

Services Exacted Instead of Compulsory Military Service: The Structure of the “Prohibition of Forced or Compulsory Labour” according to Article 4(2) of the ECHR

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Abstract

Academic writing on the prohibition of “forced or compulsory labour” according to art.4(2) of the ECHR is scarce; a fact which may well indicate that this provision does not pose major problems, either for scholars or in practice. Such an assessment would prove to be naïve. This article provides a closer look at the provision and reveals a structure in need of further analysis. The author examines the case-law on art.4 of the ECHR and concludes that the common academic approach to art.4 and how its sub-sections inter-related, are based on a misconception.

I. Introduction

A. The Austrian way

When in January 2013 the Austrian voters were asked to decide whether to retain compulsory military service (and accordingly alternative civilian service) for able-bodied adult males or to abolish it in favour of a system combining a professional army with voluntary civilian service, the result was an unambiguous one: almost 60 per cent of the participants opted to preserve the status quo.¹

However, poll numbers circulating some time before the referendum for a different option in case compulsory military service should be abolished were even more clear-cut, albeit in the opposite direction. According to a survey published in 2010, 83 per cent of the respondents were in favour of abandoning compulsory military service if compulsory civilian service was introduced.²

An unsurprising result, taking into account the important role that civilian service has in sustaining health care, patient care and transport in Austria. To introduce compulsory civilian service while abolishing compulsory military service seemed the logical choice to make for an ageing society surrounded by friendly nations. Still, to include this option in the 2013 referendum was never prominently discussed. One important reason for that was to be found in widespread doubts about whether compulsory civilian service was to

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¹ See the official webpage of the Ministry of the Interior on the referendum <http://vb2013.bmi.gv.at/> [Accessed May 27, 2014].

² See http://www.ots.at/presseaussendung/OTS_20100710_OTS0014/profil-mehrheit-wuerde-auch-frauen-zum-sozialdienst-schicken [Accessed May 27, 2014].

be reconciled with human rights standards: compulsory civilian service,³ it was argued,⁴ was to be regarded as “forced or compulsory labour”,⁵ and thus prohibited by art.4(2) of the ECHR,⁶ a view which, even though partially contested in academia,⁷ prevailed in the sphere of political discourse.

B. A European problem

Of course, this discussion had primarily had national significance. Yet the legal problem thus raised has not. Rather, it reveals that many questions concerning the scope of the prohibition of “forced or compulsory labour” according to art.4(2) are yet to be answered, indicating the need for a closer look.

In doing so, I will not pretend to develop a formula addressing all the problems possibly governed by art.4(2). Still, this article intends not only to increase the limited quantity of scholarship on the topic. What I would like to achieve is to illustrate the methodically demanding composition of the provision’s scope by paying closer attention to its structure.

II. The structure at first glance

A. Absolute, derogable, and subject to certain “exceptions”

Already a quick glance at this structure reveals similarities to the prohibitions of torture, inhuman and degrading treatment, slavery, and servitude as stipulated in arts 3 and 4(1) of the ECHR. Even if differing from those rights by not being excepted from possible derogation in times of public emergency (art.15 of the ECHR), art.4(2) of the ECHR shares their absolute character, turning each interference with the scope of the prohibition of forced or compulsory labour into a violation.⁸ It seems, however, that one main difference between art.3 and art.4(1) on the one hand and art.4(2) on the other does exist; the latter being, as stated in various academic accounts of the matter,⁹ subject to certain “exceptions” which, of course, is unfamiliar to arts 3 and 4(1).

These “exceptions” took centre stage in the Austrian debate. And these “exceptions”, as I will argue, hold the key to the understanding of the structure of the prohibition of “forced or compulsory labour” according to art.4(2).

So what about these “exceptions”? Article 4(3) mentions four quite different categories:¹⁰

- “(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

³ For the sake of the further argument, community service is similar to the existing modes of alternative civilian service.

⁴ See, in particular, Michael Köhler, “Allgemeine Dienstpflicht für junge Erwachsene?” [1995] ZRP 140 and Markus Vašek, “Verpflichtender Sozialdienst und EMRK” [2011] ÖJZ 158.

⁵ The terms “forced” and “compulsory” will be used equivalently throughout the article as it is widely accepted that they—at least for the ECHR—mean the same thing; Rolf Birk, “Art 4 ECHR”, in *Internationaler Kommentar zur EMRK*, para.20.

⁶ The ECHR was enacted as part of Austrian constitutional law in 1964 (BGBl 59/1964), thus per se enjoying a prominent place in the national fundamental rights discourse.

⁷ Wolfram Karl, “Zur Verfassungsmäßigkeit eines verpflichtenden Sozialdienstes in Österreich”, in Metin Akyürek, *Staat und Recht in Europäischer Perspektive—Festschrift für Heinz Schäffer* (Manz, 2006) p.343. See Gerhard Baumgartner, “Verfassungsfragen einer Reform des österreichischen Bundesheeres” [2011] 19 *Journal für Rechtspolitik* 159; Theo Öhlinger, “Ist ein verpflichtendes Sozialjahr zulässig?” [2011] *Kommunal* 20.

⁸ Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention*, 5th edn (Beck, 2012) p.183. For a meta-perspective on the question, see George Letsas, “Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer” [2010] 21 *E.J.I.L.* 509.

⁹ See e.g. Leo Zwaak, “Freedom from Slavery, Servitude and Force or Compulsory Labour”, in Pieter van Dijk (ed.), *Theory and Practice of the European Convention on Human Rights*, 4th edn (Intersentia, 2006) pp.443, 450–453. David Harris, *Law of the European Convention on Human Rights*, 2nd edn (OUP, 2009), pp.116–118; Mark E. Villiger, *Handbuch der Europäischen Menschenrechtskonvention (EMRK)*, 2nd edn (Schulthess, 1999); Anne Peters and Tilmann Altwicker, *Europäische Menschenrechtskonvention*, 2nd edn Beck 2012 74; Grabenwarter and Pabel (n. 8) 184–186; Thilo Marauhn, “Verbot der Sklaverei und Zwangsarbeit” in Dörr and others (eds), *EMRK/GG Konkordanzkommentar*, 2nd edn (Tübingen: Mohr Siebeck, 2013) Vol.2, pp.614–621 and most recently Ian Turner, “Positive Obligations and Article 4 of the European Convention on Human Rights: A Defence of the UK’s Human Rights Act 1998” [2014] 18 *The International Journal of Human Rights* 94, 99.

¹⁰ As only categories (b) or (d) may apply in the given context the discussion below will focus on these two alternatives. For a brief overview of the case law on the categories stated in art.4(3) of the ECHR, see Harris, *Law of the European Convention on Human Rights* (2009), pp.116–118.

- (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;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.”

B. Exacted instead of compulsory military service

It is obvious that among these categories the second, referring to “service[s] of a military character or service[s] exacted instead of compulsory military service”,¹¹ played a major part in the Austrian debate.¹² However, it also seems obvious when assessing the category’s wording, little was to be gained for those supporting compulsory civilian service as an alternative to compulsory military service,¹³ as “service[s] exacted instead of compulsory military service” are just that: exacted *instead* of (and thus pre-supposing) compulsory military service.¹⁴

Assessed in the light of the “exception” stated in art.4(3)(b), abolishing compulsory military service therefore would cause a domino effect: where there is no compulsory military service there is no further basis to exact civilian service.

C. A “normal civic obligation”?

Scholars who asserted that compulsory civilian service was to be reconciled with art.4(2) even when compulsory military service was abolished thus focused on the last category stated in art.4(3); asserting compulsory civilian service was to be regarded as a “normal civic obligation”.¹⁵ The ECHR, so it was argued, was to be considered a “living instrument”¹⁶ and civilian service may well have become regarded as a normal duty to be required of the citizen “in the light of present day conditions” (and exigencies, one may add) this “living instrument” must be interpreted.¹⁷

Two arguments, it seems, conflict with this solution. A structural objection was raised by Markus Vašek, arguing comprehensibly that it was indeed questionable to disregard the evident inapplicability of one “exception” stated in art.4(3) by broadening the scope of another.¹⁸ Rather, the question whether or not compulsory civilian service lacking a military counterpart was to be reconciled with the prohibition

¹¹ Which only recently has come to the attention of the European Court of Human Rights Grand Chamber (see *Bayatyan v Armenia* (App. No.23459/03), Decision of July 7, 2011) ruling that the phrase “in countries where they are recognised” is not to be considered a sufficient foundation to make art.9 of the ECHR inapplicable to conscientious objectors (as argued by the Commission—see, in particular, *Grandrath v Germany* (App. No.2299/64) Commission decision of December 12, 1966; *G.Z. v Austria* (App. No.5591/72), Commission Decision of April 2, 1973; and *X v Germany* (App. No.7705/76), Commission Decision of July 5, 1977. See further, Christopher Decker and Lucia Fraser, “The Status of Conscientious Objection under Article 4 of the European Convention on Human Rights” (2001) 33 NYU J. Int’l L. 379—for an in-depth discussion, see Petr Muzny, “Bayatyan v Armenia: The Grand Chamber Renders a Grand Judgment” [2012] 12 H.R.L.R. 135. *Bayatyan* did yield specific results: later in the same year the Court’s Second Section ruled that the absence of exemptions (as an alternative, albeit nonetheless compulsory, civilian service) from compulsory military service in favour of conscientious objectors may interfere with the state’s positive obligations under art.9 of the ECHR—see *Ercep v Turkiye* (App. No.23459/03), judgment of November 22, 2011, specifically at [63]. As the same section affirmed one year after *Bayatyan*, a system of mere compulsory military service that provides no alternative service and any effective procedure for an applicant to establish whether the right to conscientious objection may be exercised cannot be said to have struck a fair balance between the interest of society as a whole and that of conscientious objectors (see *Tarhan v Turkey* (App. No.9078/06), judgment of July 17, 2012 at [62]; also see *Feti Demirtaş v Turkey* (App. No.5260/07), judgment of January 17, 2012 at [108]–[111]).

¹² See Baumgartner, “Verfassungsfragen einer Reform des österreichischen Bundesheeres” [2011] 19 *Journal für Rechtspolitik* 159, 169; “Ist ein verpflichtendes Sozialjahr zulässig?” [2011] *Kommunal* 22; Vašek, “Verpflichtender Sozialdienst und EMRK” [2011] ÖJZ 161.

¹³ Even while, according to this section, civilian service may be aligned with the requirements deriving from art.4 of the ECHR—see *Johansen v Norway* (App. No.10600/83), Commission Decision of October 14, 1985.

¹⁴ Grabenwarter and Pabel, *Europäische Menschenrechtskonvention* (2012), p.185.

¹⁵ Baumgartner, “Verfassungsfragen einer Reform des österreichischen Bundesheeres” [2011] 19 *Journal für Rechtspolitik* 171; Öhlinger, “Ist ein verpflichtendes Sozialjahr zulässig?” [2011] *Kommunal* 20.

¹⁶ For this approach, see the seminal judgment *Tyrer v United Kingdom* (App. No.5856/72), judgment of April 25, 1978.

¹⁷ With particular emphasis on this point, see Karl, “Zur Verfassungsmäßigkeit eines verpflichtenden Sozialdienstes in Österreich” (2006), pp.357–358.

¹⁸ Vašek, “Verpflichtender Sozialdienst und EMRK” [2011] ÖJZ 162.

of “forced or compulsory labour” has been answered definitely in the negative by art.4(3)(b) without allowing to thwart this result by an extensive view on which civic obligations may be considered “normal”.

A related objection has to be added in a functional perspective by briefly considering the purpose that the “living instrument” approach is designed to serve: not only because such a broad view of normality rather resembles a quite abrupt mutation than a mere “evolutive interpretation of the Convention guarantees”¹⁹ associated with them being understood as part of a “living instrument”.²⁰ But more importantly because it is all but self-evident to apply this dynamic approach towards the safeguards of the Convention²¹ to an “exception” to an otherwise absolute prohibition²²: *Singularia non sunt extendenda*²³; a view explicitly emphasised in European Court of Human Rights case-law in the light of the “living instrument approach”, demanding that “limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights”.²⁴ An evolutive view on the “exceptions” stated in art.4(3), however, would contravene this standard by restricting the right rather than its limits²⁵; which is, as Giovanni Bonello once observed in a similar context, “a far cry from interpreting the Convention as a living instrument”.²⁶

III. Read “as a whole”

A. Forced or compulsory labour

If one was to develop the arguments above in greater depth, the conclusion seems plausible that abolishing compulsory military service in favour of compulsory civilian service is incompatible with art.4(2).²⁷

Still, it is possible, if not probable, that the approach chosen in the last section produced premature results. Up to this point the whole argument has been focused solely on the “exceptions” but not on the rule. But is compulsory civilian service to be considered as “forced or compulsory labour” in the first place? If not, it would have hardly been “excepted” by art.4(3)(b) when exacted instead of compulsory military service. But let us proceed more slowly by trying to answer the question: what is actually prohibited by art.4(2)?

B. Involuntary and disproportionate

The terms “forced or compulsory labour”²⁸ are not defined in the Convention. The *travaux préparatoires* give no further indication as to the specific meaning those involved in the drafting process had in mind.²⁹

¹⁹ Lucius Wildhaber, “The European Convention on Human Rights” [2007] 56 *International and Comparative Law Quarterly* 217, 223.

²⁰ George Letsas, “The Truth in Autonomous Concepts: How to Interpret the ECHR” [2004] 15 *EJIL* 279, 298.

²¹ Gerard Cohen-Jonathan, “Le Rôle des Principes Généraux dans l’Interprétation et l’Application de la Convention Européenne des Droits de l’Homme”, *Mélanges a Hommage à Louis Edmond Pettiti* (Bruylant, 1998), pp.165 (p.180 f.).

²² On the function of the “living instrument” approach from a judicial perspective, see Lucius Wildhaber, “The European Court of Human Rights: The Past, The Present, The Future” [2007] 22 *American University International Law Review* 521, 524–526.

²³ See Dig. 40, 5, 23 § 3 (Papianus).

²⁴ *Demir and Baykara v Turkey* (App. No.34503/97), judgment of November 12, 2008 (Grand Chamber) at [146].

²⁵ George Letsas, “The ECHR as a Living Instrument: its meaning and legitimacy”, in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe—The European Court of Human Rights in a National, European and Global Context* (CUP, 2013), pp.106, 132.

²⁶ Bonello, dissenting, *Witold Litwa v Poland* (App. No.26629/95), judgment of April 4, 2000.

²⁷ For this approach, see Vašek, “Verpflichtender Sozialdienst und EMRK” [2011] *ÖJZ* 158.

²⁸ Comparing the different language versions of the text allows the conclusion that the prohibition extends beyond mere physical tasks (indicated by the English term “labour”) as the French term “travail” also covers intellectual tasks—*Van der Musselle v Belgium* (App. No.8919/80), judgment of November 23, 1983 at [33].

²⁹ DH (62) 10, which is, of course, of lesser significance, because “as an international treaty, the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties [115 UNTS 331]” (*Rantsev v Cyprus and Russia* (App. No.25965/04), judgment of January 7, 2010 at [273]) which according to art.32 attributes only nachrangige Bedeutung to preparatory works (see e.g. Alexander Orakhelashvili, “Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights” [2003] 14 *E.J.L.L.* 529, 537–538). In addition to that the Court’s view of the Convention as “living instrument” referred to above which “cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago” has to be taken into account (*Loizidou v Turkey* (App. No.15318/89), judgment of March 23, 1995 at [71]). See Alastair Mowbray, “The Creativity of the European Court of Human Rights” [2005] 5 *H.R.L.R.* 57, 60–62.

Still, art.4(2) does have its antetypes in international law,³⁰ offering some guidance on how to understand the provision's scope,³¹ as "it is evident that the authors of the European Convention—following the example of the authors of art.8 of the draft International Covenant on Civil and Political Rights—based themselves, to a large extent, on an earlier treaty of the International Labour Organisation, namely Convention No.29 concerning Forced or Compulsory Labour".³²

This fact was expressly acknowledged in *Iversen v Norway*, the decision that would shape the Commission's later case-law, when four members of the majority emphasised that

"the concept of compulsory or forced labour cannot be understood solely in terms of the literal meaning of the words, and has in fact come to be regarded, in international law and practice as evidenced in part by the provisions and application of ILO Conventions and Resolutions on Forced Labour, as having certain elements which were to be considered of vital importance when interpreting Article 4(2) ECHR. [T]hese elements of forced or compulsory labour, [so they continued] are first, that the work or service is performed by the worker against his will and, secondly, that the requirement that the work or service be performed is unjust or oppressive or the work or service itself involves avoidable hardship."³³

This test is twofold, combining involuntariness with an additional element causing the disproportionality of the duty exacted³⁴ which was not considered to apply to the case at hand: since the applicant's obligation to take over the position of a regional dentist in a remote part of Norway "was for a short period, provided favourable remuneration, did not involve any diversion from chosen professional work, was only applied in the case of posts not filled after being-duly advertised, and did not involve any discriminatory, arbitrary or punitive application, the requirement to perform that service was not unjust or oppressive". Thus, the four members of the majority agreed that the obligation in question "was manifestly not forced or compulsory labour under Article 4 paragraph (2) of the Convention".³⁵

This approach reflects the structural similarities between arts 3 and 4(2) referred to above by requiring "interpretative balancing"³⁶ to address the question whether the threshold decisive for the concept of "forced or compulsory labour" is reached in the first place when assessing any "work or service [...] performed by the worker against his will".³⁷ If this is to be answered in the negative the case at hand is not to be considered as "forced or compulsory labour" according to art.4(2) in the first place and, as it was by the four members of the majority in *Iversen*, it consequently is dispensable "to express any opinion on the applicability to the case of Article 4, paragraph (3) of the Convention".³⁸

The test thus introduced eventually did become the essential guideline for the Commission's jurisprudence on art.4(2).³⁹ Commentators, however, criticised this approach, arguing that of its two

³⁰ See ILO Convention No.29 (Convention concerning Forced or Compulsory Labour—adopted 11th ILC Session June 28, 1930) and No/105 (Convention concerning the Abolition of Forced Labour).

³¹ For a deeper discussion of the international law framework, see David Ziskind, "Forced Labour in the Law of Nations" [1980] 3 *Comparative Labour Law* 253 and Thilo Maruhn, "Verbot der Sklaverei und Zwangsarbeit" in Dörr and others (eds), EMRK/GG Konkordanzkommentar, 2nd edn (Tübingen: Mohr Siebeck, 2013) Vol.2, pp.614-621.

³² *Van der Musselle* (App. No.8919/80), judgment of November 23, 1983 at [32].

³³ *Iversen v Norway* (App. No.1468/62), Commission Decision of December 17, 1963.

³⁴ For a further discussion see Zwaak, "Freedom from Slavery, Servitude and Force or Compulsory Labour" (2006), p.446.

³⁵ *Iversen* (App. No.1468/62), Commission Decision of December 17, 1963.

³⁶ Aharon Barak, *Proportionality* (CUP, 2012), pp.546–547.

³⁷ See for art.3 of the ECHR among the more recent academic accounts, Natasa Mavronicola and Francesco Messineo, "Relatively Absolute?" [2013] *Modern Law Review*, 589, 593–594. Natasa Mavronicola, "What is an 'Absolute Right'?" [2012] 12 H.R.L.R. 723, 748–757, and Andreas Th. Müller, "Der Grundrechtseingriff und Art 3 EMRK" [2012] 67 ZÖR 475, 495–498.

³⁸ *Iversen* (App. No.1468/62), Commission Decision of December 17, 1963.

³⁹ For the Commission's case-law, see for instance, *X v Federal Republic of Germany* (App. No.4653/70), Commission Decision of April 1, 1974; *X v Federal Republic of Germany* (App. No.8410/78), Commission Decision of December 13, 1979; *X v Federal Republic of Germany* (App. No.8682/79), Commission Decision of July 17, 1981; *Van der Musselle v Belgium* (App. No.8919/80), Commission Report of March 3, 1982; *X v The Netherlands* (App. No.9322/81), Commission Decision of May 3, 1983; *Ackerl v Austria* (App. No.20781/92), Commission Decision of June 29, 1994; *Helga Stadler v Austria* (App. No.27633/95), Commission Decision of April 10, 1997; *Baumgartner v Austria* (App. No. 23085/93), Commission Decision of January 16, 1996; *Pierre Doyen v France* (App. No.39109/97), Commission Decision of September 9, 1998.

elements only the first (involuntariness) could be deduced from the prohibition's antetypes in international law,⁴⁰ particularly with regard to ILO Convention No.29 which defines "forced or compulsory labour" in its art.2(1) as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" without stating any further requirements as to the disproportionate character of the obligation in question.

This is also observed in *Van der Musselle v Belgium*, the European Court of Human Rights' leading case on art.4(2): "the second criterion", so the unanimous Court asserts,

"is not stated in Article 2 § 1 ILO Convention No. 29. Rather it is a criterion that derives from Article 4 and the following Articles of that Convention, which are not concerned with the notion of forced or compulsory labour but lay down the requirements to be met for the exaction of forced or compulsory labour during the transitional period provided for under Article 1 § 2."

However, setting aside the criticism implied in that statement, the Court was not willing to proceed on the path taken by the Commission: "Be that as it may, the Court prefers to adopt a different approach".⁴¹

C. The circumstances of the case in the light of the underlying objectives of art.4

While this different approach adopted by the Court does indeed "take into account the [relevant] ILO Conventions [...] and especially Convention No. 29", it considers its definition not to be the sole decisive factor but only to be a "starting-point for the interpretation of Article 4 of the Convention" as "sight should not be lost of that Convention's special features or of the fact that it is a living instrument to be read in the light of the notions currently prevailing in democratic States"⁴²; a clarification even more important given the fact that the aim of ILO Convention No.29 originally was "to prevent the exploitation of labour in colonies, which were still numerous"⁴³ when it was adopted in 1930.

"What there has to be", the Court ascertains in a first step taken from the starting-point so determined,⁴⁴ "is work exacted ... under the menace of any penalty [which is] also performed against the will of the person concerned, that is work for which he has not offered himself voluntarily";⁴⁵ a definition so far consistent with art.2(1) of ILO Convention No.29 and with the first element of the test developed by the Commission.⁴⁶

The next step taken by the Court, however, departs both from the starting-point found in International Law and from the second element of the test developed by the Commission⁴⁷ that was governed by terms of which the Commission itself had to admit that they were difficult to define (*difficiles à définir*)⁴⁸: "[T]he Court will have regard to all the circumstances of the case in the light of the underlying objectives of Article 4 of the European Convention in order to determine whether the service [in question] falls within the prohibition of compulsory labour".⁴⁹ And to determine these objectives, the Court continues,

"[t]he structure of Article 4 is informative [as p]aragraph 3 is not intended to limit the exercise of the right guaranteed by paragraph 2, but to delimit the very content of this right, for it forms a whole with paragraph 2 and indicates what the term forced or compulsory labour shall not include (ce qui

⁴⁰ See Vašek, "Verpflichtender Sozialdienst und EMRK" [2011] ÖJZ 160.

⁴¹ *Van der Musselle* (App. No.8919/80), judgment of November 23, 1983 at [37].

⁴² *Van der Musselle* (App. No.8919/80), judgment of November 23, 1983 at [32] (quotation marks omitted).

⁴³ *Van der Musselle* (App. No.8919/80), judgment of November 23, 1983 at [32] (quotation marks omitted).

⁴⁴ See the definition in art.2(1) of the ILO Convention 29.

⁴⁵ *Van der Musselle* (App. No.8919/80), judgment of November 23, 1983 at [33]. For a further discussion of this criterion in the Court's more recent case-law, see *Dana Kovalová v the Czech Republic* (App. No.57319/00), judgment of November 30, 2011; *Schuitemaker v The Netherlands* (App. No.15906/08), judgment of May 4, 2010; and *Mihal v Slovakia* (App. No.23360/08), judgment of June 28, 2011 at [45]–[50].

⁴⁶ For the Court's further case-law, see *CN and V v France* (App. No.67724/09), judgment of October 11, 2012.

⁴⁷ See section III.B above.

⁴⁸ *Van der Musselle v Belgium* (App. No.8919/80), Commission Report of March 3, 1982 (only available in French).

⁴⁹ *Van der Musselle* (App. No.8919/80), judgment of November 23, 1983 at [37]. Also see *Mihal* (App. No.23360/08), judgment of June 28, 2011 at [43] and *Bucha v Slovakia* (App. No.43259/07), judgment of September 20, 2011 at [37].

n'est pas considéré comme travail forcé ou obligatoire). This being so, paragraph 3 serves as an aid to the interpretation of paragraph 2.”⁵⁰

This thought has become the foundation of the Court's case-law.⁵¹ It is impressive—precisely because of its simplicity. And it does expose the rather well-established understanding of art.4(3) referred to before as misapprehension: art.4(3) does not state any “exceptions” to the prohibition of forced or compulsory labour of art.4(2).

The question remains, what is an exception? A case, one would say, that is, while basically covered by the rule, still exempted from its application. Thus “excavated”, however, the exception tells us a lot about the scope of the rule while remaining silent when it comes to defining its boundaries. Which is why the exception, as a void within the rule's general claim to validity, indeed *proves* the rule.

The approach chosen by the Court, however, is not to be put on a level with an integral equation to neatly compute such voids excavated from art.4(2) by art.4(3) by the means of legal interpretation. Rather, art.4(3) “serves as an aid to the interpretation of paragraph 2” precisely because it indicates what “the term forced or compulsory labour shall not include” in the first place.⁵²

Article 4(3), by stating categories that do “not fall within the scope of forced or compulsory labour” allows for a negative determination of art.4(2). Or to put it differently, other than what has been said of the interpretive function an “exception” may serve, art.4(3) serves as an illustration not of the rule's coverage but of areas beyond it⁵³: “not intended to limit the exercise of the right guaranteed by paragraph 2, but to delimit the very content of this right”.⁵⁴ Only read as “a whole” the provisions of art.4(2) and (3) allow to further determine the scope of the Convention's “Prohibition of Forced or Compulsory Labour”.

In order “to delimit the concept of [forced or] compulsory labour”⁵⁵ by such a synoptical approach the Court consistently generalises the elements specified in art.4(3) thereby deducing those principles which allow for the analysis of “all the circumstances of the case in the light of the underlying objectives of Article 4” mentioned above; determining that “[t]he four sub-paragraphs of paragraph 3, notwithstanding their diversity, are grounded on the governing ideas of the general interest, social solidarity and what is in the normal or ordinary course of affairs”.⁵⁶

This way a second element to the test applied is introduced, assessing the proportionality of the obligation in question by asking whether the services exacted an “amount to forced or compulsory labour for the purposes of Article 4 paragraph 2 of the Convention”.⁵⁷ Thus, the Court also applies a twofold test to determine whether the activity in question does indeed meet the concept of “forced or compulsory labour”. As explicitly emphasised in later case-law, “not all work exacted from an individual under threat of a ‘penalty’ is necessarily forced or compulsory labour prohibited by this provision. Factors that must be taken into account include the type and amount of work involved”.⁵⁸

⁵⁰ *Van der Musselle* (App. No.8919/80), judgment of November 23, 1983 at [38].

⁵¹ *Karlheinz Schmidt v Germany* (App. No.1350/88), judgment of July 18, 1994; *Steindl v Germany* (App. No.29878/07), judgment of September 14, 2010; *Mihal* (App. No.23360/08), judgment of June 28, 2011 at [43]; *Stummer v Austria* (App. No.37542/02), judgment of July 7, 2011 (Grand Chamber) at [120]; *Bucha* (App. No.43259/07), judgment of September 20, 2011 at [37].

⁵² Emphasis mine. For the Court's further case-law, see *Stummer* (App. No.37542/02), judgment of July 7, 2011 (Grand Chamber) at [120].

⁵³ Also see Aaron Baker, “The Enjoyment of Rights and Freedoms: A New Conception of the “Ambit” under Article 14 ECHR” [2006] 69 M.L.R. 714, 720.

⁵⁴ Also see Manfred Nowak, “What's in a name?”, in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP, 2012), pp.307, 318.

⁵⁵ *Zarb Adami v Malta* (App. No.17209/02), judgment of June 20, 2006 at [45].

⁵⁶ *Van der Musselle* (App. No.8919/80), judgment of November 23, 1983 at [38]. See for the Court's further case-law *Schmidt* (App. No.1350/88), judgment of July 18, 1994 at [22]; *Steindl* (App. No.29878/07), judgment of September 14, 2010; *Mihal* (App. No.23360/08), judgment of June 28, 2011 at [43]; *Stummer* (App. No.37542/02), judgment of July 7, 2011 (Grand Chamber) at [120]; *Bucha* (App. No.43259/07), judgment of September 20, 2011 at [37]; *Graziani-Weiss v Austria* (App. No.31950/06), judgment of October 18, 2011 at [37].

⁵⁷ *Mihal* (App. No.23360/08), judgment of June 28, 2011 at [50]. Also see *Steindl* (App. No.29878/07), judgment of September 14, 2010.

⁵⁸ *CN and V v France* (App. No.67724/09), judgment of October 11, 2012 at [74].

IV. Conclusion

A. No “exceptions”

This analysis proves many of the initial assumptions about the structure of the prohibition of “forced or compulsory labour” according to art.4(2) to be incorrect: art.4(3) does not state any “exceptions” to art.4(2) but rather offers guidance on how to understand it by merely indicating what “the term forced or compulsory labour shall not include”.⁵⁹ By allowing to contrast art.4(2) with a set of activities outside its scope, art.4(3) negatively “provide[s] a further elucidation of the notion forced or compulsory labour”.⁶⁰

In reaching this conclusion the Court proceeds more stringently than the Commission did and pays closer attention to the characteristics of the “Prohibition of Forced or Compulsory Labour” as embedded in the Convention.⁶¹ The result, however, is similar, eventually putting a strong emphasis on the “notion of disproportionate burden”⁶² to assess whether the service in question was indeed covered by the scope of (and thus violating) art.4(2), the Court applies “interpretative balancing” in order to determine the scope of application of art.4(2)⁶³; thereby typically rendering it redundant to resort specifically to any of the pre-defined categories of art.4(3).⁶⁴ Perceived as the “whole [it forms] with paragraph 2”, art.4(3) lacks the genuine importance attributed to it in the scholarly debate retraced before.⁶⁵

B. Compulsory civilian service—what about it then?

But what does that tell us about the problem initially discussed? Is compulsory civilian service to be reconciled with art.4(2) even if a state decided to abolish compulsory military service? The analysis of the Court’s case-law raises the counter question: Why should it not be? To be clear: the bulk of the Court’s case-law deals with “duties incumbent on members of a particular profession”,⁶⁶ notably advocates or physicians.

Still, the Court’s interpretive balancing approach to determine the scope of the prohibition of “forced or compulsory labour” does allow us to infer two results from the holistic perception of the structure of art.4(2) and (3). Neither is the fear expedient that abolishing compulsory military service would automatically result in an obligation to abolish civilian service as well,⁶⁷ nor is a broad and “evolutive” interpretation of “normal civic obligations” being “excepted” from the prohibition of art.4(2) necessary in order to sustain it notwithstanding such a suppositional automatism.⁶⁸

By itself, we can conclude, the question of whether compulsory civilian service—just as any other service exacted by the state—is compatible with art.4(2), is the wrong one to ask. Rather we must ask whether an obligation does “amount to compulsory or forced labour for the purposes of Article 4 § 2 of

⁵⁹ See section III.C above.

⁶⁰ *Bayatyan* (App. No.23459/03), Decision of July 7, 2011 at [100]—referring to art.4(3)(b) in particular.

⁶¹ See section III above.

⁶² *CN and V v France* (App. No.67724/09), judgment of October 11, 2012 at [74].

⁶³ The Court’s case law proves that this test is not easily satisfied; signalling that the state does enjoy some margin in determining necessity and scope of the service exacted from its citizens. Already in the *Van der Mussele* (App. No.8919/80), judgment of November 23, 1983) case itself (see [39]) the involuntary occupation underlying the application failed to exceed the threshold defined: Obligations faced by (pupil) attorneys to act *pro deo* if so requested by indigent persons “did not fall outside the ambit of the normal activities of an advocat; they differed from the usual work of members of the Bar neither by their nature nor by any restriction of freedom in the conduct of the case[. Additionally a] compensatory factor was to be found in the advantages attaching to the profession[. ...] Moreover, the obligation to which Mr. Van der Mussele objected constituted a means of securing for [defendants] the benefit of Article 6 § 3 (c) of the Convention [to which extent it was founded on a conception of social solidarity and not to be regarded as unreasonable; making it at the same time] an obligation of a similar order to the ‘normal civic obligations’ referred to in Article 4 § 3 (d). [And f]inally, the burden imposed on the applicant was not disproportionate”.

⁶⁴ Expressly so, holding *Van der Mussele* (App. No.8919/80), judgment of November 23, 1983 at [41]; *Kovalová* (App. No.57319/00), judgment of November 30, 2011; *Graziani-Weiss* (App. No.31950/06), judgment of October 18, 2011 at [43]

⁶⁵ See sections II.C. and II.D above.

⁶⁶ *Graziani-Weiss* (App. No.31950/06), judgment of October 18, 2011 at [38].

⁶⁷ See section II.B above.

⁶⁸ See section II.C above.

the Convention”.⁶⁹ This is to be answered with regard to the specific work or service in question in the mode of interpretative balancing by “hav[ing] regard to all the circumstances of the case in the light of the underlying objectives of Article 4 of the European Convention”.⁷⁰

⁶⁹ (App. No.29878/07), judgment of September 14, 2010.

⁷⁰ *Van der Mussele* (App. No.8919/80), judgment of November 23, 1983 at [37]. Also see *Mihal* (App. No.23360/08), judgment of June 28, 2011 at [43] and *Bucha* (App. No.43259/07), judgment of September 20, 2011 at [37].