

CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL

VOLUME 32

FALL 2001

NUMBER 1

CONSCIENTIOUS OBJECTION TO MILITARY SERVICE: THE EUROPEAN COMMISSION ON HUMAN RIGHTS AND THE HUMAN RIGHTS COMMITTEE

MARIE-FRANCE MAJOR*

Despite early jurisprudence to the effect that neither the European Convention on Human Rights¹ nor the International Covenant on Civil and Political Rights² protect a right of conscientious objection,³ cases continue to be brought under both instruments alleging that refusal to allow objection to military service is contrary to the guarantee of freedom of religion.⁴ Constant complaints by individuals before international organizations have thus encouraged States to recognize the right of conscientious objection in their legislation and their practice. As the recent report of the United Nations Human Rights Commission documents, not only is there a tendency towards abolishing conscription,⁵ but the number of States in which provision is made for civilian and or unarmed service in lieu of military service is also on the rise.⁶

* B.Sc.Soc. (Ottawa), LL.B (Ottawa), BCL (Oxford), JSD (U.C., Berkeley), Associate Professor at the Faculty of Law, University of Ottawa (Canada).

1. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

2. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter International Covenant].

3. See, e.g., *Grandrath v. Fed. Republic of Germany*, 1967 Y.B. Eur. Conv. on H.R. 626, 674 (Comm. of Ministers of the Council of Europe) (noting European Convention, under art. 4(3)(b), does not require recognition of the right of conscientious objection).

4. See European Convention, *supra* note 1, art. 9 ("Everyone has the right to freedom of thought, conscience and religion") and under the International Covenant, *supra* note 2, art. 18 ("Everyone shall have the right to freedom of thought, conscience and religion.").

5. *The Question of Conscientious Objection to Military Service: Report of the Secretary-General Prepared Pursuant to Commission Resolution 1995/83*, U.N. ESCOR, Comm'n on Hum. Rts., 53rd Sess., Provisional Agenda Item 23, ¶ 54, U.N. Doc. E/CN.4/1997/99 (1997).

6. See *Civil and Political Rights, Including the Question of Conscientious Objection to*

While those who oppose military service might be encouraged by recent developments at the national or the international level, there is not yet have cause to celebrate. The reality remains that conscription continues to be enforced by many States,⁷ that conscientious objectors are still imprisoned for refusing to perform military service, and that objectors can still lose their citizenship rights for exercising their convictions.⁸ Furthermore, in those countries where a right of objection is recognized, discrimination is often directed against objectors for failure to perform their perceived duty.⁹ We are, therefore, still far from complete international acceptance of the principle that all individuals should be entitled to take responsibility for their convictions¹⁰ and States should not purposely compel individuals to perform acts which are contrary to their convictions.¹¹

In order to comprehend why so many States are reluctant to recognize a full right of objection,¹² the issues surrounding such a right will be examined. In the following pages, a review of the evolution of the concept of conscientious objection will be undertaken, paying particular attention to the stan-

Military Service, Report of the Secretary-General Submitted Pursuant to Commission Resolution 1998/77, U.N. ESCOR, Comm'n on Hum. Rts., 56th Sess., Prov. Agenda Item 11(g), at 14, U.N. Doc. E/CN.4/2000/55 (1999) (noting that most countries have provisions for alternative non-combative service).

7. E/CN.4/1997/99, *supra* note 5, at 4-6. Even in States that have no conscription, the issue of recognition remains important since enlisted persons can always develop objections once they have joined the military service.

8. See *Promotion, Protection and restoration of Human Rights at National, Regional, and International Levels: Prevention of Discrimination and Protection of children: Human Rights and Youth: Final Report on Human Rights and Youth*, submitted by Mr. Dumitru Mazilu, *Special Rapporteur*, U.N. ESCOR, Comm'n Hum. Rts., Subcomm'n on Prevention of Discrimination and Protection of Minorities, 44th Sess., Prov. Agenda Item 17(a) ¶¶ 103, 106 U.N. Doc. E/CN.4/Sub.2/1992/36 (1992); *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in Accordance with Commission on Human Rights Resolution 1996/23*, U.N. ESCOR, Comm'n on Hum. Rts., 53d Sess., Provisional Agenda Item 19, ¶ 21, U.N. Doc. E/CN.4/1997/91 (1996). See also Asbjørn Eide & Chama Mubanga-Chipoya, *Conscientious Objection to Military Service*, U.N. ESCOR, Subcomm'n. On Prevention of Discrimination and Protection of Minorities, ¶¶ 115-16, U.N. Doc. E/CN.4/Sub.2/1983/30/Rev.1 (1983).

9. Eide & Mubanga-Chipoya, *supra* note 8, ¶ 121.

10. See Donald A. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381, 1412 (1967) (presenting the view that conscription of people who do not wish to participate in war entails interference with their conscience).

11. See generally Theodore Hochstadt, *Right to Exemption from Military Service of a Conscientious Objector to a Particular War*, 3 HARV.C.R.-C.L. L. REV. 1 (1967); Russell Wolff, *Conscientious Objection: Time for Recognition as a Fundamental Right*, 6 ASILS INT'L L.J. 65 (1982); Harlan F. Stone, *The Conscientious Objector*, 21 COLUM. Q. 253 (1919); Marie France Major, *Conscientious Objection and International Law: A Human Right?*, 24 CASE W. RES. J. INT'L L. 349 (1992); and Emily N. Marcus, *Conscientious Objection as an Emerging Human Right*, 38 VA. J. INT'L L. 507 (1998).

12. See Eide & Mubanga-Chipoya, *supra* note 8, ¶ 143(e) indicating that while the right of objection is gaining acceptance by some States, it is still not yet recognized by others. See E/CN.4/1997/99, *supra* note 5, at 52 (Annex II) for a list of countries that do not, as of yet, recognize a right of objection to military service.

dards and guidelines elaborated by the United Nations Human Rights Commission, to the jurisprudence of the European Commission of Human Rights and to the opinions of the Human Rights Committee.

Part I will address the issues surrounding the right to conscientious objection so one may comprehend why so many States are reluctant to recognize a full right of objection. Part II will review the evolution of case law regarding conscientious objection, paying particular attention to the standards and guidelines elaborated by the United Nations Human Rights Commission. Part III will review conscientious objection in the European Convention on Human Rights and decisions by the European Commission of Human Rights and opinions of the Human Rights Committee. Part IV concludes the article.

I. MEMBER STATES ARE RELUCTANT TO RECOGNIZE FULL RIGHTS OF CONSCIENTIOUS OBJECTION

A. *Recognition of the Right of Objection*

Conscientious objectors are persons who, for reasons of conscience or profound convictions,¹³ refuse to perform armed service.¹⁴ While a right of objection is not explicitly protected within international instruments,¹⁵ the right to refuse military service is most often characterized as inherent in the concept of freedom of thought, conscience and religion.¹⁶ Such right is guaranteed in Article 18 of the Universal Declaration of Human Rights,¹⁷ Article

13. Conscientious beliefs are said to reflect "an individual's inward conviction of what is morally right or morally wrong, and it is a conviction that is genuinely reached and held after some process of thinking about the subject." Norman S. Reaburn, *Conscientious Objection and the Particular War*, 43 AUST. L.J. 317, 319 (1969) (citing *Grundal v. Minister of State for Labor and National Service*, Sup. Ct. of W. Austl., unreported judgment, Sept. 11, 1953).

14. See Eide & Mubanga-Chipoya, *supra* note 8, ¶ 153. See also Paul M. Landskroener, Note, *Not the Smallest Grain of Incense: Free Exercise and Conscientious Objection to Draft Registration*, 25 Val. U. L. Rev. 455, 457 (1991).

[G]enerally understood, conscientious objection to war describes a conscientious or religious belief incompatible with participation in war. Conscientious objection is not a monolithic ideology, however. Rather, the term describes a range of religious beliefs and attitudes that generally concern a person's relationship with the State in time of war.

Id.

15. Matthew Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Right*, 21 CAL. W. INT'L L.J. 31, 43 (1990-91).

16. See generally Major, *supra* note 11, at 356-61.

17. Universal Declaration of Human Rights, G.A. Res. 217(III)(A), U.N. GAOR, 3d Sess., Part 1, at 74, U.N. Doc. A/810 (1948). Article 18 states: "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." *Id.*

18 of the International Covenant on Civil and Political Rights¹⁸ and, Article 9 of the European Convention on Human Rights.¹⁹

In Resolutions 1987/46,²⁰ 1989/59,²¹ 1995/83,²² 1998/77,²³ and 2000/34,²⁴ the Commission on Human Rights specifically declared that the right to conscientiously object to military service constituted a legitimate exercise of the right to freedom of thought, conscience and religion.²⁵ The Human Rights Committee, in General Comment 22, also maintained that while “[t]he Covenant [did] not explicitly refer to a right to conscientious objection . . . such a right [could] be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief.”²⁶

The right of objection is also associated with the right to life, which is guaranteed in Article 3 of the Universal Declaration, Article 6 of the International Covenant on Civil and Political Rights, and Article 2 of the European Convention on Human Rights.²⁷ The Commission on Human Rights, in

18. International Covenant, *supra* note 2, art. 18.

19. European Convention, *supra* note 1, art. 9.

20. *Conscientious Objection to Military Service*, Res. 1987/46, U.N. ESCOR, Comm’n on Hum. Rts., 43d Sess., Supp. No. 5, 54th mtg., at 108, U.N. Doc. E/CN.4/1987/60 (1987).

21. *Conscientious Objection to Military Service*, Res. 1989/59, U.N. ESCOR, Comm’n on Hum. Rts., 45th Sess., Supp. No. 2, 55th mtg., at 139, U.N. Doc. E/CN.4/1989/86 (1989).

22. *Conscientious Objection to Military Service*, Res. 1995/83, U.N. ESCOR, Comm’n on Hum. Rts., 51st Sess., Supp. No. 4, 62d mtg., at 246, U.N. Doc. E/CN.4/1995/176 (1995).

23. *Conscientious Objection to Military Service*, Res. 1998/77, U.N. ESCOR, Comm’n on Hum. Rts., 54th Sess., Supp. No. 3, 58th mtg., at 253, U.N. Doc. E/CN.4/1998/177 (1998).

24. *Conscientious Objection to Military Service*, Res. 2000/34, U.N. ESCOR, Comm’n on Hum. Rts., 60th mtg., U.N. Doc. E/CN.4/RES/2000/34 (2000).

25. In Resolution 1998/77, the Commission “Draws attention to the right of everyone to have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion, as laid down in article 18 of the Universal Declaration of Human Rights and article 18 of the International Covenant on Civil and Political Rights.” E/CN.4/1998/177, *supra* note 23, at 254 (emphasis in original). In his interim report on the elimination of all forms of religious intolerance, Mr. Amor, a special rapporteur for the Commission on Human Rights, also expressed the opinion that “absence of alternative service or even of legal provisions recognizing the concept of conscientious objection [constituted] an omission at variance with international law.” *Human Rights Questions: Human Rights Question, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: Implementation of the Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief*, U.N. GAOR, 51st Sess., Agenda Item 110(b), ¶ 34, U.N. Doc. A/51/542 (1996) (note from Secretary-General) (citations omitted).

26. *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, Int’l Hum. Rts. Instruments, General Comment 22, at 38, U.N. Doc. HRI/GEN/1/Rev.3 (1997).

27. Eide & Mubanga-Chipoya, *supra* note 8, ¶ 44. The contention is that the right to life includes within its scope the right not to be forced to take the life of others or, put differently, that the right to life necessarily implies the right to refuse to kill: if international treaties “forbid individuals from engaging in arbitrary killing, conscientious objectors should not be punished for refusing to kill.” Major, *supra* note 11, at 362. See also *The Role of Youth in the Promotion and Protection of Human Rights, Including the Question of Conscientious Objection to Military Service: Written statement submitted by the International Peace Bureau*, U.N.

Resolution 1989/59, recognized the right to life is closely associated with the right of conscientious objection; “Mindful of articles 3 and 18 of the Universal Declaration of Human Rights, which proclaim the right to life, liberty and security of person and the right to freedom of thought, conscience and religion . . . [we] recognize[] the right of everyone to have conscientious objections.”²⁸ The Commission also linked the right to life with a right of objection to military service in the preambular paragraphs of Resolution 1998/77.²⁹

B. Implications of Recognition

Once a State acknowledges a right of objection to military service, it has to delineate the contours of the right. In particular, the State must define the circumstances or range of grounds under which the right may be claimed.³⁰ One issue, which States must address, is whether individuals can base their opposition to military service on profound religious, moral, ethical, humanitarian, or similar convictions or, only on religious motivations.³¹ States must be mindful of the position of the Commission on Human Rights that, “[C]onscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives” and, the Commission’s affirmation that whenever a right of objection is recognized there should be no discrimination “between conscientious objectors on the basis of their beliefs.”³²

ESCOR, Comm’n on Hum. Rts., 45th Sess., Agenda Item 15, at 2, U.N. Doc. E/CN.4/1989/NGO/71 (1989).

28. E/CN.4/1989/86, *supra* note 21, at 139, 141.

29. E/CN.4/1998/177, *supra* note 23, at 253.

30. As far back as 1981, the Commission on Human Rights, in Resolution 40, pointed to the need for a better understanding of the circumstances under which military service might be objected to on grounds of conscience. See *The role of the Youth in the Promotion and Protection of Human Rights, Including the Question of Conscientious Objection to Military Service*, Res. 40, *Conscientious Objection to Military Service*, Res. 1987/46, U.N. ESCOR, Comm’n on Hum. Rts., 37th Sess., Supp. No. 5, 1640th mtg., at 243, U.N. Doc. E/CN.4/1475 (1981).

31. While religious objectors base their opposition to war upon religious texts and the teachings and philosophy of their religious affiliations, ethical objectors rely upon their own morality and adopted system of ethics. See generally Lippman, *supra* note 15, at 31 (1990-91); Marcus, *supra* note 11, at 539, and Note, *Conscientious Objectors: Recent Developments and a New Appraisal*, 70 COLUM. L. REV. 1426, 1434 (1970).

32. E/CN.4/1998/177, *supra* note 23, at 254. The Human Rights Committee, in General Comment 22, also expressed the opinion that once the right of objection is recognized, “there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs.” HRI/GEN/1/Rev.3, *supra* note 26, at 39. See also Angelo Vidal d’Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. ESCOR, 46th Sess., Agenda Item 24, ¶ 113, U.N. Doc. E/CN.4/1990/46 (1990).

One of the thorniest issues for States concerns whether they should acknowledge the rights of partial objectors. Partial objectors are individuals who believe in the possibility of a just war; they do not object to all wars of all kinds or the use of violence in all situations.³³ Partial objectors invoke a right of objection only when they are convinced that the war in which they are asked to serve is unjust in either aim or method.³⁴ Most States are reluctant to recognize the rights of partial objectors,³⁵ since they do not appreciate individuals criticizing and second guessing their involvement in a particular military conflict.³⁶ However, both the General Assembly³⁷ and the Commission on Human Rights³⁸ have recognized the validity of the notion of partial objection.³⁹

33. The idea that war can be morally acceptable only in certain circumstances emanates from the concept of just war as developed by Christian theologians. See Joachim Von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665, 678-79 (1939).

34. Based on standards of international or national law or morality, partial objectors believe that, "armed force may be justified under limited circumstances . . . Objection based on reference to standards of international law may concern the purpose for which armed force is used, or it may concern the means and methods used in armed combat." Eide & Mubanga-Chipoya, *supra* note 8, ¶ 27.

35. See, e.g., E/CN.4/1997/99, *supra* note 5, at 31-37.

36. See generally Joseph E. Capizzi, *Selective Conscientious Objection in the United States*, 38 J. OF CHURCH & STATE 339 (1996); Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31; Major, *supra* note 11, at 352-56 (discussing the reasons advanced for non-recognition of the rights of partial objectors).

37. Resolution 33/165 (20 December 1978) of the General Assembly provides that all persons have the right to "refuse service in military or police forces which are used to enforce apartheid." *Status of Persons Refusing Service in Military or Police Forces Used to Enforce Apartheid*, G.A. Res. 165, U.N. GAOR, 33d Sess., Supp. No. 45, at 154, U.N. Doc. A/33/45 (1978).

38. In Resolution 1998/77, the Commission urged States "not to differentiate between conscientious objectors on the basis of the nature of their particular beliefs." E/CN.4/1998/177, *supra* note 23, at 254. It must be noted, however, that despite the fact that the resolution stipulates that objection to military service can be derived from "principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or *similar motives*," it does not specifically refer to partial objectors. *Id.* (emphasis added).

39. See Eide & Mubanga-Chipoya, *supra* note 8, ¶ 19. In their report, Eide and Mubanga-Chipoya recommended that States extend the right of objection to both absolute and partial objectors. Their position was that:

....

(b) States should, as a minimum, extend the right of objection to persons whose conscience forbids them to take part in armed service under any circumstances (the pacifist position).

(c) States should recognize by law the right to be released from service in armed forces that the objector considers likely to be used to enforce apartheid.

(d) States should recognize by law the right to be released from service in armed forces that the objector considers likely to be used in action amounting to or ap-

A second question that States must address is who shall make the final determination of whether a valid claim for conscientious objection has been presented. The issue is whether all claims of objection should automatically be accepted as bona fide once they are formulated, or whether there should exist some sort of inquiry into their validity. The argument for accepting such claims as bona fide, is that, because it is practically impossible for anyone to penetrate the conscience of an individual, a declaration setting out the individual's motives should suffice to obtain conscientious objector status.⁴⁰ The proposition that an inquiry should be made into the validity of a claim of conscientious objection is defended on the basis that if no inquiry is made, far too many individuals will invoke a right of objection.⁴¹

Assuming that claims are to be reviewed, the next choice is whether they should be scrutinized by military panels, by tribunals composed of military and civilian personnel, or by civilian boards.⁴² Deciding what type of procedural system will be established for obtaining conscientious objector status is important because the rules of procedure and of evidence vary greatly depending on whether one is arguing before a military panel or a civilian board.⁴³ While the Commission on Human Rights does not take a clear stance on the issues of whether all objection claims should automatically be accepted as valid without verification,⁴⁴ or whether civilian panels must nec-

proaching genocide.

(e) States should recognize by law the right to be released from service in armed forces that the objector considers likely to be used for illegal occupation of foreign territory.

(f) States should recognize the right of persons to be released from service in armed forces that the objector holds to be engaged in, or likely to be engaged in, gross violations of human rights.

(g) States should recognize the right of persons to be released from the obligation to perform service in armed forces that the objector considers likely to resort to the use of weapons of mass destruction or weapons that have been specifically outlawed by international law or to use means and methods that cause unnecessary suffering.

Id. ¶ 253(1). See also Amnesty International, *Out of the Margins: the Right to Conscientious Objection to Military Service in Europe*, 1997 Report, EUR, 01/02/97, at *5, at <http://www.web.org/ai.nsf/index/eur010021997> (April 1997).

40. See, e.g., Statement of the International Humanist and Ethical Union. E/CN.4/1990/46, *supra* note 32, ¶ 113; Lippman, *supra* note 15, at 35.

41. See Itzhak Kugler, *On the Possibility of a Criminal Law Defense for Conscientious Objection*, 10 CAN. J. L. & JURISPRUDENCE 387, 435-38 (1997) (discussing how to best deal with the problem of inappropriate claims of objection).

42. Eide & Mubanga-Chipoya, *supra* note 8, ¶ 101.

43. See *id.* ¶¶ 101-02. Civilian boards may also be more likely to recognize the validity of objection claims than military tribunals. As Eide and Mubanga-Chipoya points out, tribunals consisting only of "military personnel . . . are often disinclined to allow for conscientious objection." *Id.* ¶ 101.

44. See E/CN.4/1998/177, *supra* note 23, at 253. The Commission, however, "Welcomes

essarily be the ones scrutinizing all claims, it does declare that all decisions must be made by "independent and impartial decision-making bodies."⁴⁵

States must also determine how they will deal with those individuals that obtain the status of conscientious objector. Some of the issues which must be addressed include: (1) whether objectors must perform alternative services;⁴⁶ (2) if alternative service is required, what forms of services will be provided for;⁴⁷ (3) what should be the length of the alternative service—should it be equal to, or longer than, military service;⁴⁸ and (4) should objectors receive the same remuneration for their services as conscripts.

On these matters, States can obtain guidance from Resolution 1998/77 of the Commission on Human Rights. The Commission recommended to States, with a system of compulsory military service, "that they provide for conscientious objectors various forms of alternative service which are compatible with the reasons for conscientious objection, of a non-combatant or civilian character, in the public interest and not of a punitive nature."⁴⁹ The Committee of Ministers, in Recommendation R(87)8,⁵⁰ also provided that:

the fact that some States accept claims of conscientious objection as valid without inquiry." (emphasis in original). *Id.* In Recommendation No. R(87)8, the Committee of Ministers of the Council of Europe also articulates that States can "lay down a suitable procedure for the examination of applications for conscientious objector status" or simply "accept a declaration giving reasons by the person concerned." Communication on the Activities of the Committee of Ministers, EUR. PARL. ASS., 39th Sess., Doc. 5725, at 10 (1987), reprinted in COUNCIL OF EUROPE, COLLECTION OF RECOMMENDATIONS, RESOLUTIONS AND DECLARATIONS OF THE COMMITTEE OF MINISTERS CONCERNING HUMAN RIGHTS 1949-1987, at 184-85 (1989).

45. E/CN.4/1998/177, *supra* note 23, at 254. See also the recommendation of the Parliamentary Assembly of the Council of Europe that "where the decision regarding the recognition of the right of conscientious objection is taken in the first instance by an administrative authority, the decision-making body shall be entirely separate from the military authorities, and its composition shall guarantee maximum independence and impartiality." Council of Europe, Twenty-ninth Ordinary Session of the Parliamentary Assembly (Second part, 5-13 Oct. 1977), Recommendation 816, in COUNCIL OF EUROPE, COLLECTED TEXTS 222 (1977). Eide and Mubanga-Chipoya recommended that "[s]tates should maintain or establish independent decision-making bodies to determine whether a conscientious objection is valid under national law in any specific case. There should always be a right of appeal to an independent, civilian judicial body." Eide & Mubanga-Chipoya, *supra* note 8, ¶153(2)(a).

46. See Eide & Mubanga-Chipoya, *supra* note 8, ¶105. States that recognize a right of objection usually require performance of alternative service. According to Eide and Mubanga-Chipoya, the provision of alternative service fulfills two purposes for authorities. First, it imposes a burden on the objector, thus deterring those who, out of pure expediency, seek to be released from military service. Secondly, it permits States to obtain from the objector a service that is useful to the public interest. *Id.* ¶106. See also E/CN.4/1997/99, *supra* note 5, at 41-46; CHARLES C. MOSKOS & JOHN WHITECLAY CHAMBERS, THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE (1993).

47. Eide & Mubanga-Chipoya, *supra* note 8, ¶ 107. The three recognized categories of alternative service are: (a) non-combat roles in the armed forces; (b) social service/development service; and (c) peace-oriented service. *Id.*

48. When alternative service is provided, "an attempt is made to ensure that the burden of the service is at least as onerous as military service would be, in order to preclude the temptation to request alternative service for reasons of opportunism." *Id.* ¶ 33.

49. E/CN.4/1998/177, *supra* note 23, at 254. See also *The Role of Youth in the Promotion and Protection of Human Rights, Including the Question of Conscientious Objection to*

9. Alternative service, if any, shall be in principle civilian and in the public interest. Nevertheless, in addition to civilian service, the state may also provide for unarmed military service, assigning to it only those conscientious objectors whose objections are restricted to the personal use of arms;

10. Alternative service shall not be of a punitive nature. Its duration shall, in comparison to that of military service, remain within reasonable limits;⁵¹

11. Conscientious objectors performing alternative service shall not have less social and financial rights than persons performing military service. Legislative provisions or regulations, which relate to the taking into account of military service for employment, career or pension purposes shall apply to alternative service.⁵²

States that recognize a right of objection must further adjudge whether individuals who are already in the military are precluded from claiming a right of objection. States must decide whether military personnel who develop objections to military service during their involvement with the military: (1) can seek reassignment to non-combatant duties; (2) can be dis-

Military Service: Written statement submitted by Friends World Committee for Consultation, U.N. ESCOR, Comm'n on Hum. Rts., 47th Sess., Agenda Item 25, U.N. Doc. E/CN.4/1991/NGO/47 (1991) (suggesting that alternative service should never be of a punitive nature).

50. COUNCIL OF EUROPE, *supra* note 44, at 185.

51. *See also* Report of the Committee on Civil Liberties and Internal Affairs on Conscientious Objection in the Member States of the Community, EUR. PARL. DOC. A3-0411/93, ¶¶ 4 & 9 (Dec. 3, 1993), 1994 O.J. (C44) 103. Recently, the Human Rights Committee, while examining the fourth periodic report from the Russian Federation, recommended that in States where a right of objection was recognized, "every effort be made to ensure that reasonable alternatives to military service be made available that are not punitive in nature or in length of service." *Report of the Human Rights Committee*, U.N. GAOR, 50th Sess., Supp. No. 40, ¶ 400, U.N. Doc. A/50/40 (1995). In examining the second periodic report of Cyprus, the Committee also decreed that an excessive period of alternative service was not compatible with the provisions of Articles 18 and 26 of the Covenant. *See* Report of the Human Rights Committee, U.N. GAOR, 49th Sess., Vol. I, Supp. No. 40, at 54-55, U.N. Doc. A/49/40 (1994). A similar holding can be found in Report of the Human Rights Committee, U.N. GAOR, 52d Sess., Vol. I, Supp. No. 40, at 64, U.N. Doc. A/52/40 (1997). In their report, Eide & Mubanga-Chipoya also recommended that "states should provide alternative service for the objector, which should be at least as long as the military service, but not excessively long so that it becomes in effect a punishment." Eide & Mubanga-Chipoya, *supra* note 8, ¶ 153(3). They also argued that "states should, to the extent possible, seek to give the alternative service a meaningful content, including social work or work for peace, development and international understanding." *Id.*

52. *See also* E.P. Res. A3-0411/93, *supra* note 51, ¶ 10. During adoption of the International Covenant, and more specifically, during discussion of Article 8 of the Covenant, proposals to ensure that objectors receive the same pay as soldiers, were set aside. *Annotations on the Text of the Draft International Covenants on Human Rights*, U.N. GAOR, 10th Sess., Annexes, Agenda Item 28, ch. VI, ¶ 23, U.N. Doc. A/2929 (1955). *See also* YORAM DINSTEN, *The Right to Life, Physical Integrity, and Liberty*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 114, 127 (Louis Henkin ed., 1981) (noting the failure of a provision guaranteeing equal pay for alternative service under Article 8 of the International Covenant).

charged from the military; or (3) must continue to perform their duties. The position of the Commission on Human Rights,⁵³ of the Human Rights Committee,⁵⁴ and of the Committee of Ministers of the Council of Europe⁵⁵ is that all individuals, whether or not in the armed forces, must be allowed to invoke a right of objection.⁵⁶

One final issue, which States must determine, is whether they will grant asylum to individuals who flee their country of origin because they have not been granted exemption from military service. States must be mindful of Article 14 of the Universal Declaration, which affirms that “everyone has the right to seek and enjoy in other countries asylum from persecution.”⁵⁷ States must also consider General Assembly Resolution 33/165, which not only recognizes the legitimacy of refusal to serve in military police forces used to enforce apartheid, but also stresses the need for asylum for those compelled to leave their country of origin for such refusal.⁵⁸ In Resolution 1998/77, the Commission on Human Rights also encouraged States: “subject to the circumstances of the individual case meeting the other requirement of the definition of a refugee as set out in the 1951 Convention relating to the Status of Refugees,⁵⁹ to consider granting asylum to those conscientious objectors

53. After stating that it was “Aware that persons performing military service may develop conscientious objections,” the Commission, in Resolution 1998/77, “[drew] attention to the right of everyone to have conscientious objection.” E/CN.4/1998/177, *supra* note 23, at 254 (emphasis in original).

54. The Human Rights Committee position is that an individual who wishes to claim the status of conscientious objector should be able to do so at any time: whether it be before or after entering the armed forces. *See, e.g.* Report of the Human Rights Committee, U.N. GAOR, 51st Sess., Supp. No. 40, at 37-38, U.N. Doc. A/51/40 (1996), and Report of the Human Rights Committee, U.N. GAOR, 52d Sess., Supp. No. 40, at 64, U.N. Doc. A/52/40 (1997).

55. COUNCIL OF EUROPE, *supra* note 44, at 185. In Recommendation R(87)8, the Committee of Ministers of the Council of Europe urged that the law “provide for the possibility of applying for and obtaining conscientious objector status in cases where the requisite conditions for conscientious objection appear during military service or periods of military training after initial service.” *Id.*

56. *See The Role of Youth in the Promotion and Protection of Human Rights, Including the Question of Conscientious Objection to Military Service: Written statement submitted by Pax Christi International, a non-governmental organization in consultive status (category II)*, U.N. ESCOR, Comm’n on Hum. Rts., 47th Sess., Agenda Item 25, U.N. Doc. E/CN.4/1991/NGO/48 (1991); and *The Question of Conscientious Objection to Military Service: Written statement submitted by Pax Christi International, a non-governmental organization in special consultative status*, U.N. ESCOR, Comm’n on Hum. Rts., 53d Sess., Agenda Item 23, U.N. Doc. E/CN.4/1997/NGO/39 (1997).

57. Eide & Mubanga-Chipoya, *supra* note 8, ¶ 137.

58. A/33/45, *supra* note 37, at 154.

59. *See Office of the United Nations High Commissioner For Refugees, Handbook On Procedures and Criteria For Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating To the Status Of Refugees*, HCR/IP/4/Eng/Rev.1 (1979). The Handbook establishes standards for resolving some of the questions concerning conscientious objection and the right of asylum. The Handbook states that “[F]ear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition.” *Id.* ¶ 167. “A person is clearly not a refugee if his only rea-

compelled to leave their country of origin because they fear persecution owing to their refusal to perform military service when there is no provision, or no adequate provision, for conscientious objection to military service.”⁶⁰

II. THE EVOLUTION OF CONSCIENTIOUS OBJECTION BY THE U.N. HUMAN RIGHTS COMMITTEE

In a number of decisions, the European Commission and the International Committee have set aside the claims of individuals who have asserted a right of objection. Based on literal and formalistic readings of the European Convention on Human Rights and the International Covenant on Civil and Political Rights, both organizations have previously rejected the contention that a right of objection is encompassed within the protected right of freedom of religion. Fortunately for objectors, both the Commission and the Committee demonstrate a willingness to reconsider their initial rulings on the subject.

A. The International Covenant on Civil and Political Rights and the Human Rights Committee

One international standard upon which the right to conscientious objection to military service can be founded is the right to freedom of thought,

son for desertion or draft-evasion is his dislike of military service or fear of combat.” *Id.* ¶ 168. It also affirms, however, that,

the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

Id. ¶ 170. The Handbook further maintains that where “[T]he type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft evasion, could . . . in itself be regarded as persecution.” *Id.* ¶ 171. The Handbook concludes with the proposition that “[I]t [is] open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience” *Id.* ¶ 173.

60. E/CN.4/1998/177, *supra* note 23, at 254. Eide and Mubanga-Chipoya noted that most decisions concerning asylum were determined by political considerations and by the relationship that existed between the country of asylum and the country from which the conscientious objector had fled. Eide & Mubanga-Chipoya, *supra* note 8, ¶ 132. They recommended the establishment of standards to ensure a “favorable attitude towards conscientious objectors requesting asylum in conformity with obligations under international law.” *Id.* ¶ 153(5). See also *The Question of Conscientious Objection to Military Service, Written statement submitted by the International Fellowship of Reconciliation, a non-governmental organization in special consultative status*, U.N. ESCOR, Comm’n on Hum. Rts., 54th Sess., Provisional Agenda Item 22, U.N. Doc. E/CN.4/1998/NGO/22 (1998); and, *Civil and Political Rights, Including the Question of: Conscientious Objection to Military Service, Written statement submitted by the Friends World Committee for Consultation (Quakers), a non-governmental organization in special consultative status*, U.N. ESCOR, Comm’n on Hum. Rts., 56th Sess., Provisional Agenda Item 11(g), U.N. Doc. E/CN.4/2000/NGO/29 (2000).

conscience and religion. Article 18 of the International Covenant on Civil and Political Rights provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.⁶¹

The debates surrounding the adoption of Article 18 seem to preclude the possibility of claiming that a right of objection to military service is protected by the Covenant. Although the Philippines delegation proposed an additional paragraph to the Convention which stated, “[p]ersons who consciously object to war as being contrary to their religion shall be exempt from military service,” it was withdrawn prior to a vote on the issue.⁶² While an argument can be made that the reason why the proposed addition was withdrawn was simply that its inclusion was unnecessary in light of the fact that Article 18 already covered the matter,⁶³ the fact remains that when Article 18 was adopted, very few States recognized a right of objection.

1. *L.T.K. v. Finland*

In *L.T.K. v. Finland*, the Committee made its first true pronouncement on whether the Covenant guarantees a right of objection to military service.⁶⁴ In 1982, the author of the communication, a Finnish citizen, had informed the competent national authorities that, for serious moral considerations based on his ethical convictions, he was unable to perform military service.⁶⁵

61. International Covenant, *supra* note 2, art. 18.

62. U.N. Doc. E/CN.4/SR.161, ¶¶ 49-57 (1950). A proposal that no one should be required to do any act contrary to ones religious worship and observance was also set aside. *See* U.N. Doc. E/CN.4/SR.116, at 10 (1949).

63. Lippman, *supra* note 15, at 44, 45.

64. *L.T.K. v. Finland*, Comm. No. 185/1984, *Report of the Human Rights Committee*, U.N. GAOR, 14th Sess., Supp. No. 40 at 242, U.N. Doc. A/40/40 (1985). The issue of the right of conscientious objection first arose in the case of *Muhonen v. Finland*, Comm. No. 89/1981, *Report of the Human Rights Committee*, U.N. GAOR, 14th Sess., Supp. No. 40 at 164, U.N. Doc. A/40/40 (1985). However, the question of whether Article 18 of the Covenant guaranteed a right of objection did not have to be determined by the Committee since the applicant had already obtained a remedy within his country.

65. *L.T.K. v. Finland*, Comm No. 185/1984 ¶ 2.1.

Instead of armed or unarmed military service, he offered to perform alternative service.⁶⁶ After concluding that it had not been proven that serious moral considerations based on an ethical conviction prevented the author from performing armed or unarmed military service, the Military Service Examining Board ordered him to perform armed service.⁶⁷ Despite this order, he refused to perform any military duties.⁶⁸ Court proceedings were then initiated against him, and he was sentenced to eleven months imprisonment for his refusal.⁶⁹

Appearing before the Committee, the author argued that Finland had violated Articles 18 and 19⁷⁰ of the Covenant by failing to recognize his status as a conscientious objector.⁷¹ The Committee, however, rejected this contention. After observing that the author of the communication was not prosecuted and sentenced because of his beliefs or opinions, but because he refused to perform military service, the Committee declared that the Covenant “does not provide for the right to conscientious objection.”⁷² The Committee’s position was that neither Article 18 nor Article 19 of the Covenant could be construed as implying a right of objection, especially when paragraph 3(c)(ii) of Article 8 was taken into account. Article 8 paragraph 3(c)(ii) states, “forced or compulsory labor” did not include “any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors,” was taken into account.⁷³ For this reason, the author’s claim was declared incompatible with the provisions of the Covenant⁷⁴ and the communication was deemed inadmissible.⁷⁵

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* This decision was appealed, but the decision was upheld. At a later date, the author once again informed the authorities of his ethical convictions and of his desire to perform only alternative service. The Examining Board, however, decided that it had not received sufficient proof of his convictions.

70. International Covenant, *supra* note 2. Article 19 of the Covenant guarantees to everyone the right to freedom of opinion and expression. The right includes freedom “to hold opinions without interference” and “to seek, receive and impart information and ideas . . . through any other media” and “regardless of frontiers.”

71. *Muhonen v. Finland*, Comm. No. 89/1981, *Report of the Human Rights Committee*, U.N. GAOR, 14th Sess., Supp. No. 40 at 164, U.N. Doc. A/40/40 (1985).

72. *Id.* ¶ 5.2.

73. See also Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 211-212 (Louis Henkin ed., 1981). The author argues that since Article 8(3)(c)(ii) provides that a State may require national civilian service instead of military service “in countries where conscientious objection is recognized,” this “implies that States are free to recognize or not to recognize conscientious objection to military service.”

74. See E/CN.4/1997/99, *supra* note 5, at 12; and E/CN.4/2000/55, *supra* note 6, at 11. As the Committee explained, this was not a case where the author alleged that procedural defects in the judicial proceedings against him had occurred. If procedural defects had been present, then the defects themselves could have constituted violations of the provisions of the

2. Aapo Järvinen v. Finland

In *Aapo Järvinen v. Finland*,⁷⁶ the Committee reaffirmed its position that, to fulfill its obligations under the Covenant, a State need not grant the status of conscientious objector to individuals who refuse to perform military services.⁷⁷ It also expounded on its understanding of the scope of Article 26 which guarantees that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”⁷⁸ In *Järvinen*, the problem was not that Finnish authorities did not recognize the validity of conscientious objection claims. Rather, the concern was over the duration of civilian service which had to be performed instead of military service.⁷⁹ While civilian service had recently been extended from twelve months to sixteen months, the length of military service had remained at eight

Covenant. *Muhonen v. Finland*, Comm. No. 89/1981, ¶ 5.2. For argument that the Committee should not have resolved the issue of compatibility of military service and freedom of conscience at the admissibility stage, see Manfred Nowak, *UN Human Rights Committee: Survey of Decisions Given up Till July 1986*, 7 HUMAN RIGHTS L.J. 287, 303-04 (1986).

75. *Muhonen v. Finland*, Comm. No. 89/1981, ¶ 5.2.

76. *Järvinen v. Finland*, Comm. No. 295/1988, *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, ¶ 6.1, U.N. Doc. A/45/40(1990).

77. *Id.* ¶ 6.2. See also *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Comm. No. 267/1987, U.N. GAOR, Hum. Rts. Comm., Vol. 2, at 74, U.N. Doc. CCPR/C/OP/2 (1990); and *R.T.Z. v. Netherlands*, Comm. No. 245/1987, *Report of the Human Rights Committee*, U.N. GAOR, 43d Sess., Supp. No. 40 at 265, U.N. Doc. A/43/40 (1988). The Committee observed that “the Covenant does not preclude the institution of compulsory military service by State parties even though this means that the rights of individuals may be restricted during military service, within the exigencies of such service” *Id.* ¶ 3.2.

78. International Covenant, *supra* note 2, art. 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

79. *Järvinen v. Finland*, Comm. No. 295/1988, ¶¶ 2.1-2.2.

months.⁸⁰ The author's contention was that the prolonged civilian service was unjustified and constituted discrimination.⁸¹

In rejecting the author's claim, the Committee affirmed that, although individuals in Finland had to perform military or alternative service, no violation of Article 8 of the Covenant existed. Article 8, according to the Committee, clearly stated, "'service of a military character' and 'national service required by law of conscientious objectors' [did not constitute] forced or compulsory labour."⁸² On the issue of whether the specific conditions under which alternative service had to be performed constituted a violation of Article 26, the Committee maintained that States could provide for longer periods of civilian service than military service without necessarily engaging in discriminatory practices.⁸³ While Article 26 prohibited discrimination and guaranteed equal protection to everyone, it did not prohibit all differences of treatment; differences based on reasonable and objective criteria were permissible.⁸⁴ The prolonged duration of civilian service was considered reasonable and distinct because one was no longer required to prove to the examination boards that one's religious belief was genuine.⁸⁵

3. J.P. v. Canada

In its subsequent decision dealing with the rights of objectors, the Committee seemed to renege slightly on its earlier stance that the right of objection fell outside the confines of Article 18. In *J.P. v. Canada*,⁸⁶ a mem-

80. *Id.* ¶ 2.2. Until the end of 1986, the duration of civilian service was twelve months. To obtain conscientious objector status an individual had to submit a written application. The genuineness of an applicant's conviction was reviewed by an examination board. At the end of 1986, the duration of civilian service was extended to sixteen months but applicants were assigned to civilian service solely on the basis of their own declaration. The ratio for the amendment was explained as follows:

As the convictions of conscripts applying for civilian service will no longer be examined, the existence of these convictions should be ascertained in a different manner so as not to let the new procedure encourage conscripts to seek an exemption from armed service purely for reasons of personal benefit or convenience. Accordingly, an adequate prolongation of the term of such service has been deemed the most appropriate indicator of a conscript's convictions.

Id.

81. *Id.* ¶ 3.1.

82. *Id.* ¶ 6.1.

83. Despite its affirmation that the "Covenant itself does not provide a right to conscientious objection," the Committee examined whether a violation of Article 26 had occurred. It did so because of its position that the prohibition of discrimination under Article 26 was not limited to the rights provided for in the Covenant. *Id.* ¶ 6.2.

84. *Id.* ¶ 6.3.

85. *Id.* ¶¶ 6.4-6.6. For criticism of the decision see BAHYYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION 283-84 (1996) (arguing that "the exceedingly longer duration of alternative civil service" was punitive in nature).

86. *J.P. v. Canada*, Comm. No. 446/1991, *Report of the Human Rights Committee*, U.N.

ber of the Quakers refused to pay a certain percentage of her taxes. Her position was "that the Canadian Income Tax Act, insofar as it implied that a certain percentage of her assessed taxes went towards military expenditures, violate[d] her freedom of conscience and religion."⁸⁷ Despite deciding that the claim was inadmissible because the refusal to pay taxes on grounds of conscience fell outside the scope of Article 18,⁸⁸ the Committee held that "conscientious objection to military activities and expenditures" was "certainly" protected by Article 18.⁸⁹

Further proof of the Committee's willingness to reconsider its position that a right of objection could not be derived from Article 18 of the Covenant came in the form of General Comment twenty-two.⁹⁰ Interjecting on the scope of Article 18, the Committee stated:

Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.⁹¹

The Comment also specified that when the "right [of objection] is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service."⁹²

GAOR, 47th Sess., Supp. No. 40, at 434, U.N. Doc. A/47/40 (1992).

87. *Id.* ¶ 2.

88. For a similar conclusion see *J.v.K. and C.M.G.v.K.-S. v. The Netherlands*, Comm. No. 483/1991, Hum. Rts. Comm., 45th Sess., at 435, U.N. Doc. CCPR/C45/D/483/1991 (1992). The Committee was asked to reconsider its position on the question of refusal to pay taxes on grounds of conscience in a subsequent case, but declined to do so. *K.V. and C.V. v. Germany*, Comm. No. 568/1993, Hum. Rts. Comm., 50th Sess., ¶¶ 3 & 4.3, U.N. Doc. CCPR/C/50/D/568/1993 (1994). The European Commission on Human Rights has also decreed that the obligation to pay taxes is a general one, which has no specific conscientious implications in itself. See generally *C. v. United Kingdom*, App. No. 10358/83, 37 Eur. Comm'n H.R. Dec. & Rep. 142 (1983), and *Hibbs & Birmingham v. United Kingdom*, App. No. 11991/86, Eur. Comm'n H.R. (1986).

89. *J.P. v. Canada*, Comm. No. 446/1991, ¶ 4.2. But see MANFRED NOWAK, UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 324 (opining that the statement was merely an obiter dictum).

90. HRI/GEN/1/Rev.3, *supra* note 26, at 36.

91. *Id.* ¶ 11.

92. *Id.*

4. H.A.G.M. Brinkhof v. The Netherlands

In *H.A.G.M. Brinkhof v. The Netherlands*,⁹³ the Committee had the opportunity to elaborate on its understanding of the principles contained in General Comment twenty-two. In *Brinkhof*, the question before the Committee was whether a State, which recognizes the rights of objectors and which provides an alternative obligation for them, can also establish an exception to civilian service for a specified group without violating Article 26 of the Covenant.⁹⁴ The issue arose because, under Dutch law, Jehovah's Witnesses were exempt from performing military service and from performing substitute civilian service.⁹⁵ The practical effect of the law was that, while a conscientious objector had to demonstrate the authenticity of his convictions and could be prosecuted and sentenced to jail for refusing to perform alternative service, a Jehovah's Witness was exempt from such obligations.⁹⁶

In a somewhat convoluted decision, the Committee concluded that "the exemption of only one group of conscientious objectors and the inapplicability of exemption for all others" was unreasonable.⁹⁷ Referring to its general observations on Article 18, the Committee emphasized that when a State recognizes a right of conscientious objection to military service, it must not establish a distinction between objectors in relation to the nature of their respective convictions.⁹⁸ In light of the fact that States should grant the same treatment to all persons who formulate objections of the same nature against military and alternative service, the Committee recommended that the Dutch government "review its relevant regulations and practices with a view to removing any discrimination in this respect."⁹⁹

In the end, however, the Committee decided that the author of the communication, who had been jailed for refusing to obey military orders,¹⁰⁰ had

93. *Brinkhof v. The Netherlands*, Comm. No. 402/1990, Hum. Rts. Comm., 48th Sess., U.N. Doc. CCPR/C/48/D/402/1990 (1993).

94. *Id.* ¶¶ 3.3 & 3.4. This issue was raised, but not discussed, in *Järvinen v. Finland*, Comm. No. 295/1988, *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, ¶ 3.4, U.N. Doc. A/45/40 (1990).

95. To account for the special treatment reserved to Jehovah Witnesses, the State explained that "baptized members form a closed group of people who are obliged, on penalty of expulsion, to observe strict rules of behavior." One rule which all members had to follow was refusal to participate in any kind of military or substitute service. *Brinkhof v. The Netherlands*, Comm. No. 402/1990, ¶ 7.3. The State argued that membership in the group constituted strong evidence that objection to military service and substitute service was based on genuine religious convictions. *Id.* ¶ 9.2. The author of the communication maintained that the preparedness of total objectors to go to prison constituted sufficient evidence of the sincerity of their objections, and thus, that the differentiation in treatment between Jehovah's Witnesses and other conscientious objectors amounted to discrimination. *Id.* ¶ 8.

96. *Id.* ¶ 9.2.

97. *Id.* ¶ 9.3.

98. *Id.*

99. *Id.* ¶ 9.4.

100. *Id.* ¶¶ 2.1 - 2.2.

not been the victim of a violation of Article 26. No violation had occurred, for the claimant had not shown that his convictions as a pacifist were “incompatible with the system of substitute service in the Netherlands or that the privileged treatment accorded to Jehovah’s Witnesses adversely affected his rights as a conscientious objector against military service.”¹⁰¹

5. *Westerman v. The Netherlands*

In *Westerman v. The Netherlands*,¹⁰² the Committee once again had occasion to apply the principles contained in Comment 22. In *Westerman*, the author, who had been denied recognition as a conscientious objector by Dutch authorities,¹⁰³ nonetheless refused to perform military duties.¹⁰⁴ Because of his refusal to carry out military orders, the author was charged, and found guilty, under the Military Criminal Code.¹⁰⁵ Before the Committee, the author advanced that the failure of the criminal courts to treat his conscientious objections against military service as a justification for his refusal to perform military service, and to acquit him, constituted a violation of Article 18 of the Covenant.¹⁰⁶

The Committee, considering the alleged violation of Article 18 by the Dutch Government, “observe[d] that the right to freedom of conscience does not as such imply the right to refuse all obligations imposed by law, nor does it provide immunity from criminal liability in respect of every such refusal.”¹⁰⁷ After referring to General Comment 22, the Committee noted that, under Dutch law, there existed a procedure for the recognition of conscientious objection against military service.¹⁰⁸ It was only after evaluation of all

101. *Id.* ¶ 9.3. For criticism of the “non-decision” of the Committee see Manfred Nowak, *The Activities of the UN Human Rights Committee: Developments from 1 August 1992 to 31 July 1995*, 16 HUM. RTS. L.J. 377, 393 (1995) and Manfred Nowak, *United Nations*, 12 NETH. Q. HUM. RTS. 35, 36 (1994).

102. *Westerman v. Netherlands*, Comm. No. 682/1996, *Report of the Human Rights Committee*, U.N. GAOR, 55th Sess., Supp. No. 40, vol. 2, at 41, U.N. Doc. A/55/40 (1999).

103. *Id.* ¶¶ 2.1-2.7. Under Dutch law, those who have conscientious objections to performing military service, may request recognition of these objections under the Military Service (Conscientious Objection) Act. The Act defines conscientious objections “insurmountable objections of conscience to performing military service in person, because of the use of violent means in which one might become involved while serving in the Dutch armed force.” *Id.* ¶ 6.5.

104. *Id.* ¶ 2.2.

105. *Id.* ¶ 2.6.

106. *Id.* ¶ 3.2.(arguing that, even though his objections were not recognised as conscientious objections within the meaning of the Act, this did not signify that his objections were not objections of conscience. The failure of the Criminal Courts to take his objections into account constituted a violation of Article 18 of the Covenant).

107. *Id.* ¶ 9.3.

108. *Id.* ¶ 9.3. (referring to General Comment 22 which stipulates that a right of objection to military service can be derived from Article 18 and that the “obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief”).

relevant facts presented by the author that the State party concluded that he had failed to demonstrate that an “insurmountable objection of conscience to military service because of the use of violent means.”¹⁰⁹ There simply existed no need for the Committee to substitute its own evaluation for that of the national authorities, especially in light of the fact that the Dutch legal provision, which recognised a limited right of objection, was compatible with Article 18 of the Covenant.¹¹⁰

In a separate dissenting opinion, Commissioner Solari Yrigoyen examined the limited grounds of objection recognised under Dutch law.¹¹¹ He pointed out that, in times of peace, when violent means were not used, it was virtually impossible for total objectors to be exempt from military service. This was unfortunate for “even in peacetime, military service is connected with war.”¹¹² In response to the author’s argument that the sentence he received violated his rights, Commissioner Solari Yrigoyen maintained that, in light of the Committee’s statement that conscientious objection to performing military service was a manifestation of freedom of thought, conscience and religion, a violation of Article 18 of the Covenant had been established.¹¹³

6. Foin v. France, Maille v. France, Venier & Nicolas v. France

In three recent decisions, the Committee re-examined the application of Article 26 of the Covenant in relation to objectors. In *Foin v. France*,¹¹⁴ *Maille v. France*¹¹⁵ and *Venier & Nicolas v. France*,¹¹⁶ the authors claimed that the requirement, under French law, of twenty-four months for national alternative service, rather than twelve months for military service, was dis-

109. *Id.*

110. *Id.* at 48. Commissioners Bhagwati, Henkin, Pocar, Medina-Quiroga and Scheinin argued that the author’s stated reasons for conscientious objection to military service demonstrated that his objections constituted “a legitimate manifestation of his freedom of thought, conscience or religion under article 18 of the Covenant.” While the State party’s arguments could suffice to explain why the author’s reasons did not constitute conscientious objection under the State party’s domestic law, “the State party ha[d] failed to provide sufficient justification for its decision to interfere with the author’s right under article 18 of the Covenant in the form of denial of conscientious objector’s status and imposing a term of imprisonment.” As paragraph 11 of General Comment 22 clearly spelled out, there must not be any differentiation among conscientious objectors based on the nature of particular beliefs. The dissenters thus found that the author was the victim of a violation of Article 18 of the Covenant. *Id.*

111. *Id.* at 49.

112. *Id.*

113. *Id.*

114. *Foin v. France*, Comm. No. 666/1995, *Report of the Human Rights Committee*, U.N. GAOR, 55th Sess., Supp. No. 40, vol. 2, at 31, U.N. Doc. A/55/40 (1999).

115. *Maille v. France*, Comm. No. 689/1996, *Report of the Human Rights Committee*, U.N. GAOR, 55th Sess., Supp. No. 40, vol. 2, at 63, U.N. Doc. No. A/55/40 (1999).

116. *Venier & Nichols v. France*, Comm. Nos. 690/1996 & 691/1996, *Report of the Human Rights Committee*, U.N. GAOR, 55th Sess., Supp. No. 40, vol. 2, at 77, U.N. Doc. No. A/55/40 (1999).

criminatory and violated the principle of equality before the law and equal protection of the law as set forth in Article 26 of the Covenant.¹¹⁷ Just as in *Järvinen*,¹¹⁸ the issue before the Committee was whether the specific conditions under which alternative service had to be performed constituted a violation of the Covenant.

In the *Foin* decision, the Committee reiterated its position that Article 26 of the Covenant does not prohibit all differences of treatment: differentiations based on reasonable and objective criteria are acceptable.¹¹⁹ The Committee recognized that States can establish differences between military and national alternative service and, that such differences may, in a particular case, justify a longer period of service. Any differentiation, however, must be “based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service.”¹²⁰ The problem in the present cases was that France had justified its difference of treatment on the ground that doubling the length of service was the only way to test the sincerity of an individual’s convictions.¹²¹ Such argument clearly failed to meet the reasonable and objective criteria requirement.¹²²

The dissenters’ believed that, in order to assess whether the differentiation in treatment between the authors and those who served in the military was based on reasonable and objective criteria, one must consider all the relevant facts.¹²³ Specifically, one had to recognize that the conditions of alternative service differed from the conditions of military service:

While soldiers were assigned to positions without any choice, conscientious objectors had a wide choice of posts. They could propose their own employers and could do service within their own professional fields. Furthermore, objectors received higher remuneration than people servicing in the armed forces . . . [and] military service, by its very essence, carried with it burdens that were not imposed on those doing alternative service, such as military disciplines, day and night, and the risks of being injured

117. *Foin v. France*, Comm. No. 666/1995, ¶¶ 1 & 3.5; *Maille v. France*, Comm. No. 689/1996, ¶¶ 1 & 3.5; *Venier & Nicols v. France*, Comm. Nos. 690/1996 & 691/1996, ¶¶ 1 & 3.5. The authors also alleged a violation of Articles 18(2) and 19(1) of the Covenant.

118. *Järvinen v. Finland*, Comm. No. 295/1988, *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, ¶ 6.1, U.N. Doc. A/45/40(1990).

119. *Foin v. France*, Comm. No. 666/1995, ¶ 10.3.

120. *Id.*

121. *Id.*

122. *Id.* at 40. In dissent, members Ando, Klein and Kretzmer argued that States that choose to exempt conscientious objectors from military service must be able to “adopt reasonable mechanisms for distinguishing between those who wish to avoid military service on grounds of conscience, and those who wish to do so for other, unacceptable, reasons.” *Id.* ¶ 3. One effective and non-intrusive way for States to determine the validity of conscientious objection claims is by the imposition of longer service periods for those who apply for exemptions. This approach is perfectly valid so long as the extra service demanded is not punitive, that is, so long as it does not create a situation where real conscientious objectors are forced to forego their objection. *Id.*

123. *Id.* ¶ 4.

or killed during military manoeuvres or military action.¹²⁴

In the dissent's view, when all the circumstances were taken into consideration, the author's argument that the difference of twelve months between military service and the service required of objectors amounted to discrimination became unconvincing.¹²⁵ Regardless, the Committee found "that a violation of Article 26 ha[d] occurred since the author[s] w[ere] discriminated against on the basis of [their] convictions of conscience."¹²⁶

B. Admissibility Decisions

In a number of admissibility decisions, the Committee also established that a person cannot claim to be a victim of a violation of Articles 6¹²⁷ and 7¹²⁸ of the Covenant, which protect the right to life and prohibit torture, by merely referencing the requirement to do military service.¹²⁹ The Committee's position is that claimants cannot contest conscription by a mere assertion that performing military service, which implies preparation for the use of nuclear and other weaponry, inevitably forces them to become accessories to crimes against peace and crimes of genocide.¹³⁰ Neither can they contest

124. *Id.* ¶ 5.

125. *Id.* ¶ 6.

126. *Id.* ¶ 38.

127. International Covenant, *supra* note 2, art. 6. Article 6 (1) states that "Every human being has the inherent right to life," that the "right shall be protected by law" and that "no one shall be arbitrarily deprived of his life." *Id.* art. 6(1). Article 6(3) affirms that,

when deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

Id. art. 6(3). In General Comments 6 and 14, the Committee explained that Article 6 encompasses both a negative right to life against a State party, and a positive right. General Comments 6 & 14, U.N. Doc. HRI/GEN/1/Rev.3, *supra* note 26, at 6, 18 (1997). In Comment 6, the Committee affirmed that:

[W]ar and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defense is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing . . . loss of life. Every effort they make to avert the danger of war . . . and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.

Id. at 6.

128. International Covenant, *supra* note 2, art. 7. Article 7 states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.*

129. *See, e.g.,* J.P.K. v. The Netherlands, Comm. No. 401/1990, U.N. Doc. A/47/40, at 401 and T.W.M.B. v. The Netherlands, Comm. No. 403/1990, U.N. Doc. A/47/40, at 406.

130. *See, e.g.,* Brinkhof v. The Netherlands, Comm. No. 402/1990, ¶ 6.2 and A.R.U. v.

military service on the basis that it places their life, and the lives of others, in jeopardy.¹³¹ This is despite General Comment 14 which affirms the “production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as a crime against humanity.”¹³²

III. CONSCIENTIOUS OBJECTION IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COMMISSION ON HUMAN RIGHTS

Article 9 of the European Convention provides:

1. 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, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the rights and freedoms of others.¹³³

Although Article 9, at first glance, may appear to grant a right of conscientious objection, it must be read and interpreted in light of Article 4.¹³⁴ Article 4(3)(b) makes express reference to conscientious objectors and provides, “for purposes of this article, the term ‘forced or compulsory labor’ shall not include . . . *in countries where a right to objection is recognised*, service exacted [from conscientious objectors] instead of compulsory military service.”¹³⁵

A. Grandrath v. Federal Republic of Germany

The question of the right to conscientious objection to military service was examined by the European Commission in *Grandrath v. Federal Repub-*

the Netherlands, Comm. No. 509/1992, U.N. Doc. A/49/40, at 327.

131. *Id.* In *A.R.U. v. Netherlands*, the author contended, “[M]ilitary service in the Netherlands, within the framework of the defense strategy of the North Atlantic Treaty Organization (NATO), which is based on the threat with and use of nuclear weapons, violated Articles 6 and 7 of the Covenant.” *Id.* ¶ 3.1. His position was “[b]y doing military service, his life [was] endangered, because of the measures of retaliation in case of the use of nuclear weapons by NATO.” *Id.* ¶ 3.2. “He also submits that the use of nuclear weapons by NATO, through its consequences such as a fall-out and nuclear winter, directly affected his right to life and his right not to be subjected to torture or to cruel, inhuman or degrading treatment.” *Id.* The Committee, however, rejected all arguments. *Id.* ¶ 4.2.

132. U.N. Doc. HRI/GEN/1/Rev. 3, *supra* note 26, at 19.

133. European Convention, *supra* note 1, at 4.

134. See FRANCIS G. JACOBS & ROBIN C. A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 217 (2d ed. 1996). The author explains that under one interpretative principle the Convention must be read as a whole. As a result, each article of the convention must be interpreted in light of the other articles. *Id.*

135. European Convention, *supra* note 1, at 2 (emphasis added).

lic of Germany.¹³⁶ In *Grandrath*, a German citizen, who was a Bible-study leader in a congregation of Jehovah's Witnesses, had been recognized by the national authorities as a conscientious objector.¹³⁷ Although he was required to perform substitute civilian service, he was given the opportunity to apply for exemption or postponement of such service. The national authorities, however, rejected his claim of exemption.¹³⁸ When he refused to perform his obligations on grounds of conscience, criminal proceedings were instituted against him, and he was convicted and ultimately sentenced to prison.¹³⁹

Before the Commission, the applicant alleged that Article 9 of the Convention was breached because he was not exempted from substitute civilian service.¹⁴⁰ On its own motion, the Commission considered whether the claimant had been subject to discrimination under Article 14,¹⁴¹ in conjunction with Article 9 or Article 4.¹⁴² Under German law, ordained Evangelical or Roman Catholic ministers were exempt from military and alternative service. On the other hand, ministers of other religions were exempt only if the ministry was their principal occupation and only if their functions were equivalent to those of ordained Evangelical or Roman Catholic Ministers.¹⁴³

The Commission first distinguished the issues of religion and conscience under Article 9. The Commission stated the civilian service, which the applicant was required to perform, would not restrict his right to manifest his religion, because it would not interfere with the private and personal practice of his religion or with his duties to his religious community.¹⁴⁴ On the question of conscience, whether Article 9 was violated because the claimant had been required to perform a service contrary to his conscience or religion, the Commission referred to Article 4(3)(b) of the Covenant and held:

[A]s in this provision it is expressly recognized that civilian service may be imposed on conscientious objectors as a substitute for military service, it must be concluded that objections of conscience do not, under the Convention, entitle a person to exemption from such service.¹⁴⁵

136. *Grandrath v. Fed. Republic of Germany*, 1967 Y.B. Eur. Conv. on H.R. 626 (Comm. Of Ministers of the Council of Europe).

137. *Id.*

138. *Id.*

139. *Id.* at 628.

140. *Id.* at 630.

141. Article 14 provides that "the enjoyment of the rights and freedoms" set forth in the Convention are to be "secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention, *supra* note 1, at 5.

142. *Grandrath v. Fed. Republic of Germany*, 1967 Y.B. Eur. Conv. on H.R. at 630.

143. *Id.* at 656.

144. *Id.* at 672.

145. *Id.* at 674. See JAMES E.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 241 (2d ed. 1987). As Fawcett explains, "had there been no

In these circumstances, the Commission finds it superfluous to examine any questions of the interpretation of the term "freedom of . . . conscience and religion" as used in Article 9 of the Convention.¹⁴⁶

The Commission made two important affirmations in relation to Article 14 of the Covenant. First, the Commission affirmed the application of Article 14 did not depend upon a previous finding that another article of the Convention had been violated.¹⁴⁷ In certain cases, Article 14 could be violated in a field dealt with by another article of the Convention, despite being no violation of that other article:

[I]n the present case, it is necessary to refer to the limitative provisions contained in various Articles of the Convention. For example, in each of Articles 8 to 11, a certain right is guaranteed by paragraph (1), but the Contracting Parties are, under paragraph (2), allowed, subject to specific conditions to restrict that right. When using this power to restrict a right guaranteed by the Convention, the Contracting Parties are bound by the provisions of Article 14. Consequently, if a restriction which is in itself permissible under paragraph (2) of one of the above Articles, is imposed in a discriminatory manner, there would be a violation of Article 14 in conjunction with the other Article concerned. The situation under Article 4 is similar. Although the types of work and service, enumerated in paragraph (3) are not expressly described as exceptions to the general prohibition against "forced labour," they nevertheless operate as such in the present context.¹⁴⁸

....

When the provisions are considered from this point of view, it follows that the limitations permitted, particularly by any national legislation concerning compulsory military service and substitute service by conscientious

reference in Article 4(3)(b) to conscientious objection to compulsory military service, it could have been argued that, while such service is not forced labour contrary to Article 4, it is still contrary to Article 9(1) if imposed on conscientious objectors." *Id.* However, "since Article 4(3)(b) refers to conscientious objectors in terms which plainly imply that contracting States are not bound to recognize it, compulsory military service is an exception to Article 9(1) as well as Article 4." *Id.* Therefore, "it follows *fortiori* that substitute civilian service is also an exception." *Id.*

146. *Grandrath v. Fed. Republic of Germany*, 1967 Y.B. Eur. Conv. on H.R. at 674. In an individual opinion, Commissioner Eustathiades argued that "[w]here a 'service exacted instead of compulsory military service'" was imposed so as to interfere with the right guaranteed by Article 9 of the Convention, it was not permissible to exclude from consideration any of Articles 4, 9 and 14. *Id.* at 690. Article 9 of the Convention was applicable in the present case since the applicant's objections regarding the legality of the service which was a substitute for military service were connected with his religious convictions. *Id.* Commissioner Eustathiades, however, "hesitated" to conclude that the Convention had been violated in this case: "in regard to the limitations laid down in Article 9, paragraph (2), the margin of appreciation which is given to the Government concerned is extended as a result of Article 4, paragraph (3)(b), of the Convention." *Id.* at 692-93.

147. *Id.* at 678.

148. *Id.* The Commission's position was that while Article 14 did not presuppose a breach of the other provisions of the Convention, there could be no room for its application unless the facts at issue fell within the ambit of one or more of the latter. *Id.*

objectors, must satisfy the requirements of Article 14, that is to say, be non-discriminatory both in their character and in their application.¹⁴⁹

Secondly, the Commission affirmed that only those differences of treatment of persons in similar situations which had no objective and reasonable justification qualified as discriminatory under Article 14.¹⁵⁰

The Commission concluded, on the issue of whether Article 14 in conjunction with Article 4 of the Convention had been violated, that while there was no question the German legislation on compulsory service differentiated between ministers of different religions,¹⁵¹ such difference in treatment did not amount to discrimination in violation of Article 14. Adoption of the limited exemption was motivated by a wish on the part of German authorities “to prevent large-scale evasions of the duty to perform military service.”¹⁵²

The Commission continued:

In implementation of this basic purpose [to prevent evasion of military duty] the law laid down such criteria that those ministers—and those only—whose functions require their constant and continual attendance at their ministerial office, would be exempt from compulsory service. . . [T]he real basis of the distinction made by [the law] is in the function performed by different categories of ministers and is not according to the religious community to which they belong.¹⁵³

For these reasons, the criteria adopted in the German law were not discriminatory within the meaning of Article 14: they constituted a differentiation which had to be considered “to be reasonable and relevant, having regard, on the one hand, to the necessity of maintaining the effectiveness of the legislation regarding compulsory service and, on the other hand, the need of assuring proper ministerial service in religious communities.”¹⁵⁴

149. *Id.* at 680.

150. *Id.* at 680-82. According to the Commission:

The notion of discrimination between individuals implies a comparison between two or more different groups or categories of individuals and the finding that one group or category is being treated differently from—and less favorably than—another group or category and, secondly that such different treatment is based on grounds which are not acceptable.

Id. at 680.

151. *Id.* at 682.

152. *Id.*

153. *Id.* at 682-84.

154. *Id.* at 684. In addition to concluding that the German law was not discriminatory, the Commission also stated that the law was not applied in a discriminatory fashion with regard to the Applicant:

The Applicant has himself stated that at the relevant time he had a full-time employment as a painter’s assistant and that he exercised his ministerial functions in his spare time. It is therefore clear that the Applicant’s ministry was not his principal function and that, for this reason alone, he was not entitled to exemption under

The Commission also expressed the opinion that there was not a violation of Article 14 in conjunction with Article 9 of the Convention. [I]t has not been established that the Applicant had been subjected to a treatment which was in any way less favourable than that accorded to ministers of other religious communities.”¹⁵⁵ Furthermore, because the applicant’s allegation that he had been required to perform a compulsory service which was contrary to his conscience or religion only raised issues under Article 4 of the Convention, there was no need to examine the question of discrimination in relation to Article 9.¹⁵⁶

B. X v. Austria

In *X v. Austria*,¹⁵⁷ the Commission once again examined the issue of conscience and military service. The applicant, convicted for refusing to serve in the military, claimed that as a Roman Catholic, it was impossible for him to serve as an armed combatant. He alleged the national authorities violated his right to freedom of conscience.¹⁵⁸

In order to decide if a right of conscientious objection fell within the purview of Article 9, the Commission once again affirmed it had to take cognizance of Article 4(3)(b). In the Commission’s view, the inclusion of the words “in countries where they are recognized” was intended to leave a choice to the contracting parties as to whether to recognize conscientious objectors and, in case of recognition, whether to provide for some form of substitute service.¹⁵⁹ Not only did Article 9, as qualified by Article 4(3)(b), *not* impose on States an obligation to recognize conscientious objection, but States which failed to recognize conscientious objectors could choose to punish those who refused military service.¹⁶⁰

Article II of the German Act. It results from this that the Applicant cannot be considered to have been the victim of a discriminatory treatment in the application of the German law.

Id. (emphasis omitted). See JACOBS & WHITE, *supra* note 134, at 219-20 and Van Dijk & Van Hoof, *Theory and Practice of the European Convention on Human Rights* 541 (1990) for criticism of the Commission’s decision. See *X v. The Federal Republic of Germany*, App. No. 7705/76, 9 Eur. Comm’n H.R. Dec. & Rep. 196 (1977) and *Johansen v. Norway*, App. No. 10600/83, 44 Eur. Comm’n H.R. Dec. & Rep. 155 (1985) for reaffirmation of this decision.

155. *Grandrath v. Fed. Republic of Germany*, 1967 Y.B. Eur. Conv. on H.R. 626, 688 (Comm. of Ministers of the Council of Europe).

156. *Id.* at 168.

157. *X v. Austria*, App. No. 5591/72, 43 Eur. Comm’n H.R. Dec. & Rep. 161 (1973).

158. *Id.*

159. *Id.*

160. *Id.* See also *Johansen v. Norway*, App. No. 10600/83, 44 Eur. Comm’n H.R. Dec. & Rep. 155 (1985); *Conscientious Objectors v. Denmark*, App. No. 7665/76, 9 Eur. Comm’n H.R. Dec. & Rep. 117, 118 (1977); *A. v. Switzerland*, App. No. 10640/83, 38 Eur. Comm’n H.R. Dec. & Rep. 219, 222-23 (1984).

C. Johansen v. Norway and Autio v. Finland

In a number of decisions, the Commission expounded on its understanding of the rights and obligations of States that recognize a right of objection. In *Johansen v. Norway*,¹⁶¹ the Commission rejected the applicant's claim that his detention for refusal to perform civilian service¹⁶² violated his rights under Articles 5 and 9¹⁶³ of the Convention. The Commission affirmed that "the Convention does not prevent a State from taking measures to enforce performance of civilian service, or from imposing sanctions on those who refuse such service."¹⁶⁴ In *Autio v. Finland*,¹⁶⁵ where the applicant complained over the length of his substitute service, the Commission also ruled that where a State decides to provide alternative service for recognized objectors, it does not necessarily violate Article 14 in conjunction with Article 9 by providing for a longer period of civilian service than for military conscription.¹⁶⁶

Despite reaffirming that neither the right of conscientious objection to military service nor substitute service were guaranteed by the Convention,¹⁶⁷ the Commission in *Autio* ruled that the complaint fell within the scope of Article 9, and therefore Article 14 of the Convention was applicable.¹⁶⁸ Finnish

161. App. No. 10600/83, 44 Eur. Comm'n H.R. Dec. & Rep. 155 (1985).

162. Conscientious objection to the performance of military service was recognized in Norwegian legislation. While objectors could apply for civilian service instead of military service, there was no possibility of exemption from both military and civilian service, except for medical reasons. *Id.* at 158-59. Two different kinds of remedies could be applied, either separately or in conjunction with each other, to persons who refused to discharge their civilian obligations. Section 19 of the Act on Exemption from Military Service provided that a person who was liable to perform civilian service but who refused to present himself or to comply with orders given to him, could be sentenced to a fine or to imprisonment for not more than three months. *Id.* at 157. As for Section 20, it provided that a person who refused to perform civilian service could be placed at a special camp or at an institution under the Prison Administration in order to spend the period of service at that camp or institution. *Id.* Before it was decided to place a person at such camp or institution, it had to be established through a judgment by a court that the legal conditions of Section 20 were fulfilled. *Id.* In the present case, the applicant was not prosecuted on the basis of Section 19 of the Act, but proceedings were brought against him before the Tune District Court in order to have a decision by the Court that the conditions for the application of Section 20 of the Act were fulfilled. *Id.* at 158.

163. While realizing that the Convention did not entitle him to exemption from civilian service and did not prevent the Norwegian State from imposing sanctions on him for failure to perform such service, the applicant nonetheless maintained that since the possible sanctions were such as to force him to do exactly what his conscience forbade him to do, a violation of Article 9 of the Convention excised. *Id.* at 161.

164. *Id.* at 165.

165. *Autio v. Finland*, App. No. 17086/90, 72 Eur. Comm'n H.R. Dec. & Rep. 245 (1991).

166. *Id.* at 250. See also *Johansen v. Norway*, App. No. 10600/83, 44 Eur. Comm'n H.R. Dec. & Rep. 155 (1985); *Conscientious Objectors v. Denmark*, App. No. 7665/76, 9 Eur. Comm'n H.R. Dec. & Rep. 117, 118 (1977); *A. v. Switzerland*, App. No. 10640/83, 38 Eur. Comm'n H.R. Dec. & Rep. 219, 222-23 (1984).

167. *Autio v. Finland*, App. No. 17086/90, at 249.

168. *Id.*

law extended the length of substitute service from twelve to sixteen months when the compulsory military service was only eight months.¹⁶⁹ The difference in treatment, between those who opted for substitute service and those who engaged in military service, was not deemed discriminatory because there was an objective and reasonable justification for such differentiation.¹⁷⁰ The longer period of civilian service was adopted to discourage conscripts from seeking exemptions for reasons of personal benefit or convenience (thus fulfilling the legitimate aim).¹⁷¹ The prolonged civilian service concurrently removed an objector's obligation to convince examining boards of the genuineness of the objector's beliefs (thus fulfilling the requirement of proportionality).¹⁷²

D. N. v. Sweden

In *N. v. Sweden*,¹⁷³ the Commission also expressed the opinion that it was not discriminatory to limit exemption from military and substituted service to conscientious objectors belonging to a religious community.¹⁷⁴ While all males were subject to military service under Swedish law, conscripts could apply for substitute non-armed service¹⁷⁵ or for exemption from military service. "Section 46 of the Swedish *Conscript Act* required as a condition for not being called up for service that a person be affiliated to a religious community and that, in view of this affiliation, it can be assumed that he will not perform any service."¹⁷⁶ The applicant alleged a violation of Article 14 in conjunction with Article 9 in that he, being a total resister for philosophical reasons, was not exempted from military service but sentenced to imprisonment for refusal to discharge the service, while members of Jehovah's Witnesses, a religious sect, were automatically exempted from military service and thus not sentenced.¹⁷⁷

After concluding the applicant's complaint fell within the realm of Article 9 of the Convention,¹⁷⁸ the Commission made general comments regarding the practice of conscription. It observed, "any system of compulsory military service imposes a heavy burden on the citizens. This burden will be

169. *Id.* at 246-47.

170. *Id.* at 250.

171. *Id.*

172. *Id.*

173. *N. v. Sweden*, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203 (1984).

174. *Id.* at 207.

175. *Id.* at 205. Conscripts who, for reasons of conscience or religion, objected to serving in the army, were allowed to perform substitute non-armed service. *Id.* Provisions for substitute service were laid down in the *Act on Non-Armed Conscript Service. Id.*

176. *N. v. Sweden*, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203, 207 (1984). Although in practice this exception was only applied to Jehovah's Witnesses, the law did not exclude its application to other religious sects having similar views. *Id.*

177. *Id.* at 206.

178. *Id.* at 207.

regarded as acceptable only if it is shared in an equitable manner and if any exemptions from the duty to perform [such] service are based on solid grounds.”¹⁷⁹ The Commission pointed out that if some citizens were exempted without compelling justification, questions of discrimination could be alleged.¹⁸⁰ In light of these considerations, “[I]t is understandable, therefore, if national authorities are restrictive in exempting total resisters from any kind of service, the purpose being to avoid the risk that individuals who simply wish to escape service could do so by pretending to have objections of conscience against compulsory service in general.”¹⁸¹

The Commission found the differential treatment between the applicant and members of Jehovah’s Witnesses, as regards to the practice to call up for military service and the consequences for failure to discharge those duties, was objectively and reasonably justified under Article 14 of the Convention.¹⁸² The Committee’s decision was based on several facts: (1) Jehovah’s Witnesses are required to live by exhaustive set of behavioral rules; (2) These rules are enforced with “strict informal social control amongst members;”¹⁸³ and (3) one of these rules required the rejection of military and substitute service.¹⁸⁴ Thus, membership constituted “strong evidence” that objections to compulsory service were based on “genuine religious convictions.”¹⁸⁵ As the Commission explained:

[M]embership of such a religious sect as Jehovah’s Witnesses is an objective fact which creates a high degree of probability that exemption is not granted to persons who simply wish to escape service, since it is unlikely that a person would join such sect only for the purpose of not having to perform military or substitute service. The same high probability would not exist if exemption was also granted to individuals claiming to have objections of conscience to such service or to members of various pacifist groups or organizations.¹⁸⁶

E. Suter v. Switzerland and Raninen v. Finland

Allegations of discrimination were also raised in *Suter v. Switzerland*¹⁸⁷ and in *Raninen v. Finland*.¹⁸⁸ In *Suter*, the applicant challenged the distinc-

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 208.

186. *Id.*

187. *Suter v. Switzerland*, App. No. 11595/85, 51 Eur. Comm’n H.R. Dec. & Rep. 160 (1986).

188. *Raninen v. Finland*, App. No. 20972/92, 85 Eur. Comm’n H.R. Dec. & Rep. 17 (1996).

tion between those who refused to perform military service for other than moral or religious reason, and religious objectors.¹⁸⁹ The applicant argued that mere objectors could be imprisoned up to three years, conscientious objectors were only “liable to a term of imprisonment not exceeding six months or a period of close arrest ranging from one day to three months.”¹⁹⁰ The Commission rejected the applicant’s alleged violation of Article 14, in conjunction with Article 9 of the Convention, for a number reasons. The Commission found:

The legal requirement that a conscientious objector should act as a result of a serious moral dilemma in order to receive a lighter penalty is objective and reasonable. In addition, the penalties prescribed by law in respect of the two categories of conscientious objectors are proportionate to each other.¹⁹¹

In *Raninen*, the applicant contended that a violation of Article 14 in conjunction with Article 9 existed because conscripts who initially stated an absolute objection to all compulsory service suffered a harsher penalty than those who began civilian service and then declared an absolute objection.¹⁹² Finnish law allowed conscripts to choose either armed or unarmed military service, or substitute civilian service.¹⁹³ Individuals who opted for civilian service and subsequently refused to perform compulsory service, were punished less severely than objectors who expressed their opposition to both military and civilian service at the outset.¹⁹⁴ Because he refused to perform any kind of service, the applicant was incarcerated on numerous occasions.¹⁹⁵

After confirming the present complaint fell within the realm of Article 9 of the Convention,¹⁹⁶ and that the applicant had been subjected to differential treatment,¹⁹⁷ the Commission concluded the differential treatment, in light of the “State’s margin of appreciation . . . the differential treatment . . . was objectively and reasonably justified.”¹⁹⁸ The applicant’s aggregated prison sen-

189. *Suter v. Switzerland*, App. No. 11595/85, at 164.

190. *Id.*

191. *Id.*

192. *Raninen v. Finland*, App. No. 20972/92, at 27.

193. *Id.* at 24.

194. *Id.* at 24-25.

195. *Id.* at 18-24.

196. *Id.* at 30. Despite finding no violation of Article 4 of Protocol 7, the Commission also accepted that the present complaint of discrimination fell within the ambit of that provision. *Id.*

197. *Id.* at 31. The Commission considered that, for the purposes of Article 14, the applicant was in a situation comparable to that facing total objectors who expressed their objections at later stages. *Id.* In App. No. 24630/94, the Commission had previously decided that the situation of total objectors (those refusing to perform both military and substitute civilian service) could not, for the purposes of Article 14 of the Convention, “be regarded as comparable to that of conscientious objectors who are prepared to fulfill their military obligations by opting for substitute civilian service.” *Id.*

198. *Id.* at 32.

tence exceeded, by eighteen days, the fixed one-time sentence which could be imposed on objectors who expressed their objections at later stages, and the applicant remained liable to complete his military service, irrespective of his prison sentence.¹⁹⁹ Finnish authorities expressed the opinion that “[I]t was difficult to create a distinction between . . . a conscript’s purely conscientious objection to performing military service and . . . ‘classic’ military offenses with the aim of evading service.”²⁰⁰ The Commission felt that, “[T]he need to avoid such a distinction constituted a sufficiently legitimate aim.”²⁰¹ The Commission held that the duration of the applicant’s actual punishment was not out of proportion with the State’s legitimate aim.²⁰² Furthermore, as a result of amendments to the law, the applicant was no longer required to perform military service and could “no longer be sentenced for refusing to perform any kind of service in peacetime.”²⁰³

F. Tsirlis and Kouloumpas v. Greece

In *Tsirlis and Kouloumpas v. Greece*,²⁰⁴ some of the members of the Commission finally demonstrated a willingness to abandon their restrictive approach to the rights of objectors and, more particularly, their approach to the scope of Article 9. In *Tsirlis*, the applicants, ministers of the Jehovah’s Witnesses faith, made a request for exemption from military service on the grounds that they were ministers of religion.²⁰⁵ Despite the fact that, under Greek law, all ministers of “known religions” were exempt from military service, and notwithstanding the fact that Jehovah Witnesses were accepted as a known religion under Greek law,²⁰⁶ the applicants were not allowed an exemption immediately.²⁰⁷ The applicants, in fact, were detained while their status was being determined.²⁰⁸ This treatment was different from the one reserved for Orthodox ministers who were able to obtain exemptions without difficulty. The applicants alleged they suffered discrimination and their religious rights had been violated.²⁰⁹

The Commission first examined whether the applicants’ allegations established a violation of Article 14 in conjunction with Article 9. After recall-

199. *Id.*

200. *Id.* at 31.

201. *Id.*

202. *Id.* at 32.

203. *Id.*

204. *Tsirlis & Kouloumpas v. Greece*, App. No. 19233/91 & 19234/91, 21 Eur. H.R. Rep. 30, 35 (1996). For a discussion of the case see Holly Cullen, *Article 9-11 ECHR in 1995: A New Europe Approach to Fundamental Freedoms*, 21 E. L. REV. 29 (1996) and Holly Cullen, *The Emerging Scope of Freedom of Conscience*, 22 E. L. REV. 32 (1997).

205. *Tsirlis & Kouloumpas*, App No. 19233/91 & 19234/91, at 18-19.

206. *Id.* at 44.

207. *Id.* at 43.

208. *Id.*

209. *Id.*

ing that the Convention “does not guarantee *per se* a right for religious ministers to be exempted from military service,” the Commission observed that Greek law “provides for such an exemption for ministers of ‘known religions.’”²¹⁰ As the aim of the exemption was “to enable . . . ministers to perform uninhibited their religious functions,” the subject matter of the applicant’s complaint clearly fell within the scope of Article 9 of the Convention.²¹¹ The applicants suffered discrimination because they were detained before being exempted from military service. Furthermore, the applicants’ claims evidenced discrimination because the Greek government had not contested or invoked any reasonable or objective justification to explain difference in treatment of ministers of the Orthodox Church who could obtain an exemption without any difficulty.²¹²

Despite the applicants’ allegations “that they were persecuted because of their religious beliefs and that they were deprived, during their detention, of every opportunity to perform their duties as religious ministers and practise their religion together with the other followers of their creed,”²¹³ the Commission stated that, “[I]n view of its opinion concerning Article 14 in conjunction with Article 9 of the Convention,” it was unnecessary to examine the case separately under Article 9.²¹⁴

In partially dissenting opinions, Commissioners Liddy and Ress stated that, even though they agreed the facts established a violation of Article 14 in conjunction with Article 9, it was necessary to examine the case under Article 9 taken by itself.²¹⁵ As Commissioner Ress explained, “not every infringement of the right of religion, . . . can be characterized as consisting only of discrimination: such an interpretation would impose a subsidiary and negligible role on the other rights guaranteed under the Convention.”²¹⁶

While Commissioner Ress’ opinion centered mainly on the need to accord sufficient weight to freedom of religion, Commissioner Liddy’s judg-

210. *Id.*

211. *Id.*

212. *Id.* at 44.

213. *Id.*

214. *Id.* at 45.

215. *Id.* at 46-47. Both dissenting commissioners were also of the opinion that the facts confirmed interference with the rights guaranteed by Article 9. Commissioner Ress stated that “since it appears that the ministers of the Jehovah’s Witnesses are the specific target of the military authorities, there is a further and separate violation of Article 9.” *Id.* at 47. As for Commissioner Liddy, she explained that “if the applicants had undertaken military service, they would have been acting contrary to a fundamental tenet of their religion.” *Id.* at 46. Their only alternative 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.” *Id.* This lack of alternatives, argued Commissioner Liddy, amounted to a “form of compulsion . . . [which] strikes at the very substance of the freedom guaranteed. The freedom in this case is the freedom to manifest the . . . religious conviction of Jehovah’s Witnesses by refraining from military service.” *Id.*

216. *Id.* at 47.

ment focused on the substantive issue of conscientious objection.²¹⁷ Liddy's position was that Article 4(3)(b) did not exclude the possibility of examining objection claims under Article 9 of the Convention.²¹⁸ In all instances, the necessity for compulsory military or alternative service had to be considered under Article 9(2).²¹⁹ During such inquiry, the role of Article 4(3)(b) was to extend "the margin of appreciation" of individual States.²²⁰ Commissioner Liddy justified her conclusion by pointing out (1) that "the Convention does not purport to recognise that States could arbitrarily impose compulsory military service or alternative service,"²²¹ (2) that "the formulation of Article 4(3)(b) ('any' service of a military character, 'in case of conscientious objectors in countries where they are recognized') makes it clear that the framers of the Convention did not assume that every country had a need for compulsory military service,"²²² and (3) that "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 Article 10 (1)."²²³

G. Spotl v. Austria

The Commission maintained its narrow approach regarding the rights of objectors in *Spotl v. Austria*.²²⁴ In *Spotl*, the applicant was ordered to perform military service and filed a request for recognition as a conscientious objector. Although authorities excused him from the duty to perform military service, they ordered him to perform substitute civilian service.²²⁵ The applicant argued that compelled performance of civilian service constituted sexual discrimination prohibited by Article 14 in conjunction with Article 4(2), because women were not subject to such substitute civilian service.²²⁶

The Commission first examined whether the applicant could rely on Article 14 in conjunction with Article 4(2) to contest the obligation to perform

217. Cullen, *supra* note 204, at 41.

218. Tsirlis & Kouloumpas, App. No. 19233/91 & 19234/91, at 47. Commissioner Liddy referred to the concurring opinion of Mr. Eusthadiades in *Grandrath* to support her argument.

219. *Id.* at 46. In this case, Commissioner Liddy found "it unnecessary to consider whether it [the interference] was 'necessary in a democratic society.' Given the particular status of the applicants as ministers of a known religion, and the Commission's finding of unlawfulness under Article 5(1), it [could not] be said that the interference was 'prescribed by law' for the purpose of Article 9(2)." *Id.* at 46-47.

220. *Id.* at 47.

221. *Id.*

222. *Id.* at 47 (brackets in original).

223. *Id.*

224. *Spotl v. Austria*, App. No. 22956/93, 22 Eur. H.R. Rep. 88 (1996).

225. *Id.*

226. *Id.* at 89. In Austria, only men had the obligation to perform military service. In 1991, the Austrian Constitutional Court decided that the exclusion of women from military service was consistent with the Austrian Constitution. *Id.*

civilian service. The government argued that in order to invoke a violation of Article 14, the facts at issue had to fall within the ambit of another provision of the Convention. The problem, according to Austrian authorities, was that “under paragraph 3(b) of Article 4, the entire [question] of military and alternative non-military service is excluded from the scope of the Convention.”²²⁷

In rejecting the government’s argument, the Commission noted “[P]aragraph 3 of Article 4 was not intended to limit the exercise of the right guaranteed by paragraph 2, but to ‘delimit’ the very content of that right.”²²⁸ Paragraph 3 had to be read in conjunction with paragraph 2, since it indicated what the term ‘forced or compulsory labor’ does not include.²²⁹ As the Commission explained:

The limitations permitted, particularly any national legislation concerning compulsory military service and substitute service by conscientious objectors, must satisfy the requirements of Article 14, that is to say, be non-discriminatory both in their character and in their application.²³⁰

It therefore followed that, in conjunction with Article 4(2) and (3)(b), Article 14 applied to the facts of the case.²³¹

While the commission decreed that the applicant could invoke gender discrimination arguments to contest his obligation to perform civilian duty, it also affirmed no violation of Article 14 was proven.²³² This was because the difference in treatment between men and women with regard to the obligation to perform military service,²³³ to which the obligation to perform civilian service was an accessory obligation, was justified by objective reasons.²³⁴ These reasons included the existence of a common standard among contracting States of excluding women from mandatory military service²³⁵ and a pol-

227. *Id.* at 90.

228. *Id.* Compare European Convention, *supra* note 1, Article 4(2) “No one shall be required to perform forced or compulsory labour,” with Article 4(3)(b) “‘Forced or compulsory labour’ shall not include . . . service exacted instead of military service.”

229. *Spotl v. Austria*, App. No 22956/93, at 90.

230. *Id.*

231. *Id.*

232. *Id.* at 91.

233. *Id.* “The Commission note[d] that the . . . [complaint was] essentially about gender discrimination with regard to the obligation under Austrian law to perform civilian service.” *Id.* However, “in view of the fact that women are not obliged to perform military service,” because civilian service replaces military service, “they are not in the same situation as men.” *Id.*

234. *Id.* at 91.

235. *Id.* As the Commission explained, “[s]uch a standard takes into account continuing traditions in the field of national military defense, the opinion of the people, and the public interest in maintaining an effective national defense system of those Contracting States which, like Austria, have based their system of national defense on compulsory military service.” *Id.*

icy of according a wide margin of appreciation to contracting States in the organization of their national defenses.²³⁶

IV. CONCLUSION

An examination of the jurisprudence of the Human Rights Committee and of the Commission on Human Rights reveals that both organizations have adopted similar, if not identical, instances on the question of the existence of a right of conscientious objection to military service. The similarity of these positions may be explained, in part, by the fact that both organs have interpreted comparable texts. Indeed, not only do the European Convention and the International Covenant include general articles guaranteeing freedom of thought, conscience and religion, but more importantly, they both contain articles that declare service of a military character does not constitute forced or compulsory labour. Both organs have affirmed that two conclusions inevitably follow from the wording of Article 8 of the International Covenant and Article 4 of the European Convention.²³⁷ First, because the provisions speak of conscientious objectors “in countries where they are recognized,” contracting States have no obligation to acknowledge and to exempt conscientious objectors from compulsory military service. Secondly, because the articles make express provision for substitute service, it follows that when States choose to recognize objectors and allow them to perform alternative obligations in lieu of military service, objectors cannot claim, under Articles 9 or 18, exemption from such service.

When the Covenant and the Convention were drafted and when the Committee and the European Commission started examining the question of a right of objection to military service, acceptance of the existence of such a right was far from universal.²³⁸ The question of whether individuals could object to military service was still perceived by most States as essentially a political question, not as an issue involving deep convictions. The early decisions of both organs, which established that under the Covenant and the Convention, recognition of a right of objection rested in the hands of each State, were undoubtedly influenced by and predicated on the fact that few States acknowledged the validity of objection claims within their national laws.

Just as a change of attitude among nations is now occurring, as witnessed by the number of States which recognize the validity of conscientious

236. *Id.* See Cullen, *supra* note 204, at 42 (arguing that the decision “leaves no room for the review of conscription policy, or potentially any matter relating to the organization of the armed forces, by the Convention organs”).

237. See also JACOBS & WHITE, *supra* note 134, at 217 and TAHZIB, *supra* note 85, at 282.

238. TAHZIB, *supra* note 85, at 353. Had a right of objection been universally accepted, the phrase “in countries where conscientious objection is recognized” would probably not have been inserted. *Id.*

claims and provide for alternative services,²³⁹ so too must the position of the European Commission on Human Rights (and its successor—the European Court of Human Rights)²⁴⁰ and U.N. Human Rights Committee. Fortunately, encouraging signs are emanating from both organizations. In General Comment 22, the Committee gave voice to the idea that a right of conscientious objection could be “derived from Article 18,”²⁴¹ and in her partially dissenting opinion in *Tsirlis*, Commissioner Liddy expressed the opinion that it was possible to interpret the Convention in such a manner as to recognize a right of objection.²⁴² In its 1993 resolution, the European Parliament also stated, “conscientious objection to military service is inherent in the concept of freedom of thought, conscience and religion, as recognized in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedom.”²⁴³ The resolution made clear the European Parliament, “is convinced that the right of conscientious objection derives from the human rights and fundamental freedoms which the European Union undertakes to respect pursuant to Article F(2) of the [EU] Treaty and, therefore, that the harmonization of legislation in this field falls within the competence of the European Community.”²⁴⁴ Article 10, paragraph 2 of the Charter of Fundamental Rights of the European Union also stipulates, “the right to conscien-

239. Gianella, *supra* note 10, at 1412-13.

240. See Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, May 11, 1994, Europ. T.S. No. 155. Protocol No. 11 entered into force on November 1, 1998. Pursuant to Protocol No. 11, the Commission will continue to exist until October 31, 1999.

241. HRI/GEN/1/Rev.1, *supra* note 26, General Comment 22, at 39.

242. *Tsirlis & Kouloumpas v. Greece*, App. Nos. 19233/91 & 19234/91, 21 Eur. H.R. Rep. 30, 46-47 (1996). Although the Commission, in its jurisprudence, has been reluctant to recognize the existence of a right of objection to military service, other organs of the Council of Europe have called for acknowledgment of such a right. For example, in 1967, the Consultative Assembly of the Council of Europe adopted Resolution 337 “on the right of conscientious objection,” which inferred from Article 9 the principle that “persons liable to conscription for military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from the obligation to perform such service.” This resolution was subsequently presented to the Council of Europe’s Committee of Ministers in Recommendation 478. See Amnesty International, *Special Action for Conscientious Objectors in Western Europe*, Circular 2, 1979, at 3. See also Recommendation 816 (1977), *supra* note 45. In 1987, the Committee of Ministers also adopted recommendation R(87) which stated 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, on the conditions set out thereafter.” COUNCIL OF EUROPE, *supra* note 44, at 184-85. The Steering Committee for Human Rights is now conducting an assessment of the implementation of recommendation (87)8 with a view to identifying what further action might be called for at the European level. See *Written Question No. 366 on the rights of conscientious objectors in Greece*, 39 Y.B. EUR. CONV. ON H.R. 522 (1996).

243. E.P. Res. A3-411/93, *supra* note 51, at 5, ¶ A. See also Amnesty International, *Out of the Margins: The Right to Conscientious Objection to Military Service in Europe*, *supra* note 39, at *6.

244. E.P. Res. A3-0411/93, *supra* note 51, ¶ 6.

tious objection is recognised, in accordance with the national laws governing the exercise of this right.”²⁴⁵

While these statements constitute steps in the right direction, they are insufficient. Not only does the Committee not mention, in General Comment 22, that it is setting aside its previous rulings, but the Comment itself concludes with the familiar refrain, “when this right is recognized by law or practice”—thus sending the message that States need not recognize a right of objection.²⁴⁶ Similarly, although Commissioner Liddy argues for a reinterpretation of the different provisions of the Convention so as to recognize a right of objection, her opinion is merely one of dissent.

True respect for the conscience of all individuals will occur only once the Committee and the Commission unambiguously affirm that a right of objection to military service can be derived from Article 9 of the Convention and Article 18 of the Covenant. Acknowledgment that the Covenant and the Convention protect a right of objection would ensure those States which refuse to recognize the validity of objection claims would shoulder the burden of justification.²⁴⁷ Justification for non-recognition would be rendered more difficult in that many States currently provide for a right of objection.

Direct involvement of the Commission and the Committee in an assessment of the reasons invoked for refusal of acknowledgment of the right of objection will signify greater protection for objectors only if both organizations agree to truly scrutinize the reasons invoked by States. If too much deference is shown to States regarding the reasons invoked for non-recognition of the right of objection, the situation of objectors will remain the same and objectors will continue to be imprisoned for their beliefs.²⁴⁸ Be-

245. Charter of Fundamental Rights of the European Union, art. 10(2), 2000 O.J. (C 364/01).

246. HRI/GEN/1/Rev.3, *supra* note 26, General Comment 22, at 39. According to David Harris and Sarah Joseph, inclusion of these words implies that “such recognition is not actually guaranteed under the Covenant.” DAVID J. HARRIS & SARAH JOSEPH, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 160* (1995). The authors argue that the ambiguous drafting of the comment “resulted from a wish to avoid arousing opposition from State parties, and misgivings on the part of Committee members over the propriety of unambiguously recognizing a right of conscientious objection.” *Id.* But see TAHZIB, *supra* note 85, at 357-58 (arguing that inclusion of the word “can” indicates “that this is not a permissive provision for States”).

247. Justification would be done by reference to one of the restriction grounds found in the second paragraph of Article 9 of the Convention or the third paragraph of Article 18 of the Covenant. For a contrary position see *The Question of Conscientious Objection to Military Service: Letter dated 22 April 1998 from the Permanent Representatives of Singapore to the United Nations Office at Geneva addressed to the Chairman of the Commission on Human Rights*, U.N. ESCOR, Comm’n on Hum. Rts., 53d Sess., Agenda Item 22, ¶ 3, U.N. Doc. E/CN. 4/1998/173 (1998). In a letter addressed to the Commission on Human Rights, twelve delegations maintained that States need not justify their non-recognition of a right of objection because “where a State has established a compulsory military system under which every citizen is legally required to serve military service, it is then a question of equality before the law.” *Id.* If one group, for whatever reason, was allowed to be excluded from military service, this would compromise the universality of the application of the law.

248. Individuals denied the status of objector, but refuse to perform military service or

cause objectors can serve their State's interests and contribute to society by performance of alternative services, the temptation to automatically accept as sufficient any justification for non-recognition should be reduced.

A more liberal interpretation of the Convention and Covenant would ensure the jurisprudence of the Committee and Commission would be more in line with the resolutions of the United Nations Commission on Human Rights. A unified and consistent message by international bodies would make it extremely difficult, both politically and legally, for individual States to refuse to recognize the rights of objectors. International efforts could then concentrate on the development of an equitable procedural system for obtaining conscientious objector status and on the establishment of guidelines in the area of substitute services.

individuals who refuse to carry out alternative services to which they object are often severely penalized. *See*, E/CN.4/1997/99, *supra* note 5, at 46-51 (listing punishments by country).