

**IN THE GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application No. 23459/03**

**VAHAN BAYATYAN**

**Applicant**

**-V-**

**ARMENIA**

**Respondent Government**

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**WRITTEN COMMENTS SUBMITTED BY AMNESTY INTERNATIONAL,  
CONSCIENCE AND PEACE TAX INTERNATIONAL, FRIENDS WORLD  
COMMITTEE FOR CONSULTATION (QUAKERS), INTERNATIONAL  
COMMISSION OF JURISTS, AND WAR RESISTERS' INTERNATIONAL, PURSUANT  
TO ARTICLE 36 § 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND  
RULE 44 § 3 OF THE RULES OF THE COURT**

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## TABLE OF CONTENTS

### **I. Introduction**

### **II. Issues addressed in this submission**

#### **II.i Overview**

#### **II.ii Conscientious objection to military service and the right to freedom of thought, conscience and religion**

#### **II.iii Limitations to the freedom to manifest one's religion or belief**

#### **II.iv Exceptions to the prohibition on forced labour**

### **III. Conclusion**

#### **Annex 1: Description of the Intervening Organisations**

#### **Annex 2: Extract from Views of the Human Rights Committee under Article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights: *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea* (UN Doc. CCPR/C/88/D/1321-1322/2004, adopted 3 November 2006)**

#### **Annex 3: Conscription and related provisions for conscientious objection in Council of Europe member states**

#### **Annex 4: Articles on the right to freedom of thought, conscience and religion and on forced labour of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of the International Covenant on Civil and Political Rights**

#### **Annex 5: Concluding Observations of the UN Human Rights Committee relating to conscientious objection to military service**

## **I. Introduction**

1. These comments are submitted by Amnesty International, Conscience and Peace Tax International, Friends World Committee for Consultation (Quakers), International Commission of Jurists, and War Resisters' International ('the Interveners'), pursuant to Article 36 § 2 of the European Convention on Human Rights following the leave granted by the President of the Court in accordance with Rule 44 § 3 of the Rules of the Court by letter dated 24 June 2010. (See Annex 1 for a Description of the Intervening Organisations.)

2. The present submission draws substantially on the interpretation by the UN Human Rights Committee of the International Covenant on Civil and Political Rights ('ICCPR') and by other international and regional bodies of the right to freedom of thought, conscience and religion in relation to conscientious objection to military service.

## **II. Issues addressed in this submission**

3. This submission addresses: the protection of conscientious objection to military service in international human rights standards; limitations on manifestation of religion or belief; and the reference to military service and conscientious objection in Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, "the Convention").

### **II.i Overview**

4. The right to freedom of thought, conscience and religion comprises two elements: the right to hold convictions or beliefs, and the right to manifest one's religion or belief in worship, teaching, practice and observance. The Interveners submit, consistent with the jurisprudence of other international human rights bodies and mechanisms, that conscientious objection to military service is a belief of sufficient seriousness and cogency to attract the protection of Article 9.<sup>1</sup> Compulsion to engage in military service contrary to such a belief is in itself a violation of the individual's freedom of conscience. In addition, compulsory military service, without provision for those who are conscientious objectors for religious or other reasons, amounts to an unjustified interference with the right to manifest a religion or belief. The UN Human Rights Committee has identified both elements in relation to conscientious objection to military service. In its most recent Views on an individual petition the Committee found that the authors' "conviction and sentence amounted to an infringement of their freedom of conscience and a restriction on their ability to manifest their religion or belief".<sup>2</sup>

5. Conscientious objection to military service has been recognised by the Human Rights Committee as deriving from the right to freedom of thought, conscience and religion under Article 18 of the International Covenant on Civil and Political Rights ('ICCPR'). Repeated resolutions of the former UN Commission on Human Rights recognised that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives.<sup>3</sup> Special procedures mandated by the UN Human Rights Council have similarly addressed the question. The UN Special Rapporteur on freedom of religion or belief has made specific recommendations in regard to conscientious objection<sup>4</sup> and taken up individual

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<sup>1</sup> See, for example, *Kokkinakis v Greece* (Application No. 14307/88), judgment of 25 May 1993, § 31; *Valsamis v Greece* (Application No. 21787/93), judgment of 27 November 1996, § 25.

<sup>2</sup> *Eu-min Jung, Tae-Yang Oh, Chang-Geun Yeom, Dong-hyuk Nah, Ho-Gun Yu, Chi-yun Lim, Choi Jin, Tae-hoon Lim, Sung-hwan Lim, Jae-sung Lim, and Dong-ju Goh v Republic of Korea* (Communications Nos. 1593 to 1603/2007), Views adopted 23 March 2010, UN Doc. CCPR/C/98/D/1593-1603/2007.

<sup>3</sup> UN Commission on Human Rights Resolutions 1989/59, 1993/83, 1995/83, 1998/77, 2002/45, and 2004/35. The UN General Assembly abolished the Commission on 16 June 2006 (A/RES/60/251), replacing it with the Human Rights Council.

cases.<sup>5</sup> In 2008 the UN Working Group on Arbitrary Detention ruled that imprisonment of conscientious objectors to military service was a form of arbitrary detention.<sup>6</sup> The Committee of Ministers of the Council of Europe,<sup>7</sup> the Parliamentary Assembly of the Council of Europe (PACE),<sup>8</sup> and the European Parliament<sup>9</sup> have all recognised conscientious objection to military service. It is also explicitly recognised in the European Union (EU) Charter of Fundamental Rights and in the Ibero-American Convention on Young People's Rights. Moreover, of the 17 member states of the Council of Europe which still have conscription, Turkey is the only one which has no provision for conscientious objection to military service.<sup>10</sup> Given these developments both internationally and in Council of Europe member states, and in light of the principle that the Convention is a 'living instrument', the Interveners submit that the Court should affirm that Article 9 protects the right of conscientious objectors not to engage in compulsory military service.

## **II.ii Conscientious objection to military service and the right to freedom of thought, conscience and religion**

6. All member states of the Council of Europe and hence all High Contracting Parties to the Convention are also parties to the ICCPR. The provisions of Article 9 of the Convention and Article 18 of the ICCPR are almost identical.<sup>11</sup> It is, therefore, relevant to consider the interpretation of Article 18 of the ICCPR by the Human Rights Committee, the expert body which monitors States' implementation of their obligations under the ICCPR.

7. The Human Rights Committee has explicitly stated its view that conscientious objection to military service is protected as part of the right to freedom of thought, conscience and religion, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. It has affirmed this in one of its General Comments (interpreting the ICCPR provisions), in numerous Concluding Observations (in relation to States parties' reports under the ICCPR), and in 'Views' (decisions on individual petitions under the First Optional Protocol to the ICCPR).<sup>12</sup>

8. Initially, in 1987, the Human Rights Committee followed the same approach as the European Commission of Human Rights in declaring inadmissible its first case concerning a conscientious objector to military service,<sup>13</sup> referring to the wording in Article 8 § 3 c (ii) of the ICCPR (the equivalent of Article 4 § 3 b of the Convention). However, through the State reporting process, and the consideration of other individual cases relating to conscientious objection and alternative service (but not the central question of

<sup>4</sup> For example, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, Mission to Turkmenistan, UN Doc. A/HRC/10/8/Add.4, 12 January 2009, § 68; <http://www2.ohchr.org/english/bodies/hrcouncil/10session/reports.htm>.

<sup>5</sup> For example, Summary of cases transmitted to Governments and replies received, UN Doc. E/CN.4/2006/5/Add.1, 27 March 2006, cases in Armenia at § 3-11; <http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>.

<sup>6</sup> Opinion 8/2008 (Colombia) and Opinion 16/2008 (Turkey), in Opinions adopted by the Working Group on Arbitrary Detention, UN Doc. A/HRC/10/21/Add.1, 4 February 2009, pp. 110-114 and pp. 139-147; <http://www2.ohchr.org/english/bodies/hrcouncil/10session/reports.htm>.

<sup>7</sup> Recommendations R(87)8 regarding conscientious objection to compulsory military service (9 April 1987) and CM/Rec (2010)4 on human rights of members of the armed forces (24 February 2010).

<sup>8</sup> Resolution 337 (1967) and Recommendations 478 (1967), 816 (1977) and 1518 (2001).

<sup>9</sup> Resolution of 7 February 1983 (Macciocchi resolution) on conscientious objection (OJ C 068, 14/03/1983 P. 0014); Resolution of 13 October 1989 (Schmidbauer resolution) on conscientious objection and alternative civilian service (OJ C 291, 20/11/1989 P. 0122); and Resolution of 19 January 1994 (Bandres, Molet and Bindi resolution) on conscientious objection in the member states of the Community (OJ C 044, 14/02/1994 P. 0103); see also European Bureau for Conscientious Objection, <http://www.ebco-beoc.eu/page/1uside/document/doc2eu.htm>.

<sup>10</sup> See Annex 3 which sets out in tabular form the situation with regard to conscription and related provisions for conscientious objection in Council of Europe member states.

<sup>11</sup> See Annex 4 for the respective provisions of the Convention and the ICCPR.

<sup>12</sup> The Human Rights Committee adopts its General Comments and Concluding Observations unanimously.

<sup>13</sup> *L.T.K. v Finland* (Communication No. 185/1984), Admissibility decision of 9 July 1985, UN Doc. CCPR/C/OP/2.

whether conscientious objection itself was protected under the ICCPR), the Committee's position evolved.

9. In 1993, the Committee adopted General Comment No. 22<sup>14</sup> on the right to freedom of thought, conscience and religion (Article 18, ICCPR). In it the Committee noted that "a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service". The Committee added: "The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."

10. On the basis of General Comment No. 22, and using the procedure which it started in 1991 of unanimously adopting Concluding Observations<sup>15</sup> when considering States' reports on their implementation of the ICCPR, the Committee has addressed the issue of conscientious objection on numerous occasions,<sup>16</sup> all but one explicitly or implicitly under Article 18.<sup>17</sup> The Concluding Observations have included specific recommendations to States to introduce legislation to provide for conscientious objection in States which fail to provide for recognition of such status, as well as to address discriminatory and unsatisfactory provisions where some recognition existed. For example, in the case of Chile: "The State party should expedite the adoption of legislation recognizing the right of conscientious objection to military service, ensuring that conscientious objectors are not subject to discrimination or punishment and recognizing that conscientious objection can occur at any time, even when a person's military service has already begun."<sup>18</sup>

11. In 1998, some years before the present application under the Convention was submitted, Armenia's most recent periodic report was considered by the Human Rights Committee. The Committee regretted "the lack of legal provision for alternatives to military service in case of conscientious objection ... [and deplored] the conscription of conscientious objectors by force and their punishment by military courts, and the instances of reprisals against family members."<sup>19</sup>

12. It was not until 2004 that the Committee received an individual petition from conscientious objectors in a State with conscription which had no legislative provision for conscientious objection and who were, therefore, sentenced to prison for their religiously based objection. In that case, *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*,<sup>20</sup> the Committee had its first opportunity to address the precise question of the protection of conscientious objection to military service under the ICCPR in an individual case. The Committee reviewed its earlier case law and the relevance of the provision concerning forced labour (Article 8, ICCPR). It concluded that this article "neither recognizes nor excludes a right of conscientious objection" and that "the present claim is to be assessed solely in the light of Article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose".<sup>21</sup> Ruling on this case in November 2006, the Committee concluded that conscientious objection to military service is protected under Article 18, and, after considering the

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<sup>14</sup> General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30 July 1993, UN Doc. CCPR/C/21/Rev.1/Add.4, § 11. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument).

<sup>15</sup> Originally the Committee members expressed individual comments on States' reports; it was only in 1991 that the Committee as a whole started adopting Concluding Observations which are agreed unanimously.

<sup>16</sup> The Interveners have found 44 references: see Annex 4.

<sup>17</sup> Sometimes in conjunction with Article 26 (non-discrimination) and once under Article 24 (rights of the child) in the case of possible conscription of persons under 18 years of age.

<sup>18</sup> Chile: 17 April 2007, UN Doc. CCPR/C/CHL/CO/5, § 13.

<sup>19</sup> Armenia: 19 November 1998, UN Doc. CCPR/C.79/Add.100, § 18.

<sup>20</sup> *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea* (Communications Nos. 1321/2004 and 1322/2004), Views adopted 3 November 2006, UN Doc. CCPR/C/88/D/1321-1322/2004. See Annex 2 of this Submission.

<sup>21</sup> *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, § 8.2.

permissible limitations on the manifestation of religion or belief, it found a violation of Article 18 § 1 of the ICCPR.

#### Regional standards, interpretation and practice

13. There are no judgments of other regional human rights courts about conscientious objection to military service and only one decision of the Inter-American Commission on Human Rights, in 2005.<sup>22</sup> That decision preceded the Human Rights Committee's decision in *Yoon and Choi v Republic of Korea*. It followed the earlier case law of the Human Rights Committee and the European Commission of Human Rights in interpreting the equivalent provisions of the American Convention on Human Rights.<sup>23</sup> However, later in the same year, in approving a friendly settlement, the Inter-American Commission recognised the evolving nature of the right to conscientious objection and made an explicit reference to General Comment No. 22 of the Human Rights Committee.<sup>24</sup> In that case, the Bolivian State, represented by the Ministry of Defence, agreed, despite the lack of legislation, to provide a conscientious objector who had refused to perform military service with a document of completed military service without levying on him the military tax normally imposed on those declared exempt, and also to issue a Ministerial Resolution stipulating that in the event of an armed conflict he would not be called up. The State also undertook "in accordance with international human rights law, to include the right to conscientious objection to military service in the preliminary draft of the amended regulations for military law currently under consideration by the Ministry of Defense and the armed forces", and "to encourage congressional approval of military legislation that would include the right to conscientious objection to military service". In approving the terms of the friendly settlement as being compatible with the American Convention, the Inter-American Commission reiterated that the purpose of the friendly settlement procedure was to reach a settlement on the basis of respect for the human rights recognised in the Convention, and that the State's acceptance of it was an expression of its good faith to comply with its obligations under the Convention.<sup>25</sup>

14. There are currently two regional standards relevant to Council of Europe member states, both agreed in the last decade, which explicitly recognise the right of conscientious objection to military service. The EU Charter of Fundamental Rights (2000), Article 10:

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Situating this recognition of conscientious objection within Article 10 of the Charter confirms its association with the right to freedom of thought, conscience and religion. The *Explanations Relating to the Charter of Fundamental Rights* state: "The right guaranteed in paragraph 2 corresponds to national constitutional traditions and to the development of national legislation on this issue".<sup>26</sup> Annex 3 of this Submission sets out the position of all the member states of the Council of Europe (to which all EU member states belong) on conscientious objection to military service. This information demonstrates the universal provision for conscientious objection to military service by EU States who have or have had conscription. Secondly, the Ibero-American Convention on Young People's Rights (2008), Article 12:

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<sup>22</sup> *Cristián Daniel Sahli Vera et al. v Chile*, Case 12.219, Decision of 10 March 2005, Report No. 43/05.

<sup>23</sup> American Convention on Human Rights Articles 12 and 6 § 3 b are almost identical to Articles 9 and 4 § 3 b of the European Convention.

<sup>24</sup> *Alfredo Diaz Bustos v Bolivia*, Report No. 97/05, 27 October 2005.

<sup>25</sup> As provided under the American Convention on Human Rights, the main function of the Inter-American Commission on Human Rights is to promote respect for and defence of human rights (Article 41). Its powers include taking action on petitions and other communications submitted to it alleging violations of rights protected by the American Convention (Articles 41(f) and 44). In dealing with such petitions its procedures include placing itself at the disposal of the parties with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognised in the Convention (Article 48.1 (f)).

<sup>26</sup> *Explanations Relating to the Charter of Fundamental Rights* (2007/C 303/02), OJ C 303/17, 14.12.2007.

“Young people have the right to form a conscientious objection against compulsory military service.” Spain is a party to, and Portugal has signed, this Convention.<sup>27</sup>

#### Committee of Ministers of the Council of Europe

15. The Committee of Ministers, the Council of Europe's decision-making body, has adopted two recommendations relevant to conscientious objection. Recommendation No. R(87) of 9 April 1987 calls on all member states to recognise the right to conscientious objection to military service and to subscribe to the basic principle that “anyone liable to conscription to military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service”, and urges the governments of member states, insofar as they have not already done so, to bring their national law and practice into line with this basic principle.

16. Most recently, on 24 February 2010 the Committee of Ministers adopted Recommendation CM/Rec (2010)4 on human rights of members of the armed forces. It is particularly significant that in this Recommendation, in contrast to Recommendation No. R(87)8, the Committee of Ministers of the Council of Europe situate the provisions on the right to conscientious objection to military service squarely within the right to freedom of thought, conscience and religion. Section H on the right to freedom of thought, conscience and religion, urges States to implement the following recommendation: “For the purposes of compulsory military service, conscripts should have the right to be granted conscientious objector status and an alternative service of a civilian nature should be proposed to them.” It then goes on to provide for the release of professional members of the armed forces on grounds of conscience, and addresses issues of non-discrimination, non-criminalisation, and the duty to inform members of the armed forces of their rights and the procedures they should follow in this respect.

#### Parliamentary Assembly of the Council of Europe (PACE):

17. In Recommendation 1518 of the Council of Europe Parliamentary Assembly, adopted in May 2001, the Assembly noted that “the exercise of the right to conscientious objection to military service has been an ongoing concern of the Council of Europe for over thirty years”. The Assembly also stated plainly that “the right of conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the Universal Declaration of Human Rights and the European Convention on Human Rights”. The Parliamentary Assembly recommended that the Committee of Ministers incorporate the right of conscientious objection to military service into the European Convention on Human Rights by means of an additional protocol amending Articles 4 § 3 b and 9.<sup>28</sup> The Committee of Ministers decided not to act upon this recommendation, stating that its preferred course of action was to “make a sustained effort to implement the 1987 Recommendation”.<sup>29</sup>

18. Finally, promulgation of legislation in accordance with international standards on conscientious objection to military service has been included in the accession criteria for new members of the Council of Europe where compulsory military service has applied.<sup>30</sup> The Interveners draw attention in particular to PACE Opinion 221 (2000) on Armenia's application for membership of the Council of Europe. The

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<sup>27</sup> Bolivia, Costa Rica, Dominican Republic, Ecuador, Honduras, **Spain** and Uruguay are parties and Cuba, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, **Portugal** and Venezuela are signatories. It is also open to **Andorra**, Argentina, Brazil, Colombia, Chile and El Salvador.

<sup>28</sup> PACE Recommendation 1518 (2001), Exercise of the right to conscientious objection to military service in Council of Europe member states, § 6. As early as Recommendation 478 (1967) PACE asked the Committee of Ministers to draft a Convention or Recommendation on conscientious objection to military service.

<sup>29</sup> Committee of Ministers' reply to PACE Recommendation 1518 (2001) on the right to conscientious objection to military service in Council of Europe member states, adopted at the 785<sup>th</sup> meeting of the Ministers' Deputies (26-27 February 2002).

<sup>30</sup> PACE: Opinion No. 193 (1996) on Russia's request for membership of the Council of Europe; Opinion No. 221 (2000), Armenia's application for membership of the Council of Europe; Opinion No. 222 (2000), Azerbaijan's application for membership of the Council of Europe, Opinion No. 234 (2002) Bosnia and Herzegovina's application for membership of the Council of Europe; Opinion No. 239 (2002), The Federal Republic of Yugoslavia's application for membership of the Council of Europe.

Opinion recorded that Armenia had promised to adopt within three years a law on alternative service for conscientious objectors.<sup>31</sup>

### **II.iii Limitations to the freedom to manifest one's religion or belief**

19. Under Article 9 § 2 of the Convention, “Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”<sup>32</sup>

20. It is notable that, unlike the similar provisions in Articles 8, 10 and 11 of the Convention, national security is not included as one of the grounds for possible limitation under Article 9. The same is true of the almost identical wording of Article 18 § 3 of the ICCPR, as the Human Rights Committee specifically noted in its General Comment No. 22, § 8.

21. In the case of *Yoon and Choi v Republic of Korea* the Human Rights Committee examined the Government arguments to see whether its refusal to recognise conscientious objection and the penalties imposed on the individuals who had refused to carry out military service fulfilled the requirements to constitute permissible restrictions on the manifestation of religion or belief within the terms of Article 18 § 3 of the ICCPR. In considering these arguments, the Committee first set out the general interpretation: “Such restriction must be justified by the permissible limits described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others”. In addition, they emphasized that “such restriction must not impair the very essence of the right in question”.<sup>33</sup>

22. The Human Rights Committee then went on to consider both the specific arguments put forward by the Government, and the “relevant State practice, that an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service”. The Committee concluded “that the State party has failed to show what special disadvantage would be involved for it if the rights of the authors under article 18 would be fully respected” and thus “that the State party has not demonstrated that in the present case the restriction in question is necessary, within the meaning of article 18, paragraph 3, of the Covenant”.<sup>34</sup>

23. In March 2010, the Human Rights Committee unanimously reiterated its position in a similar case of objectors who were a Buddhist, a Catholic and a number with conscientious objections not based in a specific religion, finding “an infringement of their freedom of conscience and a restriction on their ability to manifest their religion or belief. The Committee finds that as the State party has not demonstrated that in the present cases the restrictions in question were necessary, within the meaning of article 18, paragraph 3, it has violated article 18, paragraph 1, of the Covenant.”<sup>35</sup>

24. In relation to the interpretation of the Convention, it is notable that of the 17 member states of the Council of Europe which still have conscription, Turkey is the only one which has no provision whatever for conscientious objection to military service; Azerbaijan has a Constitutional provision but it has yet to be implemented in legislation. Armenia has had a provision since 2003 (subsequent to the events in the case under consideration). Conscription formerly applied in 23 further Council of Europe member states; at the time it was abolished or suspended each of the 23 provided for conscientious objection.

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<sup>31</sup> Cited in the Chamber judgment *Bayatyan v Armenia*, § 43.

<sup>32</sup> See further *Kokkinakis v Greece*, n.1 above; *Manoussakis and others v Greece* (Application No. 18748/91), judgment of 29 August 1996.

<sup>33</sup> *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, n. 20 above, § 8.3.

<sup>34</sup> *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*.

<sup>35</sup> *Eu-min Jung, Tae-Yang Oh, Chang-Geun Yeom, Dong-hyuk Nah, Ho-Gun Yu, Chi-yun Lim, Choi Jin, Tae-hoon Lim, Sung-hwan Lim, Jae-sung Lim, and Dong-ju Goh v Republic of Korea*, n. 2 above, § 7.4.



25. In the light of the near universal State practice within the Council of Europe region recognising conscientious objection to military service,<sup>36</sup> as well as the Human Rights Committee's insistence that "such restriction must not impair the very essence of the right in question", the Interveners contend that a State's failure to make any provision for conscientious objection to military service is an interference which cannot be justified in terms of Article 9 § 2 of the Convention.

#### **II.iv Exceptions to the prohibition on forced labour**

26. One of the issues which has arisen in relation to the protection of conscientious objection to military service under both the Convention and the ICCPR is the reference under their respective provisions relating to the prohibition on forced labour.<sup>37</sup>

27. The Human Rights Committee explicitly addressed the question of Article 8 in relation to conscientious objection to military service in the individual cases of *Yeo-Bum Yoon and Myung-Jin Choi*. The Committee concluded:

The Committee ... notes that article 8, paragraph 3, of the Covenant excludes from the scope of "forced or compulsory labour", which is proscribed, "any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors". It follows that article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose.<sup>38</sup>

28. The Interveners submit that an evolution in thinking comparable to that of the Human Rights Committee between 1985 and 2006 (see paras. 8-12 above) had occurred with respect to the understanding of conscientious objection to military service under the Convention, beginning with the decisions of the former European Commission on Human Rights. The Chamber judgment in *Bayatyan* is silent on this evolution as was pointed out by Judge Power in her dissenting opinion. In their referral request to the Grand Chamber, the applicants traced the shift away from the traditional interpretation of the relationship between Article 4 § 3 b and Article 9. The former Commission's inadmissibility decision in *Grandrath v Germany*, the leading decision of that body, held that the engagement of Article 4 § 3 b referring to conscientious objection precluded the recognition of an individual conscientious objector as a victim under Article 9 of the Convention.<sup>39</sup> In *Tsirlis and Kouloumpas v Greece*, Commissioner Liddy citing the concurring opinion of Mr Eusthadiades in *Grandrath*, challenged the position that the engagement of provisions of Article 4 of the Convention meant that Article 9 was inapplicable.<sup>40</sup> In *Thlimmenos v Greece* six Commissioners, in a joint dissenting opinion referring to the evolution of the Convention case law since *Grandrath*, doubted if that decision continued to be appropriate.<sup>41</sup> The six Commissioners decided this case on conscientious objection to military service by the direct application of Article 9 and considered that there had been a violation of that Article on the facts of the case.<sup>42</sup>

29. The purpose of Article 4 § 3 is clear. It is to exclude certain activities from the prohibition of forced labour under Article 4: "For the purpose of this article the term 'forced or compulsory labour' shall not include ...", and specifically to ensure that alternative service for conscientious objectors is not *per se* prohibited as forced labour.<sup>43</sup>

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<sup>36</sup> See Annex 3.

<sup>37</sup> See Annex 4.

<sup>38</sup> *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, n. 20 above, § 8.2.

<sup>39</sup> *Grandrath v Germany*, Application No. 2299/64 (1966).

<sup>40</sup> *Tsirlis and Kouloumpas v Greece*, Application No. 19233/91, Report of Commission adopted 7 March 1996.

<sup>41</sup> *Thlimmenos v Greece*, Application No. 34369/97, Report of Commission adopted 4 December 1998.

<sup>42</sup> Evans, C., *Freedom of Religion under the European Convention on Human Rights*, Oxford University Press, 2001, pp. 176-179.

<sup>43</sup> The UK, who at the time of the Convention's drafting had both conscription and alternative service, proposed excluding from the definition of forced labour: "any service of a military character or service in the case of

30. The Interveners submit that to interpret the wording in Article 4 § 3 b as determinative of Article 9 is inappropriate. In particular, in relation to Article 9, Article 4 § 3 b should not permit impairment of the right to freedom of thought, conscience and religion, or any interference with the right to manifest one's religion or belief.

### III Conclusion

31. It is the Interveners' submission that the weight of international standards and guidance from both Council of Europe institutions and international bodies outside the Council of Europe system, as well as the jurisprudence of the UN Human Rights Committee, supports the protection of conscientious objection to military service as a belief under the right to freedom of thought, conscience and religion (Article 9 of the Convention). It makes clear that where military service is compulsory States are required to make provision for conscientious objectors in order to comply with Article 9. The now almost universal recognition of conscientious objection in Council of Europe member states further supports a progressive development of the Convention jurisprudence in this regard.<sup>44</sup>

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conscientious objectors exacted in virtue of compulsory military service laws" (*Amendments to Articles 1, 2, 4, 5, 6, 8 and 9 of the Committee's Preliminary Draft Proposed by the Expert of the United Kingdom*, Comm. Of Experts, Doc. CM/WP 1 (50) 2; A 915 (Mar. 6, 1950)). By contrast, the earlier International Labour Organisation Forced Labour Convention, 1930 (C29), Article 2 includes only an exception for military service.

<sup>44</sup> *Tyrer v UK* (Application No. 5856/72, judgment of 25 April 1978; *Marckx v Belgium* (Application No. 6833/74) judgment of 13 June 1979; *Selmouni v France*, (Application No. 25803/94), judgment of 28 July 1999; *Stafford v UK* (Application No. 46295/99), judgment of 28 May 2002; *Sigurjonsson v Iceland* (Application No. 16130/90), judgment of 30 June 1993.