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Freedom of Conscience in Europe and its Protection under International Law
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Introduction

1. ADF International is a global alliance-building legal organization that advocates for the right of people to freely live out their faith. As well as having ECOSOC consultative status with the United Nations (registered name “Alliance Defending Freedom”), ADF International has accreditation with the European Commission and Parliament, the Fundamental Rights Agency of the European Union, and the Organization for Security and Co-operation in Europe. ADF International has argued, co-counseled or intervened in over 45 cases before the European Court of Human Rights, as well as other national and international courts of the highest level.
2. The purpose of this memorandum is to provide an exposition of the right of conscience in international law, and explain why this right must protect more than just conscientious objection to military service. As will be detailed, the fundamental right to freedom of conscience must protect citizens against the compulsion to perform actions that go against their deeply held beliefs, including, for example, conscientious objection to abortion procedures.

I. Freedom of Conscience in International Law

3. Freedom of conscience is a “vital human right”¹ and is protected in the domestic law of liberal democratic societies as well as in international law.
4. Article 1 of the Universal Declaration of Human Rights 1948 states that “all human beings” are “endowed with reason and conscience.” Article 18 states that, “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”
5. This right was later declared in Article 1 of the UN’s Declaration on the “Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.”² The preamble to the Declaration noted that infringements of this right, in particular, “have brought, directly or indirectly, wars and great suffering to mankind”. Furthermore, protecting freedom of conscience will “contribute to the attainment of the goals of world peace, social justice and friendship among peoples...”
6. In a later Resolution on the “Elimination of all forms of religious intolerance”, adopted by the General Assembly in 1993, the UN reaffirmed, “that freedom of thought, conscience,

¹ Murdoch, Jim, “Freedom of thought, conscience and religion”, *Council of Europe*, 2007, p. 58

² Proclaimed by General Assembly resolution 36/55 of 25 November 1981



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religion and belief is a human right derived from the inherent dignity of the human person and guaranteed to all without discrimination”.³ Furthermore, the resolution urged States “to ensure that their constitutional and legal systems provide full guarantees of freedom of thought, conscience, religion and belief...”⁴

7. Article 18(1) of the International Protocol on Civil and Political Rights likewise states that: “Everyone shall have the right to freedom of thought, conscience and religion”, which includes the right to manifest one’s religion or belief in “observance [and] practice.” The Human Rights Committee has commented on the “far-reaching and profound” nature of this right, as well as its “fundamental character”, reflected in the fact that “this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.”⁵
8. Article 18(3) does place limitations on Article 18(1) and states that: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” However, the Committee has noted that these restrictions are to be “strictly interpreted” and limitations “may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.”⁶
9. Freedom of conscience is also enshrined in the European Convention on Human Rights, with Article 9(1) stating that: “Everyone has the right to freedom of thought, conscience and religion”, which includes the right to manifest one’s religion or belief in “practice and observance.” Once again, the right to manifest one’s religion or belief is qualified, but the limitations are narrow in scope. Indeed, it has been noted that when the Convention was being drafted, “the final draft of Article 9(2) was the narrowest of the proposed articles.”⁷ Article 9(2) states that: “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 protection of the rights and freedoms of others.” These restrictions make Article 9 the least qualified of all the qualified articles in the Convention. Whereas privacy, freedom of expression and freedom of assembly can be lawfully restricted for a number of reasons, including “national security” or “the prevention of disorder or crime”, Article 9 cannot.⁸

³A/RES/48/128, 20 December 1993, para 1

⁴ *Id.*, at para 2

⁵ General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) : 30/07/1993 at para 1.

⁶ *Id.*, at para 8.

⁷ Evans, Carolyn, *Freedom of Religion Under the European Convention on Human Rights*, Oxford, Oxford University Press, 2001, p. 137.

⁸ For other regional treaties, see American Convention on Human Rights, Article 12 and African Charter on Human and Peoples’ Rights, Article 8.



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10. The European Court of Human Rights declared in *Kokkinakis v Greece* that: “As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention” and “[t]he pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.” Furthermore, the Court considered that without the freedom to manifest one’s beliefs, “Article 9, would be likely to remain a dead letter.”⁹
11. The Charter of Fundamental Rights of the European Union potentially goes the furthest in recognition of the rights of conscience. Article 10(1) of the Charter states that: “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 in private, to manifest religion or belief, in worship, teaching, practice and observance.” However, Article 10(2) goes further, and explicitly recognizes the right to conscientious objection: “The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.”
12. In the recent cases of *Federal Republic of Germany v Y* (Case C-71/11) and *Federal Republic of Germany v Z* (Case C-99/11), the Court of Justice of the European Union (“CJEU”) provided helpful insight into the extent to which freedom of thought, conscience and religion must to be protected. In his advisory opinion, the Advocate General made it clear that *manifestation* of religious belief is of paramount importance and thus religious freedom is much more than merely the freedom only to *believe*. The Advocate General stated that if the so-called “core area” of religious belief comprised only of “private conscience”, it would render any protections for “the external manifestation of that freedom” effectively “meaningless”.¹⁰ In its final ruling the CJEU held that the right to act upon sincerely held religious or moral beliefs clearly is extended to public manifestations of those beliefs. The Council of Europe’s Council of Ministers also affirms rights of conscience.¹¹

II. The Developing Right to Conscientious Objection

13. As detailed above, freedom of conscience is explicitly recognized in numerous international and regional human rights documents. Moreover, this right has been interpreted by numerous international and regional human rights bodies as including a right to conscientious objection from military service.¹²

Human Rights Committee

⁹ *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, at para 31.

¹⁰ Advocate General opinion at§ 46.

¹¹ See Recommendation R(87)8 and Recommendation CM/Rec(2010)4.

¹² For example, the former UN Commission on Human Rights passed numerous resolutions on this issue, (2004/35, 2002/45, 2000/34, 1998/77, 1997/117, 1995/83, 1993/84, 1991/65, 1989/59 and 1987/46), as has the Parliamentary Assembly of the Council of Europe (Resolution 337(1967), Recommendation 478(1967), Recommendation 816(1977), Recommendation 1518(2001) and Recommendation 1742(2006)) and the Council of Ministers (Recommendation R(87)8 and Recommendation CM/Rec(2010)4).



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14. In General Comment No. 22 the Committee stated that: “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.”¹³
15. In addition to this General Comment, the Human Rights Committee has developed its interpretation of conscientious objection in a number of communications under the Optional First Protocol and Concluding Observations of States Parties to the ICCPR.
16. For example, in *Westerman v. the Netherlands*¹⁴ the Committee reiterated that “the right to conscientious objection to military service can be derived from article 18.” The case of *Frédéric Foin v. France*¹⁵ concerned a French citizen who challenged a French law requiring compulsory military service for all except those with a conscientious objection. The law required conscientious objectors to serve in a civilian post for twice as long as those in the military. The Human Rights Committee held that there had been a violation of the ICCPR since the person “was discriminated against on the basis of his conviction of conscience.”
17. In a collection of communications regarding the Republic of Korea – for example, *Yoon et al. v. Republic of Korea*,¹⁶ *Jung et al. v. Republic of Korea*,¹⁷ *Jeong et al. v. Republic of Korea*¹⁸ and *Jong-nam Kim et al v. Republic of Korea*¹⁹ – the Committee has solidified this position, stating recently that:

The Committee therefore reiterates that the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to exemption from compulsory military service if the latter cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion. ...In the present case, the Committee considers that the authors' refusal to be drafted for compulsory military service derives from their religious beliefs which, it is uncontested, were genuinely held, and that the authors' subsequent conviction and sentence amounted to an infringement of their freedom of conscience, in breach of article 18, paragraph 1, of the Covenant.²⁰

¹³ General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) : 30/07/1993 at para 11.

¹⁴ CCPR/C/67/D/682/1996 13 December 1999.

¹⁵ CCPR/C/67/D/666/1995, 9 November 1999.

¹⁶ Communications Nos. 1321/2004 and 1322/2004.

¹⁷ Communications Nos. 1593–1603/2007.

¹⁸ Communications Nos. 1642–1741/2007.

¹⁹ Communication No. 1786/2008.

²⁰ *Id.*, at paras 7.4 and 7.5.



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18. Undoubtedly, therefore, the Human Rights Committee interprets the right to freedom of thought, conscience and religion as including the right to conscientious objection from military service.

European Court of Human Rights

19. Although the text of the European Convention does not refer to conscientious objection *per se*, the right has been developed by the Court under Article 9.²¹ In addition to holding that where Member States recognize conscientious objection, they must do so in a non-discriminatory manner,²² the Court has more recently upheld the right to conscientious objection even when the State in question did not itself recognize the right.
20. In the landmark case of *Bayatyan v. Armenia*,²³ the Grand Chamber for the first time expressly upheld the right to conscientious objection. The Court held in *Bayatyan* that: “opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.”²⁴
21. While the Court held that one means of expressing the guaranteed right of conscience is through exemption from military service, the judgment by no means limited the expression of conscientious objection only to military service. It is thus worth quoting the Grand Chamber at length, as the reasoning of the Court could quite easily apply to other situations:

124. The Court cannot overlook the fact that, in the present case, the applicant, as a member of Jehovah’s Witnesses, sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious convictions. (...) Thus, the system existing at the material time imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who, like the applicant, refused to perform military service. In the Court’s opinion, such a system failed to strike a fair balance between the interests of society as a whole and those of the applicant. It therefore considers that the imposition of a penalty on the applicant, in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society. Still less can it be seen as necessary taking into account that there existed viable and effective alternatives capable of accommodating the competing interests, as

²¹ See I Leigh, ‘New trends in religious liberty and the European Court of Human Rights’, *Ecc.L.J.*, 2010, 12(3), 266-279.

²² ECHR, *Thlimmenos v. Greece* (Application No. 34369/97) 6 April 2000.

²³ (2012) 54 E.H.R.R. 15.

²⁴ *Id.*, at § 110.



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demonstrated by the experience of the overwhelming majority of the European states.

126. The Court further reiterates that pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (...). Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant’s by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.²⁵

22. The reasoning of the Grand Chamber was immediately then applied in the conscientious objection case of *Bukharatyan v. Armenia*,²⁶ thus cementing the right under Convention law – which will surely be developed further in the future. In reaching this decision, the Court also noted at length the developments in international law on the right to conscientious objection, stating that for a number of years there have been “important developments concerning recognition of the right to conscientious objection in various international fora.”²⁷ These include developments at the United Nations, the Council of Europe and the European Union.

III. Recognizing the right of Conscience beyond Military Service

23. Beyond the specific circumstance of conscientious objection to military service, the right of conscience has been recognized both internationally and at the domestic level. For example, in the ECHR case of *Jakóbski v. Poland*,²⁸ the applicant was a Buddhist and a detainee in a Polish prison. As a Mahayana Buddhist, he could not eat meat, yet the prison the prison authorities only provided him with a pork-free diet. In refusing to recognize his conscientious objection to eating meat, the Court held that “the authorities failed to strike a fair balance between the interests of the prison authorities and those of the applicant, namely the right to manifest his religion through observance of the rules of the Buddhist religion.”²⁹ It therefore concluded that there had been a breach of Article 9 of the Convention.

24. Numerous other exemptions from domestic law exist in order to protect the conscience of the individual.³⁰ For example, in the United Kingdom, Sikhs may conscientiously

²⁵ *Id.*, at § 126.

²⁶ (Application no. 37819/03) judgment of 10 January 2012

²⁷ *Bayatyan* at § 105.

²⁸ (2010) 30 BHRC 417.

²⁹ *Id.*, at § 54.

³⁰ See R. Sandberg and N. Doe, 'Religious exemptions in discrimination law', *C.L.J.* 2007, 66(2), 302-312.



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objection to wearing a safety hat on a construction site³¹ or a safety helmet when riding a motor cycle,³² Jews and Muslims benefit from special rules relating to animal slaughter methods,³³ and shop workers may object to working on a Sunday.³⁴ Many other countries have similar provisions. Thus, if the rights of conscience are to be taken seriously, then the question should not be *whether* the State should recognize conscientious exemptions, but rather *how* such exemptions should be implemented in practice.³⁵

iv. Conscientious Objection and Abortion

25. One area of immediate concern is the right to conscientious objection from abortion procedures.
26. In 2010, the Parliamentary Assembly passed Resolution 1763 (2010) on “the right to conscientious objection in lawful medical care”, which states that: “No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason.”
27. The Parliamentary Assembly resolution reflects the situation in many countries that have already explicitly recognized the right to conscientious objection from abortion procedures. For example:
 - In Austria, article 97(2) of the Criminal Code states: “No physician is required to perform an abortion or to participate in it, unless an abortion without delay is necessary to save the pregnant woman from an imminent, not otherwise preventable death. This is also true for those working in the nursing profession, in medical-technical services, and for people employed in auxiliary medical services.”
 - In Belgium, article 348, al 2, 6^e of the Criminal Code states: “Neither a physician, nor a nurse, nor a medical assistant is obliged to cooperate with the termination of a pregnancy. The physician is obliged to inform a patient interested in abortion, during the first visit, of his refusal.”

³¹ Employment Act 1989, s.11

³² Road Traffic Act 1988, s.16

³³ Welfare of Animals (Slaughter or Killing) Regulations 1995, SI 1995/731, sch. 12.

³⁴ Sunday Trading Act 1994, s. 4.

³⁵ See Y. Nehushtan, 'Religious conscientious exemptions', *Law & Phil.* 2011, 30(2), 143-166.



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- In Denmark, section 10(2) Consolidated Act on Induced Abortion states: “...doctors, nurses, midwives and social and health assistants, or students in these professions, for whom it is contrary to their ethic or religious beliefs to perform or assist in induced abortion, can apply for and be granted exemption.”
- In France, Art L.2212-8 of the Code of Public Health allows medical physicians to invoke a “conscience clause” on the basis of which they may refuse to perform an abortion.
- In Slovenia, article 42 of the Slovenian Code of Medical Deontology Practice states: “Physicians may refuse to carry out an abortion or sterilisation if it is not in accordance with their beliefs and conscience and it is not a case of emergency medical assistance. They shall be obliged to refer the patient to another capable physician, or must inform the healthcare institute of their refusal in order to ensure the execution of such interventions in accordance with the law.”
- In the United Kingdom, section 4 of the Abortion Act states: “...no person shall be under any duty whether by contract or by statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection: Provided that in any legal proceeding the burden of proof conscientious objection shall rest on the person claiming to rely on it.”

28. In other many other countries that have not expressly recognized the right to conscientious objection from abortion procedures in legislation, general laws on the right of conscience have been applied to such circumstances.³⁶

29. The need for such protections – either expressly recognized in statute or through interpretation of general provisions – has become vitally important. In recent years more and more medical professionals have been faced with an impossible choice: either perform an action that goes against your deeply held convictions, or be dismissed from work. The following three cases are representative of an emerging human rights problem in some European nations regarding failure to recognize rights of conscientious objection.

³⁶ For example, see *DeCarlo v. The Mount Sinai Hospital*, No. 09 Civ 3120 (RJD-JO), 2009. Information available at: <<http://www.adfmedia.org/news/prdetail/2895>>.



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Case of Concepta Ward and Mary Teresa Doogan

30. In 2012, two highly experienced nurses, Concepta Ward and Mary Teresa Doogan, were told by their employer, NHS Greater Glasgow and Clyde Hospital, that they were required to supervise abortion procedures as part of their duties. Being devout Catholics who believe abortion is the taking of innocent unborn life, the women felt that they could not comply with the hospital's order and challenged the decision in court. Despite very clear and explicit language excusing medical staff from performing abortions under § 4 of the Abortion Act of 1967 for reasons of conscience, nurses Ward and Doogan lost their lower court case. However the case was reversed on appeal – the judges holding that: “In our view the right of conscientious objection extends not only to the actual medical or surgical termination but to the whole process of treatment given for that purpose.”³⁷ The case is now before the Supreme Court of the United Kingdom.

Case of Ellinor Grimmark

31. In November 2013, Höglandssjukhuset women's clinic rescinded a job offer as a midwife from Ellinor Grimmark after she explained that she could not perform abortions because of her Christian faith. The head of the maternity ward left her a telephone message saying that “she was no longer welcome to work with them” and questioned “whether a person with such views actually can become a midwife.” A few months later, Grimmark tried to obtain employment with Ryhovs women's clinic, which told her that a person who refuses to perform abortions does not belong at a women's clinic.

32. In January, Värnamo Hospital's women's clinic offered Grimmark a job but then withdrew employment because of the complaint she filed against Höglandssjukhuset in April. Grimmark's case was rejected review by the Discrimination ombudsman and is now pending at a court of first instance in Sweden.

33. The problem in Sweden is further highlighted in the collective complaint currently being heard on its merits by the European Committee of Social Rights; No. 99/2013, *Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden*.

Case of Dr. Bogdan Chazan

34. Pre-eminent in his field and recognized throughout Poland for his medical expertise, Dr. Bogdan Chazan was recently fined and fired from his position as Director of Obstetrics and Gynecology at the Holy Family Hospital in Warsaw, Poland for refusing to perform an abortion on a child diagnosed with potentially severe brain damage. Dr. Chazan, also a Professor at Warsaw University Medical School and a former National Consultant in Obstetrics and Gynecology, is a devout Roman Catholic who sincerely believes that abortion is the intentional killing of an innocent human child.

³⁷ See <<http://www.bbc.com/news/uk-scotland-glasgow-west-22279857>>.



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35. Dr. Chazan's medical record is beyond reproach. He earned his first medical degree 40 years ago and since 1998 has served as Department Head of the OB/GYN ward of one of Poland's most important hospitals. The impressiveness of his curriculum vitae has only been matched by his integrity with regard to his Catholic views on life. Despite this, the Mayor of Warsaw herself, Hanna Gronkiewicz-Waltz, called for Dr. Chazan's contract with the hospital to be cancelled for his refusal; disregarding his right to conscientious object to performing the life-ending procedure.

Conclusion

36. International law explicitly recognizes and elevates the right of conscience as a fundamental human right. Moreover, many international and regional human rights bodies, as well as national courts and legislatures, have interpreted this right to explicitly include conscientious objection from military service.

37. This memorandum has sought to demonstrate that the right of conscience is far broader than one narrow set of circumstances. As the Human Rights Committee has noted, "the obligation to use lethal force may seriously conflict with the freedom of conscience." Thus, there is no reason why this principle should not be applied to other circumstances, including conscientious objection to abortion procedures.