Confidential

Application No. 2299/64

by

Albert GRANDRATH

against

the Federal Republic of Germany

REPORT OF THE COMMISSION

4624
06.2/31

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INTRODUCTION

1. The following represents an outline of the case as it has been presented by the Parties both in writing and orally to the European Commission of Human Rights.

The Applicant is a German citizen, born in 1938 and at present living in Düsseldorf. He is represented by Mr. Claus Poensgen, a lawyer practising in Düsseldorf.

The Applicant is a member of the sect of Jehovah's Witnesses and exercised in the period which is relevant for this case the function of a Bible study conductor (Buchstudienleiter) within this sect. As with other members of the sect, he objects, for reasons of conscience and religion, not only to performing military service but also any kind of substitute service.

In 1960, the Examination Board for Conscientious Objectors to War Service (Prüfungsausschuss für Kriegsdienstverweigerer) with the District Office for Substitute Military Service (Kreiswehrersatzamt) at Düsseldorf recognised the Applicant as a conscientious objector.

By letter of 16th November, 1961, the Federal Minister for Labour and Social Structure (Bundesminister für Arbeit und Sozialordnung) asked the Applicant to perform a substitute civilian service; at the same time he was given the opportunity to indicate any reasons which might exist either for his exemption from such service or for its postponement.

By letters of 4th December, 1961, 9th February and 1st August, 1962, the Applicant asked for exemption but his application was subsequently rejected by the Minister.

On 24th September, 1962, the Minister made a new decision in regard to the Applicant in which it was stated, inter alia, that he was available for substitute service. On 4th October, 1962, the Applicant lodged an objection (Widerspruch) against this decision but this was rejected by the Minister on 9th October, 1962.

By the Minister's further decision of 20th October, 1962, the Applicant was called up for substitute service, beginning on 1st December, 1962. On 6th November, 1962, the Applicant again lodged an objection and this was also rejected by the Minister on 12th November, 1962.

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The Applicant then filed a complaint (Klage) with the Administrative Court (Verwaltungsgericht) at Cologne regarding the Minister's decisions of 24th September and 20th October, 1962, but, on 7th January, 1963, the Administrative Court rejected his complaint. Subsequently, he lodged an appeal (Revision) with the Federal Administrative Court (Bundesverwaltungsgericht); on 16th July, 1963, that Court, by an interim decision, refused to order that the appeal should have a suspensive effect, and on 25th March, 1966, the Court rejected the appeal.

As a result of the Applicant's refusal to perform substitute civilian service, criminal proceedings were instituted against him. On 21st June, 1963, the District Court (Schöffengericht) at Düsseldorf convicted him on a charge of desertion (Dienstflucht) under the Act on Substitute Civilian Service and sentenced him to eight months' imprisonment. His conviction was upheld on appeal (Berufung) but his sentence was reduced to six months by decision of the Regional Court (Landgericht) at Düsseldorf dated 22nd October, 1963. His further appeal (Revision) was rejected on 2nd April, 1964, by the Court of Appeal (Oberlandesgericht) at Düsseldorf.

The Applicant also lodged a constitutional appeal (Verfassungsbeschwerde) against the decisions of the Administrative Court, the District Court and the Regional Court. On 20th February, 1964, the Federal Constitutional Court (Bundesverfassungsgericht) rejected this appeal as being manifestly ill-founded.

The Applicant served his sentence from October 1964 to April 1965.

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2. The Application was lodged with the Commission on 1st September, 1964 and was declared admissible by the Commission on 23rd April, 1965. The present Report, which was adopted by the Commission on 12th December, 1966, has been drawn up in pursuance of Article 31 of the Convention and is now transmitted to the Committee of Ministers in accordance with paragraph (2) of that Article.

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A friendly settlement of the case has not been reached by the Commission, and the purpose of the Commission in the present Report, as prescribed in paragraph (1) of Article 31, is accordingly:

(1) to establish the facts (Part I), and

(2) to state an opinion as to whether the facts found disclose a breach by the Respondent Government of its obligations under the Convention (Part II).

A schedule setting out the history of the proceedings is attached as Appendix I and the Commission's decision on the admissibility of the Application and a report on the measures taken with a view to a friendly settlement are attached as Appendices II and III. An extract of the decision of the Federal Administrative Court dated 25th March, 1966 is attached as Appendix IV, and the principal dates in the case have been summarised in Appendix V.

The full text of the oral and written pleadings of the Parties, together with the documents handed in as exhibits, are held in the archives of the Commission and are available if required.

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PART I

POINTS AT ISSUE, SUBMISSIONS OF THE PARTIES AND ESTABLISHMENT OF THE FACTS

A. POINTS AT ISSUE

3. When dealing with the question of the admissibility of the Application, the Commission considered the Applicant's allegations submitted in his application form including the statement which was attached to that form, as well as the further written and oral submissions of the Parties. Although the Applicant had only invoked Article 9 of the Convention expressly, the Commission considered ex officio that the facts alleged by him also gave rise to certain questions relating to Articles 4 and 14 of the Convention.

Consequently, the Commission had to decide whether there had been a violation of

(1) Article 9 of the Convention in that the Applicant had not been exempted from substitute civilian service on the ground of his objections which were based on his conscience and religion;

(2) Article 14 of the Convention - in conjunction with Article 4 or Article 9 - in that, by being refused exemption from service, he had been subject to discrimination, as compared with Roman Catholic and Protestant ministers.

4. The respondent Government raised objections to admissibility on the grounds that,

(1) in so far as the Applicant claimed the right to be exempted from service, the Application was incompatible with the Convention;

(2) in regard to the other aspects of the case, the Application was manifestly ill-founded.

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5. On 23rd April, 1965, the Commission decided to declare the Application admissible. It became, consequently, a task of the Commission to establish the facts in regard to the issues set out above which relate to Article 9 considered separately and to Article 14 in conjunction with Article 4 or Article 9 of the Convention.

B. SUBMISSIONS OF THE PARTIES

6. In the proceedings before the Commission and the Sub-Commission, the Parties made the following submissions on the question whether the Convention had been violated in connection with the refusal by the German authorities to exempt the Applicant from compulsory service or with the conviction and sentence which were the result of his failure to perform such service.

I. As to the Government's objection regarding incompatibility with the Convention

7. At the stage of admissibility, the Government submitted that, in so far as the Applicant claimed the right to be exempted from service, his claim did not relate to any right guaranteed under the Convention and was therefore to be considered as incompatible with its provisions (1).

After the Application had been declared admissible, the Government submitted that, being of the opinion that the Applicant could not claim in his favour any right under the Convention, it maintained its standpoint that the Application was incompatible with the provisions of the Convention (2).

8. The Applicant made no specific comments on this point.

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(1) Verbatim record of 23rd April,1965 (Doc. A 927.47), p. 10.
(2) Observations of 18th October,1965 (Doc. D 9390), p. 2.

II. As to the question of a possible violation of Article 9 of the Convention

9. The Applicant submitted that his right to freedom of conscience and religion as guaranteed by Article 9 of the Convention had been violated in the present case.

He stated that freedom of conscience was a fundamental freedom, based on natural law, which had to be respected as long as it did not interfere with the rights of other persons. From this point of view, it was not permissible to order members of Jehovah's Witnesses to perform a service which was contrary to their conscience and to send them to prision if they refused to comply with such orders. The detention of hundreds of Jehovah's Witnesses as criminals could not be justified just becuase they were obliged by their conscience to refuse to participate in a service which they considered indirectly to favour war. By holding this opinion, the Jehovah's Witnesses did no harm to others, not even to the state. On the contrary, it would be highly satisfactory to the state if there were more people of the same kind, even if this meant that the number of soldiers was slightly reduced. In the western world of today, freedom of conscience was accepted as being a fundamental freedom prevailing on any considerations regarding the public interest. However, by failing to exempt Jehovah's Witnesses from service, the German authorities let the public interest prevail. Freedom of conscience implied that, unless there was any interference with the fundamental rights of others, any decision taken by a person according to the requirements of his conscience should be respected, and this also applied to the 'erring conscience' (das irrende Gewissen). In this respect, reference was made to statements by Thomas Aquinas and Cardinal Newman. In the present case, it had not been contested that the Applicant's refusal was based on a genuine conviction and it was therefore inhuman to submit him to detention. Further reference was made to a statement by Professor Karl Peters of Tübingen who maintained that it was pointless to punish Jehovah's Witnesses for acts based on their faith since the punishment would not in any way make them change their conviction (1).

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(1) Application of 1st September, 1964, p. 5, observations of 4th February, 1965, pp. 1-4.

The Applicant further submitted that he was a minister (Geistlicher) within the sect and this was a further ground for his exemption from service. In his opinion, it was an essential element in the freedom of religion that ministers should not be obliged to perform military or substitute service. This principle was accepted in all civilised states and was designed to ensure the free practice of religion by congregations. The religious life of communities should not be impeded through their being deprived of their ministers. Consequently, the exemption of ministers could not be considered as a privilege but as a genuine part of religious freedom as protected by Article 9 of the Convention (1).

In regard to the question to what extent his religious activities would have been affected by his performance of substitute service, the Applicant submitted that there would apparently not have been any interference with his private religious life (2) but that on the other hand, his religious duties as a minister would have been hindered to a large extent. At the relevant time, he worked in Düsseldorf as a painter's assistant about 43 hours per week (3) but he devoted all his spare time to his religious duties. He has indicated that his religious activities took up a minimum of 120 hours a month (30 hours a week) and sometimes as much as 150 hours (4). He held the function of a Bible study conductor and described his activities in the following way. On Mondays he had to pay follow-up visits to interested Christians. In addition, he also studied the Scriptures for his own further education. These activities occupied some 2 to 3 hours. On Tuesdays he spent 2 to 3 hours preparing for the Bible study class which he conducted on Wednesday evenings. On

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(1) Application of 1st September, 1964, p.2, and verbatim record of 23rd April, 1965, (Doc. A 92747), p. 10.

(2) Verbatim record of 18th July, 1966 (Doc. 2944 TN 7447), p. 25.

(3) Verbatim record of 18th July, 1966 (Doc. 2944 TN 7447), p. 27.

(4) Verbatim record of 23rd April, 1965 (Doc. A 92747). pp.11-12.

Wednesdays he engaged in house-to-house calls after which he conducted a Bible study class at which the Holy Bible was interpreted, discussed and explained. A total of 3 hours was devoted to religious activities every Wednesday. On Thursdays the applicant studied for the missionary school, a further education course which he attended in his capacity of a minister, and prepared for the prayer meeting which took place on Fridays. He also paid further follow-up visits. Similar duties accounted for 3 1/2 hours on Fridays. On Saturdays he had to deliver a sermon and to visit members of the congregation. These duties, together with preparatory studies, regularly occupied a minimum of 4 hours every Saturday. On Sundays he again took a group for Bible study and preached. In the afternoon he officiated at the congregation's general Bible study meeting which one might call a congregational divine service. In addition he had other special assignments. Once or twice a month, he had to prepare and deliver special sermons and lectures. For their preparation, he used at least 4 1/2 hours a week (1).

He submitted that, while performing substitute civilian service, he would in no way have been able to perform his religious duties to the same extent as otherwise. First of all, it was likely that he would have been obliged to perform his service at a place other than his home-town of Düsseldorf. If so, he would have been prevented from performing his usual religious activities among the Jehovah's Witnesses of that town. Moreover, while performing substitute service, he would have had to live in special quarters and also to spend part of his free time at these quarters. This would have substantially prevented him from devoting himself to the members of his community. In any case, he would have been unable to receive people at his home, to work and study (2).

10. The Government contested that Article 9 had been violated in the present case.

In the Government's opinion, the right to be exempted from military or substitute service on grounds of conscience or religion was not guaranteed by Article 9, paragraph (1) of the Convention. Neither members of certain religions nor ministers of these religions could claim such right under the Convention. As regards some ministers, a right to exemption existed under German law, and this was to be considered as a special privilege.

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(1) Verbatim record of 23rd April, 1965 (Doc. A 92.747), p. 12.
(2) Verbatim record of 18th July, 1966 (Doc. 2944 EN 7447), pp. 23-24.

If this question should be considered to fall under Article 9, paragraph (1), it was undoubtedly covered by the exception clause in paragraph (2) of the same Article (1). As military service, as well as substitute civilian service, were expressly permitted under Article 4 of the Convention, it would have been natural to include an exception in Article 9 in regard to conscientious objectors. However, this had not been done and the conclusion must be that the Convention left it to the discretion of the States to decide whether they required service from conscientious objectors. This opinion was also supported by the actual legislation in force in the Contracting States. Certain countries, such as Greece and Turkey, did not even allow exception from military service. In Italy provisions on substitute service had not existed but were now being prepared. Among the other member States of the Council of Europe, Switzerland did not recognise refusal to perform military service. Reference was also made to a draft recommendation which had recently been submitted to the Consultative Assembly of the Council of Europe. This draft recommendation which had subsequently been referred to the Legal Committee of the Assembly had the following wording :

"The Assembly,

1. Considering that the European Convention on Human Rights in its Article 9 guarantees the right to freedom of thought, conscience and religion;

2. Considering that a legitimate exercise of the right of freedom of conscience is conscientious objection to compulsory military service;

3. Considering that some member States recognise the right of conscientious objectors not to perform military service, possibly on condition of doing, if required, some other service in lieu thereof, but that other member States do not recognise this right;

4. Considering, moreover, that even when this right is recognised there may be doubts as to the categories of persons to whom, or the circumstances in which, it applies;

5. Considering that conscientious objectors who are nationals of member States which do not admit this right have sought and obtained asylum in other member States,

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(1) Observations of 20th January, 1965, (Doc. D 5542), pp. 1-2;
Verbatim record of 23rd April, 1965 (Doc. A 92.747) pp.2-9;
Verbatim record of 18th July, 1965 (Doc. 2944 TM 7447),pp.9-10.

6. Recommends to the Committee of Ministers that it should instruct the Committee of Experts on Human Rights to examine, on the basis of the proposals made by the Assembly, the possibility of defining the guiding principles concerning the right of conscientious objectors to abstain from performing military service on grounds of conscience."

In the Government's opinion, this draft resolution showed clearly the general views on conscientious objectors among members of the Council of Europe. It was also interesting to note that the substitute civilian service was specifically mentioned in this draft.

Even the wording of Article 9, paragraph (1), of the Convention ("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") seemed to indicate that exemption from military or substitute service was not a part of the freedom of conscience or religion. On the contrary, the question of such exemption was part of the legal rules which governed the relations between the State and the different religious communities. These legal rules did not concern creeds but other matters outside the exclusive competence of the religious communities, for instance, the right of certain churches to levy taxes, the rights of the churches in bankruptcy proceedings and also the exemption of ministers from jury service.

The Government also submitted that the Applicant's exercise of his religion would not have been interfered with, while he performed substitute service. He had the possibility of indicating the place and the institution where he wished to perform the service. As there were about 300 various places where such service was performed in the Federal Republic, a member of Jehovah's Witnesses could generally choose his home-town or a place in the close neighbourhood. This implied that they worked in their home-town during ordinary working hours and that, in their free time, they could be active in their community. In so far as Jehovah's Witnesses were concerned, the authorities usually made exceptions from the rule, otherwise applied, that a person called up for substitute service should not serve at his place of residence. There were five institutions in Düsseldorf at which service could be performed and the Applicant would have probably been allowed to work at one of these institutions. If he had been working at a hospital, he would have had normal working hours and would have been free in the evenings until 10 p.m. He would also have had the possibility of asking for permission

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to stay away from his quarters later in the evening. The substitute service was usually performed in such institutions as hospitals, lunatic asylums and the work was distributed according to the professional experience of the persons concerned, or according to their own wishes or the needs of the institutions concerned. The work was very similar to ordinary civilian work but the persons performing obligatory service had to live together in special quarters and had to take their meals together according to the system applicable. Generally, the institutions at which service was performed were not state institutions. The Act on Substitute Civilian Service expressly protected the right to the free exercise of religion and, in practice, the authorities also strictly respected this right. It was also submitted that the persons performing service received free lodgings, food and working clothes. Moreover, they received money corresponding to the allowances granted to persons performing military service. The family received certain allowances according to special legislation.

In the applicant's case, he would have had basically the same opportunity of devoting himself to religious activities as he had otherwise since, in any event, he did a full-time job as a painter's assistant (1).

III. As to the question of a possible violation of Article 14 (in conjunction with Article 4 or 9) of the Convention

11. The Applicant submitted that the German legal provisions regarding exemption from substitute civilian service and the application of these provisions by the authorities constituted a discrimination against himself and other ministers of his sect as compared with Roman Catholic and Protestant Ministers. According to the said provisions, ministers of religious communities other than the Roman Catholic and Evangelical Churches were only exempted on two conditions, namely, first, that their principal occupation was their ministry and, secondly, that their function was equivalent to that of an ordained minister of Evangelical faith or of a minister of Roman Catholic faith ordained as a subdeacon.

It was submitted that, while the financial situation of the Protestant and Roman Catholic churches made it possible for their ministers to perform their religious activities on a full-time basis, the situation was different in regard to Jehovah's Witness

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(1) Observations of 20th January, 1965 (Doc. D 5542), pp. 1-3; Verbatim record of 18th July, 1966, (Doc.2944 TN 7447)pp.7-10, 17-18, 24, 25, 26.

ministers who had to do other work in order to earn their living. The Jehovah's Witnesses did, however, devote all their spare time to their religious duties which, in the Applicant's case, amounted to 120 hours or more per month. Consequently, it was a discrimination to base the right of exemption on the condition that ministerial work was a principal occupation, while the only acceptable criterion should be whether the persons concerned considered their ministerial work as their vocation and principal task. In this respect, the Applicant referred to certain decisions by American courts, and quoted the following passages from these decisions.

In the case Dickinson v. the United States, the US Supreme Court stated : "That the ordination, doctrines or manner of preaching that his sect employs diverge from the orthodox and traditional is no concern of ours; of course, the statute does not purport to impose a test of orthodoxy. The statutory definition of a 'regular or duly ordained minister' does not preclude all secular employment. Many preachers, including those in the more traditional and orthodox sects, may not be blessed with congregations or parishes capable of paying them a living wage. A statutory ban on all secular work would mete out draft exemptions with an uneven hand, to the detriment of those who minister to the poor and thus need some secular work in order to survive".

In the case Date v. the United States, the US Court of Appeals emphasised that local draft boards must not "fit the garments of orthodoxy on a pioneer minister of Jehovah's Witnesses" and stated : "Therefore, here, in addition to the non-existence in the record of evidence to rebut the defendant's prima facie case, there are the further undisputed facts that the draft boards employed standards applicable to ministers of orthodox churches instead of those standards fixed in the law and applicable here, and thus erroneously held : that part time secular work, upon which the defendant earned all his livelihood, defeated the ministerial claim; and that, because he did not earn any part of his livelihood from his ministry, he could not be regarded as a minister. Nowhere in the /the Act and the Regulations/ is there a requirement that a minister earn his livelihood from the ministry or from a particular congregation, or that he have a pulpit before he can claim and receive classification as a minister. All that the act and regulations require in order for one to qualify as a minister and to receive the classification is that the ministry be his vocation, not an incidental thing in his life".

Finally, in the case Wiggins v. the United States, the Court of Appeals declared : "Ministers of Jehovah's Witnesses are not paid a salary, furnished a parsonage or even given funds for

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necessary expenses to carry on their ministerial work. As pointed out, they have no choice except to engage in secular pursuits in order to obtain funds to make the ministry their vocation. The Act does not define a minister in terms of one who is paid for ministerial work, has a diploma and a license, preaches and teaches primarily in a church. The test under the Act is not whether a minister is paid for his ministry but whether, as a vocation, regularly, not occasionally, he teaches and preaches the principles of his religion" (1).

The Applicant added that, although he considered the question as to whether religious work was a person's principal activity as being totally irrelevant from the point of view of religious freedom, it should be observed that, according to the German Act on Compulsory Military Service, ministers of other religions than the Protestant or the Roman Catholic faith were only exempted when religion was their principal occupation while, in regard to Protestant and Roman Catholic ministers, no similar condition was applied.

Moreover, it was frequently stated that the office of Jehovah's Witness ministers was not equivalent to that of the ministers of the two principal religions since Jehovah's Witness ministers did not form a closed group as did the Protestant or the Roman Catholic clergy, which consisted of persons who had been ordained only after certain university studies and examinations. However, even a Jehovah's Witness could only be ordained as a minister after many years' spiritual training. The basic criteria which characterised a minister were that he considered the service of his religion and its diffusion as his principal task. The ministers of Jehovah's Witnesses satisfied this criterion to a very high degree.

In regard to the Roman Catholic Church, all ministers ordained as sub-deacons were exempted and, in regard to the Evangelical Church, all ordained ministers. Moreover, students of theology were entitled to have their service postponed and as, after ordination, they were finally exempted, in reality, a person who intended to become a Roman Catholic or Evangelical minister was exempted from the time when he started his studies of theology. It was submitted that the Applicant's religious functions were equivalent to those of a Roman Catholic sub-deacon or an Evangelical curate (Vikar). The Catholic sub-deacon had no real function in the life of the community; he was generally

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(1) Application of 1st September, 1964, pp. 1-4.

not allowed to administer the sacraments although, exceptionally, he could perform an act of baptism. A sub-deacon was not yet a real minister but was exempted so as to permit him to pursue his religious education. The Evangelical curate took a more active part in the religious life of the community and did, in fact, sometimes exercise the functions of a minister although, generally, he was only the assistant of a minister.

It appeared, therefore, that ministers holding low offices in the Roman Catholic and Evangelical churches were exempted while no exemption was given to ministers of Jehovah's Witnesses, however high their rank.

As a Bible study conductor the Applicant held an important office within his sect. The Bible study within the community (Versammlungsbuchstudium) played an important part in the life of Jehovah's Witnesses, and, as a leader of these activities, the Applicant was the spiritual guide of many people. He was responsible for a centre of teaching where the active ministers as well as other interested persons gathered in order to study and interpret the Bible. Moreover, the ministers received from the Bible study conductor inspiration and advice as to their own preaching. The Bible study conductor also gave lectures on the Bible to small groups and was generally the assistant of the congregation servant (Versammlungsdiener).

The Applicant had exercised his functions with particular diligence and could well be compared with a sub-deacon or a curate. He was competent to perform a baptism or to officiate at a marriage or communion service. The discrimination against him was particularly serious since even students of theology belonging to the two principal churches were in fact exempted and he could undoubtedly be considered to be at least the equivalent of a student of theology.

It had been pointed out that the Catholic and Evangelical communities comprised a considerably higher number of members than the communities of Jehovah's Witnesses and that, therefore, a Roman Catholic or Evangelical minister was the spiritual guide of more people than a Jehovah's Witness minister. It should be observed, however, in this connection that, among the members of the Roman Catholic or Protestant communities, only a small number were active members of the church and that, moreover, even the ministers of these confessions often admitted that they were hardly able to take proper care of their large communities (1).

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(1) Verbatim record of 18th July, 1966(Doc. 2944 TN 7447),pp.1-4.

It was not acceptable, from the point of view of the freedom of religion, that the state decided who was to be considered as a minister. This was a matter for each community. If, however, the state issued special regulations as to what constituted a minister of religion and made the consequences, which were of legal importance, such as the exemption from military service, dependent on their observance, this amounted to practising unwarrantable interference with ecclesiastical affairs. On this point be criticised a decision by the Court of Appeal of Hamburg (Monatsschrift für deutsches Recht, 1965, p. 63) which stated : "The question whether the principal occupation of a preacher of the sect of Jehovah's Witnesses is his ministry must be judged according to temporal criteria" (1).

12. The Government submitted that there had been no violation of Article 14 of the Convention. This Article was only applicable in regard to the rights guaranteed by the Convention and no such rights were involved in the present case. The exemption granted to certain ministers in German law was to be considered a privilege and the State was under no obligation under the Convention to extend this privilege to all ministers. Moreover, the right to exemption was not a result of the freedom of conscience and religion as guaranteed by Article 9, paragraph (1) of the Convention. Even if it fell under that provision, it would be permissible under Article 9, paragraph (2) and, even so, it would be within the discretion of the State to decide on the possible exemptions to be granted to ministers of different religions. It was of no relevance, how the American courts had decided these questions on the basis of American law.

Moreover, the distinction made in German law between Protestant and Roman Catholic ministers, on the one hand, and other ministers, on the other hand, was reasonable and could not, either in itself or in its application in the present case, be considered as a discrimination against the Applicant.

The basis of the exemptions granted to the Roman Catholic and Evangelical ministers were agreements between State and Church, in particular, the agreements concluded with the Holy See and the Evangelical Church. It should be observed that the substance of these agreements was an exchange of mutual benefits between State and Church ("do ut des"). This could imply that, while the State agreed to exempt ministers from compulsory service, the Church agreed to give the State some influence on the appointment of holders of ecclesiastical offices or to provide the armed forces with ministers in order to satisfy the religious needs of the soldiers.

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(1) Observations of 18th June, 1965 (Doc. D 7551, TF 4712), pp.1-3.

The Government pointed out that, in German law, the right to exemption had also been given to quite different categories of citizens for various social or humanitarian reasons and this too showed that the right to exemption was not a result of the freedom of conscience and religion.

When the German legislator was faced with the problem of establishing a rule for exemption of ministers, it was fairly easy, in regard to the two principal churches, to connect the right to exemption with ordination. However, in regard to other religions, the legislator had to find a criterion which was applicable to the different denominations - about 80 - existing in the Federal Republic. These different religious communities were of very varying structures but nevertheless general criteria had to be formed which gave those communities a right of exemption which corresponded to the rules applicable to Roman Catholic and Protestant ministers. It was then decided to introduce two criteria namely, first that the religious activities should be the principal occupation of the ministers concerned (Hauptamtlichkeit) and, secondly that the functions of the ministers concerned should correspond to those of ordained ministers of the two principal religions.

It was also submitted that in other contracting States the right to exemption from military or substitute service did not apply to ministers of all religions. In Greece, only Jewish or Moslem priests were exempted and in Italy only Catholic priests had the right to exemption from military service and other ministers only if the churches were officially recognised by the State. Such was not the case with Jehovah's Witnesses. In the Netherlands, ministers were generally exempted from military service but not Jehovah's Witness ministers, since Jehovah's Witnesses were not a recognised religious community. In Switzerland, the right to exemption depended on cantonal law. These examples too showed that the States did not consider this as a question of freedom of conscience or religion. If so, this variety of legal provisions would not have been possible.

The question as to whether in a particular case the religious functions were the principal activity had to be decided according to objective standards. It was of no importance if a person considered his religion to be his principal task.

As regards the question on what basis it should be decided whether certain functions were equivalent to those of an ordained Catholic or Protestant minister, the Government referred, in particular, to the decision of the Federal Administrative Court dated 25th March, 1966 (see Appendix IV).

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The Government indicated that, in the Evangelical Church in the Federal Republic, there was, on the average, in rural areas, one minister per 500 church members (in the big cities one per 3500 or more). In the Catholic Church, the relation was one per 1700 to 1800.

However, in the sect of Jehovah's Witnesses, the situation was entirely different. In principle, all baptised members were ministers. Baptism could sometimes take place at the early age of 12 or 13 and, in the applicant's case, it seemed to have taken place at the age of 17. But even if only those members were considered as ministers who held special offices in the sect, there would be one minister per 10 members of the sect.

There were, in the Government's submission, about 80,000 baptised Jehovah's Witnesses in the Federal Republic. They were divided among 900 different local congregations. The head of each congregation was a congregation servant (Versammlungsdiener) and he was assisted by an assistant congregational servant (Hilfsversammlungsdiener). Moreover, there were in each congregation a Bible study servant (Bibelstudiendiener), a magazines territory servant (Zeitschriften- Gebietsdiener), a literature servant (Literaturdiener), an accounts servant (Rechnungsdiener), a watch-tower study servant (Wachtturmstudiendiener), a ministry school servant (Predigtdienstschuldiener) and, for every ten to twenty members, a Bible study conductor. On the average, a congregation had seventy members. There were, however, congregations of only twenty members, and there were also larger congregations.

Several congregations constituted a circuit (Kreis) whose head was a circuit servant (Kreisdiener). Several circuits constituted a district (Bezirk) whose head was a district servant (Bezirksdiener), and the districts constituted the German branch (Zweig) of Jehovah's Witnesses, the head being the branch servant (Zweigdiener). Outside this organisation, there were also (in 1962) about 350 special pioneers (Sonderpionierverkündiger).

If it was also taken into account that the women normally did not hold any office within the sect, the result would be that there was one office-bearer per five members of the sect.

It should also be observed that not all office-bearers in the Roman Catholic and Protestant Churches were exempted under German law. In the Evangelical Church, the deacons (Diakone) were not exempted, and there were also lay preachers (Laienprediger) in the Evangelical communities who were not exempted.

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Moreover, there was in German law a possibility for a community to ask for a decision that a person should not be called-up for service because his services were indispensable to the community (Unabkömmlichstellung). No such application had ever been made by Jehovah's Witness communities although it could sometimes have had a chance of success. The reason was apparently that Jehovah's Witnesses were not willing to accept favours from the State.

The German courts had also considered that the 'principle of equality' as laid down in Article 3 of the German Basic Law had not been violated by the refusal to exempt Jehovah's Witnesses from substitute service. It was pointed out that Article 14 of the Convention had a more limited scope than Article 3 of the Basic Law and that the Expert Committee on Human Rights had recently expressed the opinion that a provision protecting full equality before the law should not be included in a protocol to the Convention (1).

(1) Observations of 20th January, 1965 (Doc. D 5542), pp.7-10;
observations of 18th October, 1965 (Doc. D 9390), pp.2-4;
verbatim record of 18th July, 1966 (Doc. 2944 TN 7447)
pp. 10-17, 20-23.

C. ESTABLISHMENT OF THE FACTS

I. German legislation and practice regarding exemption of ministers from substitute civilian service

13. According to Article 4, paragraph (1), of the German Basic Law (Grundgesetz) freedom of faith and of conscience and freedom of creed, religious or ideological, are inviolable.

Under paragraph (3) of the same Article, no one may be compelled against his conscience to carry out war service as an armed combatant. It is, however, stated in Article 12, paragraph (2), that those who, for reasons of conscience, refuse to serve as armed combatants may be obliged to perform a substitute service according to further provisions to be contained in special legislation; such provisions must not, however, interfere with their freedom of conscience and must provide for a service which has no connection with the armed forces.

14. Detailed provisions as to the obligation to carry out military service are contained in the Act on Compulsory Military Service (Wehrpflichtgesetz) of 1956 as amended in 1962 (1).

Article 25 of this Act provides that persons who, for reasons of conscience, object to participating in any use of weapons between States and who, therefore, refuse to perform war service as armed combatants, shall render a substitute civilian service outside the armed forces.

15. Further provisions concerning the kind of service which is to be performed by conscientious objectors are contained in the Act on Substitute Civilian Service (Gesetz über den zivilen Ersatzdienst) of 1960 (2).

16. According to Article 11 of the Act on Compulsory Military Service, certain categories of people are exempted from military service. These categories include

1. ordained ministers of Evangelical faith,

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(1) For the purposes of the present case, the subsequent amendment of this Act in 1965 is irrelevant and all references in this text concern the wording of the Act before this amendment.

(2) References to this Act in this Report concern the Act in its original version while an amendment in 1965 is left out of account.

2. Ministers of Roman Catholic faith who have been ordained as sub-deacons,

3. Ministers of other religions, whose principal occupation is their ministry and whose function is equivalent to that of an ordained minister of Evangelical faith or that of a minister of Roman Catholic faith ordained as a sub-deacon.

The Applicant has submitted that, in practice, ministers of Jehovah's Witnesses were never exempted from service by application of these provisions.

This has been generally confirmed by the Government's representative, Oberregierungsrat Dr. H. Ciesinger, who pointed out, however, that applications for exemption of persons holding high offices within the sect had not been received, as service was usually performed at the age of 20 or 21. Moreover, he could not exclude that in an exceptional case, a Jehovah's Witness might have been exempted by the local authorities but that would have been contrary to the general principles adopted by the Ministry of Defence.

Article 12, paragraph (2), of the same Act provides that persons who prepare themselves for the ministerial office shall be granted, on their application, a postponement of their military service.

The Act on Compulsory Military Service also contains provisions regarding a number of other exceptions to the general principle that military service is compulsory (Articles 9 to 13a of the Act).

17. According to Article 9, paragraph (3), of the Act on Substitute Civilian Service, the provisions of the Act on Compulsory Military Service regarding exemption and postponement, as referred to under 16., are applicable by analogy to substitute civilian service.

18. Article 1 of the Act on Substitute Civilian Service provides that the work which is to be carried out in the course of the performance of substitute service shall be of public utility. Reference is made, in particular, to service in hospitals and lunatic asylums.

It appears from Article 5 of the same Act that any person liable to service is entitled to apply for permission to perform service with a particular recognised organisation indicated by him. However, as a rule, service is not to be performed at the place of residence of the person concerned.

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In their pleadings, the parties have dealt with the question as to whether the applicant would have had the possibility of performing substitute service in Düsseldorf, which is his home-town. Although the parties were not agreed about his chances in this respect, the Commission has attached particular weight to the following assertions made by Oberregierungsrat Dr. W. Giesinger representing the Government. According to Dr. Giesinger's submissions,

- there are, in the Federal Republic, about 300 institutions where substitute service is performed,

- there are five such institutions in Düsseldorf,

- before a person is called up for service, he is informed about his right to indicate a place or an institution where he wishes to perform service,

- in regard to members of the sect of Jehovah's Witnesses, the authorities in practice even deviate from the rule that service should not be performed at the place of residence of the person liable to service.

19. Article 23 of the Act on Substitute Civilian Service provides that any person performing service has a right to the undisturbed practice of his religion and that participation in divine service is voluntary.

Article 18 of this Act also provides that the person performing substitute service has the right to devote himself to other occupations (Nebentätigkeit) in so far as these occupations do not jeopardise his fitness for service or are contrary to the requirements of his service.

20. In regard to the general manner in which substitute service is performed in the Federal Republic, Dr. Giesinger has submitted the following information which has not been contested by the Applicant.

Service is usually performed in hospitals and lunatic asylums where each person is assigned work according to his professional experience, his training, his own wishes or the needs of the institution concerned. Generally speaking, the working conditions are similar to those of ordinary civil work, but the persons performing compulsory service have to live together in special quarters (Gemeinschaftsunterkunft) and take their meals together (Gemeinschaftsverpflegung) and they are subjected to the disciplinary rules which are necessary for that purpose.

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The working hours are the same as in ordinary civil work. If, for instance, the applicant had been performing his service with the Municipal Hospitals (Städtische Krankenanstalten) at Düsseldorf, he would have been free, after working hours, until 10 p.m. After 10 p.m. he could have obtained special leave if he had indicated that he wished to use more time for his religious activities.

Any person performing service has free board and lodging and free working clothes. If working clothes are not provided, he is entitled to compensation. He also receives some payment as well as compensation for the use of his own clothes outside working hours. The family receives, in so far as it is otherwise dependent on the person performing service, certain allowances.

21. Article 37 of the Act on Substitute Civilian Service provides that anyone who leaves or abstains from service shall, if certain further conditions are satisfied, be convicted of desertion (Dienstflucht) and sentenced to imprisonment of not less than one month.

II. Organisation of Jehovah's Witnesses and the applicant's position within the sect

22. The applicant has not contested the following information provided by the Government :

There are in the Federal Republic about 80,000 baptised members of the sect of Jehovah's Witnesses, divided among about 900 local congregations.

The head of each local congregation is a congregation servant (Versammlungsdiener) who is assisted by an assistant congregational servant (Hilfsversammlungsdiener). Moreover, there are in each congregation a Bible study servant (Bibelstudiendiener), a magazine territory servant (Zeitschriften-Gebietsdiener), a literature servant (Literaturdiener), an accounts servant (Rechnungsdiener), a watch-tower study servant (Wachtturmstudiendiener), a ministry school servant (Predigtdienstschuldiener) and, for each ten to twenty members, a Bible study conductor (Buchstudienleiter).

A congregation (Versammlung) has, on the average, seventy members. There are congregations of only twenty members and there are also considerably larger congregations.

Several congregations constitute a circuit (Kreis) headed by a circuit servant (Kreisdiener). Several circuits constitute a district (Bezirk) whose head is a district servant (Bezirks-

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diener) and the districts form the German branch (Zweig) of the Watch Tower Bible and Tract Society. The head of the German branch is the branch servant (Zweigdiener).

Outside this general organisation, there are also, in the Federal Republic, about 350 special pioneers (Sonder- pionierverkündiger) belonging to this sect.

Most of the office-holders in the sect do not exercise their religious functions as their principal occupation but the special pioneers form an exception as well as certain office-holders above the rank of a congregation servant.

23. In regard to the Applicant's functions within the sect, it appears that at the relevant time he was a Bible study conductor.

The Applicant has submitted that in this function he was the leader of a centre where sect members gathered to study the Bible and to discuss religious subjects under the guidance of the leader and where even the active preachers gathered in order to get inspiration and advice for their preaching. The Bible study conductor also gave lectures on the Bible and organised study and preaching activities.

He has stated that his religious activities took up a minimum of 120 hours a month and sometimes as much as 150 hours.

On Mondays he paid follow-up visits to interested Christians and studied the Scriptures for his own further education (2 to 3 hours).

On Tuesdays he prepared for the Bible study class which he conducted on Wednesday evenings (2 to 3 hours).

On Wednesdays he engaged in house-to-house visiting and was occupied with his Bible study class (3 hours).

On Thursdays he studied for the missionary school, prepared for a prayer meeting on the following day and paid further follow-up visits (number of hours not indicated).

On Fridays he had similar occupations (3 1/2 hours).

On Saturdays he delivered a public sermon, visited members of the congregation and did some preparatory studies (4 hours).

On Sundays he again conducted a Bible study class and preached. In the afternoon he officiated at the general Bible

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study meeting of the congregation (number of hours not indicated).

Moreover, he had special assignments; once or twice a month he prepared and delivered special sermons and lectures. For their preparation, he used at least 4 1/2 hours a week.

The Government has not specifically commented on these statements by the Applicant but has observed

- that the function of Bible study conductor is a rather low function within the sect,

- that the Applicant also had full-time employment as a painter's assistant.

The Applicant has informed the Commission that, as a painter's assistant, he worked about 43 hours a week.

III. Proceedings before the German courts and other authorities regarding the service imposed on the Applicant

(a) Proceedings before the administrative authorities

24. In 1960, the Examination Board for Conscientious Objectors to War Service (Prüfungsausschuss für Kriegsdienstverweigerer) with the District Office for Substitute Military Service (Kreiswehrersatzamt) at Düsseldorf recognised the Applicant as a conscientious objector entitled to refuse military service.

On 16th November, 1961, the Federal Minister for Labour and Social Structure (Bundesminister für Arbeit und Sozialordnung) invited the Applicant to perform a substitute civilian service.

On 4th December, 1961, 5th February and 1st August, 1962, the Applicant asked for exemption from civilian service. These requests were subsequently rejected by the Minister.

On 24th September, 1962, the Minister declared the Applicant to be available for civilian service.

On 9th October, 1962, the Minister rejected the Applicant's objection (Widerspruch) against the decision of 24th September, 1962.

On 20th October, 1962, the Minister decided to call up the Applicant for civilian service beginning on 1st December, 1962. The service would concern medical care (Krankenpflegedienst) and would be performed at the University of Tübingen.

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On 12th November, 1962, the Minister rejected the Applicant's objection (Widerspruch) against the decision of 20th October, 1962.

(b) Proceedings before the Administrative Courts

25. In regard to the Ministers' decisions of 24th September and 20th October, 1962, the Applicant lodged a complaint (Klage) with the Administrative Court (Verwaltungsgericht) at Cologne.

In these proceedings he submitted that he was entitled to

- exemption from service according to Article 11 of the Act on Compulsory Military Service (which provides for exemption of ministers)

- postponement of service according to Article 12, paragraph (2) of the same Act (which gives students of theology the right to such postponement).

On 7th January, 1963, the Administrative Court rejected the Applicant's complaint and the decision was communicated to the Applicant on 21st February, 1963.

Against that decision, the Applicant lodged an appeal (Revision) with the Federal Administrative Court (Bundesverwaltungsgericht) and he also asked the Federal Administrative Court to declare that the appeal should have suspensive effect.

On 16th July, 1963, the Federal Administrative Court, by an interim decision, refused to order that the appeal should have a suspensive effect. The Court referred to three previous decisions (BVerwGE 7,66; 14,318 and BVerwG VII C 63.62) by which the Federal Administrative Court had decided that pioneer preachers (Pionierverkündiger) and special pioneers (Sonderpionierverkündiger) were not to be considered as ministers within the meaning of Article 11 of the Act on Compulsory Military Service, The same applied, in the Court's opinion, to the Applicant as a Bible study conductor. The Court also stated that the Applicant did not prepare himself for ministerial work within the meaning of Article 11 and he was therefore not entitled to postponement under Article 12. Consequently, as the Applicant's appeal had no chance of success, the Court found no reason to order its suspensive effect.

On 25th March, 1966, the appeal was rejected by the Federal Administrative Court. The Court considered that the Applicant had no right to exemption, because his principal occupation was not his ministry and his function was not equivalent to that of

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an ordained minister of Evangelical faith or to that of a minister of Roman Catholic faith ordained as a sub-deacon.

The Court dealt in considerable detail with the application of these two criteria to the present case. An extract of the Court's decision appears as Appendix IV to this Report.

Before the Federal Administrative Court had decided on the appeal, the Applicant lodged a constitutional appeal with the Federal Constitutional Court (Bundesverfassungsgericht) in regard to the decision of the Administrative Court dated 7th January, 1963. He alleged violations of several provisions of the German Basic Law, in particular, its Articles 3 (equality before the law) and 4 (freedom of conscience and religion).

On 20th February, 1964, the Federal Constitutional Court rejected this appeal as being manifestly ill-founded. As to the grounds, the Court referred to a letter of 3rd December, 1963, sent to the Applicant's lawyer by the judge in charge of the record (Berichterstatter). In this letter, it was indicated that, independently of the question of the admissibility, the appeal was not well-founded,

- in regard to Article 3 of the Basic Law, as there were valid reasons not to give the Applicant the same right of exemption as ministers of Roman Catholic or Evangelical confession,

- in regard to Article 4 of the Basic Law, since substitute service was expressly provided for in Article 12 of the Basic Law and could therefore not be assumed to constitute a violation of the rights guaranteed by Article 4.

The Constitutional Court added that, while performing substitute service, the Applicant would have the right to undisturbed exercise of his religion (Article 23 of the Act on Substitute Civilian Service) and that, consequently, he would not be prevented from participating in religious ceremonies outside his service or from associating with other members of his sect. It was stated that, in respect of such service, he could not derive any further rights from Article 4 of the Basic Law.

(c) Criminal proceedings against the Applicant

26. On 21st June, 1963, the District Court (Amtsgericht-Schöffengericht) at Düsseldorf convicted the Applicant of desertion and sentenced him to eight months' imprisonment.

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The Applicant lodged an appeal (Berufung) from this decision.

On 22nd October, 1963, the Regional Court (Landgericht) at Düsseldorf upheld the Applicant's conviction but reduced his sentence to six months' imprisonment.

The Applicant lodged a further appeal (Revision) with the Court of Appeal (Oberlandesgericht) at Düsseldorf.

On 2nd April, 1964, the Court of Appeal rejected this appeal.

Before the Court of Appeal had given its decision, the Applican extended his constitutional appeal to cover also the decisions of the District Court dated 21st June, 1963, and of the Regional Court dated 22nd October, 1963.

On 20th February, 1964, the Federal Constitutional Court also rejected the appeal, in so far as it concerned the decisions of the District Court and the Regional Court. As to the grounds, it referred to the grounds on which the constitutional appeal against the decision of the Administrative Court was rejected (see paragraph 25).

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PART II

OPINION OF THE COMMISSION

A. QUESTION OF INCOMPATIBILITY WITH THE CONVENTION

27. After the Commission had decided, on 23rd April, 1965, to declare the present Application admissible, the Federal Government submitted, in the proceedings before the Sub-Commission on the merits of the case, that the Application was incompatible with the provisions of the Convention. In its pleading of 18th October, 1965, the Federal Government summarised its position in the following terms: "The Federal Government, being of the opinion that the Applicant, in regard to his concrete case, cannot claim in his favour any right guaranteed by the Convention, maintains its view that the Application is incompatible with the provisions of the Convention."

The Commission observes that the issue raised by the Government concerns the admissibility of the Application and that, before declaring the Application admissible, it had already found that all relevant conditions had been satisfied. Consequently, as the Government, in merely repeating its argument made before admissibility in this connection, has not indicated any ground for a reconsideration of that decision, the Commission is of the unanimous opinion that it is not necessary to make any further statement on the Government's objection regarding the Application's alleged incompatibility with the Convention.

B. QUESTION OF A POSSIBLE VIOLATION OF ARTICLE 9 OF THE CONVENTION CONSIDERED SEPARATELY

28. Article 9 of the Convention states as follows:

"(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' 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."

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29. In the Commission's opinion, the question whether or not Article 9 has been violated in the present case must be examined from two different aspects. On the one hand, the question arises whether the civilian service which the Applicant was required to perform would have restricted the Applicant's right to manifest his religion. This question will be examined in paragraphs 30 and 31 below. On the other hand, it is also necessary to consider the question whether Article 9 has been violated by the mere fact that the Applicant has been required to perform a service which is contrary to his conscience or his religion. This question will be examined in paragraph 32 below.

30. The Commission first observes that the Applicant has not alleged that the compulsory service would have interfered with the private and personal practice of his religion (see above paragraph 9), nor indeed could the facts, as established by the Commission, sustain any conclusion to the effect that there would have been any such interference.

31. In the Commission's opinion, it also appears from the facts established in this case (see above paragraphs 18-20) that the nature of the compulsory service which would have been imposed upon the Applicant would have been such as to leave him sufficient time to perform his duties towards his religious community.

In fact, as far as these duties are concerned, the Applicant would not have been placed in a situation greatly different from that in which he normally lived. He has himself informed the Commission that during the relevant period he worked about 43 hours a week as a painter's assistant and that his "ministerial" duties, which occupied at least 120 hours a month, were performed largely in his spare time (see above paragraph 23). According to the practice of the German authorities in regard to Jehovah's Witnesses, he would presumably have been allowed to perform service in his home town and, while performing such service, he would have had the right, under Article 18 of the Act on Substitute Civilian Service, to do such outside work as did not interfere with the service required of him (see above paragraphs 18 and 19).

Consequently, in the Commission's opinion, the service required of the Applicant would not have implied any interference with his "freedom ... to manifest his religion or belief, in ... teaching" within the meaning of Article 9, paragraph (1), of the Convention.

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32. The Commission has also examined the Applicant's allegation that the German authorities had violated the Convention by imposing on him a service which was contrary to his conscience and religion and by punishing him for his refusal to perform such service. In this respect, the Commission states the following opinion:

The Commission finds no reason to doubt that the Applicant's objection to compulsory service was based on his genuine religious convictions.

It is true that, in this respect, the Applicant has alleged a violation of Article 9 of the Convention. The Commission observes, however, that, while Article 9 guarantees the right to freedom of thought, conscience and religion in general, Article 4 of the Convention contains a provision which expressly deals with the question of compulsory service exacted in the place of military service in the case of conscientious objectors.

Consequently, the Commission finds it necessary to examine the Applicant's allegation primarily on the basis of Article 4 of the Convention.

Article 4, paragraphs (2) and (3), of the Convention provide as follows:

"(2) No one shall be required to perform forced or compulsory labour.

(3) For the purpose of this Article, the term "forced or compulsory labour" shall not include:

(a) .....

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service ;"

As in this provision it is expressly recognised 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.

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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.

33. The Commission arrives at the unanimous conclusion that Article 9 of the Convention considered separately has not been violated in the present case.

34. Mr. Ermacora states the following individual opinion:

I am of the opinion that Article 9 considered separately is applicable but has not been violated, for the following reasons:

The Applicant worked, at the time concerned, as a painter's assistant and could, in any case, only devote himself to religious activities outside his normal working hours. It appears from the Government's submissions regarding the performance of substitute service in the Federal Republic that the Applicant would presumably have been allowed to perform substitute service in the locality where he had his religious activities. While performing such service, he would have had substantially the same possibility to devote himself to his religion as he had when he was doing his ordinary work. It should also be observed that the Applicant's functions within his sect are not comparable to those of a Roman Catholic or a Protestant minister and that his ministerial office is not "institutionalised" in the same way as the offices of the ministers of the two other religions. In fact, the Applicant enjoys considerable freedom in the organisation and performance of his religious activities, and this fact too would have reduced the inconveniences resulting from the compulsory service. Consequently, there has not been any interference with the Applicant's right to freedom of religion within the meaning of Article 9 of the Convention.

Although I agree with the majority in considering that Article 9 has not been violated in the present case, I do not find it necessary to base this conclusion on an examination of Article 4 of the Convention.

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In my opinion, which is based on the development regarding the interpretation of human rights in Austria and the Federal Republic of Germany, freedom of conscience and religion means freedom from interference (by the State or otherwise) with matters relating to the conscience or religion of a person. This freedom is subject to certain limitations of an immanent character, based on the fact that any individual has the obligation to respect the interests of the community in which he lives.

Moreover, Article 9, paragraph (2), of the Convention expressly permits "such limitations as are prescribed by law and are necessary in a democratic society" for certain specified purposes, among which is "the protection of public order". Under this limitation mentioned in paragraph (2), the States are allowed to require their citizens to perform compulsory military service and it is a matter within the discretion of the States whether or not to exempt conscientious objectors from military service.

Where a State chooses to exempt some of its citizens from military service on account of their objections of conscience, it cannot be considered a violation of Article 9 if the State imposes on these citizens a substitute civilian service. As such civilian service is merely a substitute for military service, it must also be considered to fall within the limitations mentioned in paragraph (2) of Article 9 ("for the protection of public order").

35. Mr. Balta states the following individual opinion:

In cases where the imposition of military service including substitute civilian service on a person implies interference with his right to manifest his religion, as guaranteed by Article 9, paragraph (1), such interference must nevertheless be considered to be justified under Article 9, paragraph (2), in conjunction with Article 4, paragraph (3), of the Convention.

In the present case, however, this question does not arise, since it appears that the Applicant's freedom to manifest his religion would not have been restricted as a result of the compulsory service required of him.

36. Mr. Eustathiades states an individual opinion which concerns not only Article 9 but also Article 14 of the Convention. This opinion is set out below under paragraph 47.

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C. QUESTION OF A POSSIBLE VIOLATION OF ARTICLE 14 (IN CONJUNCTION WITH ARTICLE 4 OR 9) OF THE CONVENTION

(a) The interpretation of Article 14

37. Article 14 of the Convention states as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national minority, property, birth or other status."

38. In view of the wording of Article 14, the Commission has discussed whether, in the present case, a violation of Article 14 is excluded by the mere fact that, in the Commission's opinion, no other Article of the Convention, considered separately, has been violated.

On this question of the interpretation of Article 14, the Commission, by eight votes to five, has adopted the following opinion:

The application of Article 14 does not only depend upon a previous finding of the Commission that a violation of another Article of the Convention already exists. In certain cases, Article 14 may be violated in a field dealt with by another Article of the Convention, although there is otherwise no violation of that Article. In 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 provision 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. (See the Commission's further considerations on this point in paragraph 40).

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39. MM. Eustathiades, Süsterhenn, Ermacora, Sperduti and Maguire do not accept the opinion of the majority on this point but do not find it necessary, for the purposes of the present case, to make any further statement on the interpretation of Article 14 (as regards Mr. Eustathiades, see, however, his general opinion as reproduced below in paragraph 47).

(b) Application in the present case of Article 14 in conjunction with Article 4

40. In regard to the question whether or not Article 14 in conjunction with Article 4 of the Convention has been violated in the present case, the Commission states the following opinion:

The problem is, in this respect, whether there has been a discrimination against the Applicant in the enjoyment of the general right defined in Article 4, namely, the right not to be subjected to "forced or compulsory labour". It is true that Article 4, paragraph (3), is so worded that military service and substitute civilian service by conscientious objectors are not included under the term "forced or compulsory labour", and it might therefore be argued that these categories of service are entirely outside the scope of Article 4 and thus do not concern the right set forth in that Article.

This argument, however, is not conclusive. The form of drafting applied in Article 4 is taken over from the ILO Convention of 1930 concerning forced or compulsory labour, and it would be in conformity with the drafting methods adopted in other Articles, such as 8,9,10 and 11, to consider Article 4,paragraph (3),as constituting provisions which permit limitations of, or exceptions to, the general freedom from forced and compulsory labour set forth in paragraph (2) of that Article. 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 objectors, must satisfy the requirements of Article 14, that is to say, be non-discriminatory both in their character and in their application.

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 favourably than - another group or category and, secondly, that such different treatment is based on grounds which are not acceptable.

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In the present case, the Applicant alleges that as a minister of Jehovah's Witnesses he has been subjected to a treatment less favourable than that accorded to ministers of other religious communities, on the basis of Article 11 of the German Act on Compulsory Military Service. The first question to be examined is, therefore, whether the provisions of Article 11 imply by their nature a discriminatory treatment. Secondly, the manner in which that Article has been applied to the Applicant must also be examined.

Article 11 of the German Act distinguishes between three different categories. In regard to the first two categories - ministers of Evangelical faith and of Roman Catholic faith - the decisive criterion is ordination. In regard to the third category comprising ministers of other religions, the distinguishing criterion is a double one: (a) The ministry must be the principal occupation of the person concerned and (b) the functions must be equivalent to those of an ordained minister of one of the first two groups. All three categories are given equal treatment: they are all exempted from compulsory service. Ministers who do not belong to any of the three groups are subjected to a less favourable treatment: they will be obliged to perform military service or, if they are recognised as conscientious objectors, substitute civilian service.

Consequently, it is unquestionable that different groups of ministers of religion are treated differently in respect of exemption from compulsory service.

Whether or not this difference in treatment amounts to a discrimination in violation of Article 14 depends upon an evaluation of the grounds on which the difference is based. In previous decisions (see, for instance, the decisions on the admissibility of Applications Nos. 104/55 and 167/56, Yearbook I, pp. 229 and 236), the Commission has stated, in accordance with the general doctrine on the subject of discrimination, that certain differentiations may be legitimate and therefore not precluded by Article 14.

The reason for which the German legislature, in regard to such ministers as are neither of Roman Catholic nor of Evangelical faith, has only agreed to grant exemption from service, where their ministry is their principal occupation, is undoubtedly the wish to prevent a large-scale evasion of the general duty to perform

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military service. As stated in the decision of 25th March, 1966 of the Federal Administrative Court, it is not the intention of the law to exempt an entire religious community, and this might well be the result if the limitation established by the law now in force was abandoned. In implementation of this basic purpose 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. The significance of the German law is that the real basis of the distinction made by it is in the function performed by different categories of ministers and is not according to the religious community to which they belong.

For these reasons, the criteria adopted in Article 11 of the German Act are not discriminatory within the meaning of Article 14 of the Convention. They constitute a differentiation which must 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.

It remains to be examined whether the criteria established in the German Act have been properly applied to the Applicant. In answering this question, the Commission feels bound to have regard to the facts which have been established concerning the position of the Applicant within his community (see paragraphs 22-23), as well as to the decisions of the competent German authorities, in particular, the decision of the Federal Administrative Court dated 25th March, 1966 (see paragraphs 24-26). The task of the Commission, however, is not to examine whether the German authorities have applied German law correctly, but only to satisfy itself that, although the law was not discriminatory, its application to the Applicant was also not discriminatory within the meaning of Article 14 of the Convention.

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 (see paragraph 23). 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 Article 11 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.

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In these circumstances, it is not decisive whether or not the functions of the Applicant in other respects correspond to those of an ordained Evangelical or Roman Catholic minister. Nevertheless, even in this respect, it is possible to indicate a number of significant differences between the function held by the Applicant within his sect and the office of an Evangelical or Roman Catholic minister. While within the sect of Jehovah's Witnesses every baptised member is, in principle, the holder of a ministerial office, the status of an Evangelical or Roman Catholic minister is obtained after a long training and only by a small number of selected members of the Churches concerned. Further, the Evangelical or Roman Catholic office has another essence and significance for the community. The Federal Administrative Court, in its decision of 25th March, 1966, has dealt at length with these aspects and the Court's basic statements regarding the differences between the office of a Jehovah's Witness minister and that of an Evangelical or Roman Catholic minister can generally be accepted. Moreover, it appears that, in the hierarchy within the sect of Jehovah's Witnesses, the function of a Bible study conductor which was held by the Applicant is a comparatively low function, and there are also in the Evangelical and Roman Catholic Churches certain office-holders (such as the "Diakone" of the Evangelical Church) who have not been ordained and, consequently, are not entitled to exemption from service under German law. Consequently, the Commission is of the opinion that the German courts, when considering that the Applicant did not hold a function equivalent to that of an ordained Evangelical or Roman Catholic minister, have arrived at a reasonable conclusion. It follows that, on this point too, there is no appearance of any discriminatory application of Article 11 of the German Act.

41. The Commission unanimously arrives at the conclusion that Article 14 in conjunction with Article 4 of the Convention has not been violated in the present case.

42. Mr. Balta states the following individual opinion:

In my view, the intention of Article 14 is to establish the principle of complete equality in the enjoyment of the rights and freedoms set forth in the Convention. This being so, enjoyment of those rights and freedoms may not be made subject to any kinds of discrimination other than those which are either inherent in the nature of the right in question or are designed to remedy existing inequalities.

In the present case, I find a discrimination in the fact that Article 11 of the Act on Compulsory Military Service exempts from service all ordained ministers of Evangelical faith and all Roman Castholic ministers ordained as sub-deacons, whereas equivalent ministers of other religious denominations are not exempted unless their ministry is their principal occupation.

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It appears, however, from the interpretation given by the Federal Administrative Court that the German law requires as a general condition for exemption, that the ministers concerned belong to a separately organised clergy within their own community. As the Applicant's ministerial status does not satisfy this requirement, he cannot, on the basis of Article 14, claim the same treatment as Evangelical or Roman Catholic ministers.

43. MM. Eustathiades and Castberg state individual opinions which are set out below in paragraphs 47-48.

(c) Application in the present case of Article 14 in conjunction with Article 9.

44. In regard to the question whether or not Article 14 in conjunction with Article 9 of the Convention has been violated in the present case, the Commission states the following opinion:

The Commission has already reached the conclusion (see paragraphs 30-31) that the service required of the Applicant would not have interfered with the private and personal practice of his religion, nor would it have restricted his freedom to manifest his religion by teaching within his community.

Consequently, in these respects, it 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, and the question of discrimination therefore does not arise.

In so far as the Applicant complained that he had been required to perform a compulsory service which was contrary to his conscience or religion, the Commission reached the conclusion (see paragraph 32) that this allegation concerned a matter which should be determined solely in the light of Article 4 of the Convention and the question of discrimination only arises, therefore, in this respect from a consideration of Article 14 in conjunction with Article 4 of the Convention (see paragraphs 40-41).

45. The Commission unanimously arrives at the conclusion that Article 14 in conjunction with Article 9 of the Convention has not been violated in the present case.

46. MM. Eustathiades and Castberg state individual opinions which are set out below in paragraphs 47-48.

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D. INDIVIDUAL OPINIONS

47. Mr. Eustathiades states the following individual opinion:

As regards Article 4 of the Convention, the relevant question, in my opinion, would not be to ask whether or not this Article has been violated in the present case. It seems to me certain that in any case the Applicant could not invoke Article 4 in an independent manner, that is to say that his Application could not be well-founded if he only alleged a violation of that Article which, in paragraph (2), prohibits forced and compulsory labour. This is so because paragraph (3)(b) of the same Article expressly refers, as an exception to the general rule, to service of a military character and contains a further special reference to service exacted instead of compulsory military service in the case of conscientious objectors. It should be added that, properly speaking, paragraph (3) of Article 4 does not enumerate possible restrictions regarding the general prohibition against forced or compulsory labour, but rather defines the notion of forced or compulsory labour within the meaning of the Convention by including in paragraph (3)(a)(b)(c) and (d) certain clarifications formulated in a negative way.

However, these considerations do not lead to the conclusion that Article 4, paragraph (3)(b), of the Convention excludes the applicability of Article 9 of the Convention in cases where such work as falls under the said paragraph (3)(b), affects one of the rights guaranteed by Article 9 of the Convention. Consequently, the Commission is faced with a problem regarding the relations between Articles 4 and 9 of the Convention, since the question as to whether the service imposed on the Applicant is contrary to the Convention concerns the problem of the religious convictions of the Applicant. It cannot be maintained that Article 4, paragraph (3)(b), does not come into consideration in a case of this kind. Where a "service exacted instead of compulsory military service" (paragraph (3)(b) of Article 4 of the Convention) is imposed so as to interfere with the right guaranteed by Article 9 of the Convention, which provision has been invoked by the Applicant, it would not be permissible to exclude a priori from consideration any of Articles 4, 9 and 14.

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This being so, it is certain, in my opinion, that Article 9 of the Convention is applicable in the present case, since the Applicant's objections regarding the legality of the service which is a substitute for military service, are connected with his religious convictions which forbid him to perform not only military service but also substitute civilian service. However, the finding that Article 9 is applicable in the present case does not answer the question whether this Article has been violated in regard to the Applicant. On this point, having regard to the Applicant's religious convictions, the fact of requiring him to perform a substitute civilian service constitutes an interference with his freedom of conscience as guaranteed by Article 9, paragraph (1), of the Convention. Furthermore, it is not certain whether the limitations set out in paragraph (2) of this Article apply to the present case. In this respect, it is sufficient to compare the fact of imposing compulsory substitute service on the Applicant with the legitimate limitations laid down in paragraph (2) of Article 9. There may be some doubt, however, as to the "public safety"; this ground ought to be kept in mind, when considering whether Article 9, paragraph (2), could be legitimately applied in the present case. In this respect, it is the constant jurisprudence of the Commission that it is primarily a matter for each Contracting State to decide whether or not such special circumstances exist (in the present case a necessity in the interests of public safety) as justify restrictions to be imposed in regard to a right guaranteed by the Convention according to the specific provisions contained in that Article of the Convention which guarantees such right. However, according to the same constant jurisprudence of the Commission, this does not exclude a control by the Commission, in order to establish whether the State has not made an improper use of its competence, which exists in principle, to restrict a right guaranteed by the Convention (in the present case, the freedoms laid down in Article 9). This power of control results from the Commission's general function as a guardian of the rights guaranteed by the Convention and is strengthened by Article 18 of the Convention.

Nevertheless, from this point of view, the following two questions should, in my opinion, be considered: the first question concerns the notion of "necessity in a democratic society" (Article 9, paragraph (2)) and the second relates to Article 4 of the Convention. After these questions have been further analysed, the following observations can be made, which finally limit the two above aspects to one single question:

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First, a measure taken in the interests of "public safety" is not justified, according to Article 9, paragraph (2), unless it is "necessary in a democratic society". In order not to dwell too long on this aspect, I only observe that the notion of "democratic society" within the meaning of the Convention is not easy to grasp as in fact there are two ways of envisaging a necessity resulting from the character of a democratic society: one way would be to examine the solutions which appear from legislation and jurisprudence in each Member State of the Council of Europe; the other way would be to give the Commission full liberty in each case to consider and conclude, irrespective of the practice in the Contracting States, whether a "democratic society", as defined on the basis of whatsoever criteria, might require more than the simple finding that one of the clauses of the Convention regarding legitimate restrictions applies to the case concerned.

In this respect, it is not necessary, in the present case, to make a choice between these two methods of defining the notion of "democratic society" which justifies restrictions to be imposed according to paragraph (2) of Article 9. Indeed, whatever method is chosen, the result would be the same. It is true that, in some States which are members of the Council of Europe, there are not, in respect of military service, any special rules which apply to conscientious objectors. As, however, such States are apparently in a minority, the argument to be drawn from a comparative study would not be sufficient, if Article 4, paragraph (3)(b) did not clarify the matter further by admitting that the recognition of objections of conscience by a Contracting State is only optional ("in case of conscientious objectors in countries where they are recognised", Article 4, paragraph (3)(b)).

In these circumstances, it seems to me difficult to conclude with absolute certainty that the measures provided for in German law and inspired by motives regarding "public safety" are necessary in a democratic society. However, in this respect and more generally 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. Consequently, on the basis of Articles 9 and 4 as read together, I hesitate to conclude that the Convention has been violated.

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My opinion as expressed at length in other cases, such as the Belgian linguistic cases which have been brought before the Court, is that the question of a violation of Article 14 cannot arise in an independent manner but only in connection with a violation of one of the rights guaranteed by the Convention and consequently I do not find it necessary, in the present case, to make any statement on the question as to whether or not Article 14 has been violated.

48. Mr. Castberg states the following individual opinion:

In common with the other members of the Commission, I am of the opinion that the German legislation as applied to the Applicant is not contrary to the Convention, neither to Article 4 or 9 regarded separately, nor to Article 14.

Concerning Article 14, however, I wish to emphasise that, in my opinion, it can only be in exceptional cases that legally imposed differentiations between different categories of persons can be characterised as discriminations in the sense of Article 14, provided that the legal provisions concerned do not at the same time violate another Article of the Convention as considered separately. The Commission cannot regard such legislation as being discriminatory for the sole reason that this legislation is not just and reasonable or legitimate in the eyes of the Commission. If a country considers it fit - within the framework of Articles 4 and 9 - to establish certain distinctions between different religions or confessions, this does not in itself imply a violation of the Convention. Certainly, it may not be excluded that a legal differentiation in favour of established churches can go so far or have such an odious character that Article 14 is thereby violated, but this is certainly not so in the present case.

49. As to the individual opinions stated by MM. Ermacora and Balta, see paragraphs 34, 35 and 42.

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