

- it is recognised that conscientious objection may develop after having started military service and so the law should allow a request at that stage;[183]
- alternative service "shall be in principle civilian"[184] and not of a punitive nature, so its duration should "remain within reasonable times" in comparison to the military service.[185]

Finally, the European Parliament called "on the Commission and the Member States to press for the right to alternative civilian service to be incorporated in the European Convention . . . as a human right."[186] This resolution gives greater protection to conscientious objectors than the documents analysed so far. Firstly, it affirms that "no court and no committee can examine a person's conscience"[187] and that "a declaration" of the "individual's motives should suffice."[188] Secondly, it adopts a broad definition of conscientious objector when it "[c]alls for the right to be granted to *all conscripts* at *any time* to refuse military service, whether *armed or unarmed*, on *grounds of conscience*."[189] Thirdly, it points out "that the existing inequalities and the penalties applied by some Member States to conscientious objectors—which are the result of differing geographical, social and cultural determinants—create unequal living conditions . . . and are thus detrimental to the process of European integration."[190] Finally, it recognises that "conscientious objection cannot constitute non-participation in the defence of the community but may be seen as another way of practising such participation."[191]

VI. Conclusion

The status of the right to conscientious objection in Europe has been similar to the movement of a pendulum. At its

183. *See id.* para. 8. *See also* Parliamentary Assembly's Work on Human Rights of Conscripts 4 n.17.

184. *See CM Recommendation R(87)8, supra* note 179, at 9.

185. *See id.* para. 10.

186. Resolution on Conscientious Objection and Alternative Civilian Service, Eur. Parl. Doc. A3-15/89, 1989 O.J. (C 291) 122, ¶ 11 (1989).

187. *Id.* ¶ A.

188. *Id.* ¶ 4.

189. *Id.* ¶ 1.

190. *Id.* ¶ C.

191. *Id.* ¶ E.

inception, the Convention had a neutral position in regard to conscientious objection. In 1966, *Grandrath* set the pendulum in motion toward denying a right to conscientious objection. The Commission continued this line of reasoning and further strengthened this denial of the right. In 1984, the pendulum hit its apex in *A. v. Switzerland*, when the Commission denied the existence of a right to conscientious objection altogether. In response, both United Nations organs and Council of Europe bodies began addressing this issue through studies, reports, resolutions, and recommendations. In the mid- to late-1980s, the pendulum began its swing back toward the neutral position. By 1993, the Human Rights Committee had fully recognized the right to conscientious objection through General Comment No. 22 on ICCPR Article 18. While usually a leader in human rights standards, the Council of Europe is behind international law in regard to conscientious objection. Although in its most recent decision the Commission seems to be backing off its interpretation in *A. v. Switzerland*, only the dissenting opinion appears to embrace the true logic of the Convention. The pendulum is moving towards recognition of the right to conscientious objection, but the Commission has avoided dealing with issues of conscience as much as possible.

So while the Commission has overlooked the intent of the drafters, and has made Article 9 generally subservient to Article 4, there is vast material to guide the Court to acknowledge the existence of a right to conscientious objection. The Court can look to the drafters' intention as witnessed by the *travaux préparatoires*. Although the Court has not often utilized the *travaux préparatoires* because it lacks significant substance,[192] it is important to reiterate that after all the amendments to Article 4, there was no commentary. It can be assumed that the *travaux préparatoires*'s silence does not preclude a right, as was the case in *Johnston v. Ireland* concerning divorce.[193] Moreover, the Court is not bound by the Commission's decisions, and theoretically the Court is the final (and now only)[194] inter-

192. *See* HARRIS, *supra* note 99, at 17. **R**

193. *Id. See* Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) (1986).

194. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, *entered into force* Nov. 1, 1998, Europ. T.S. No. 155 (1994). Protocol 11 restructured the European mechanism by eliminating

preter of the Convention.[195] Lastly, there is no *stare decisis* in the Court or Commission. As stated by the Court, it "is free to depart from an earlier judgement if there are 'cogent reasons' for doing so, which might include the need to 'ensure that the interpretations of the Convention reflects societal changes and remains in line with present day conditions.'"[196]

Clearly, the legal landscape of Europe has changed since the drafting of the Convention. With the recognition of the right to conscientious objection under the Human Rights Commission resolutions, the Human Rights Committee General Comment 18, the Parliamentary Assembly's resolutions, the Committee of Ministers' recommendation, and states' practice within the Council of Europe, there is a very strong argument that the right to conscientious objection should be upheld by the Court. The issue of conscientious objection is at a defining moment. Recognition of the right to conscientious objection is merely one Court decision away.

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the European Commission for Human Rights and created a European Court of Human Rights with greater powers.

195. *See* HARRIS, *supra* note 99, at 18. **R**

196. *Id.* at 18-19, *quoting* Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at para. 35 (1990).