From *Grandrath* to *Bayatyan:* The development of European jurisprudence on conscientious objection to military service

Abstract

The paper discusses the historical evolution of the legal right to conscientious objection to military service within the key institutions of the Council of Europe. It does so by examining the *travaux preparatoire* and legislative history of the European Convention on Human Rights, focusing on the intention of its drafters to incorporate into the scope of the treaty, a right to be exempted from military service on grounds of conscience. It further explores the activities of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe in order to identify whether these bodies intended to expand the scope of the Convention to cover objections of conscience to the undertaking of military duties as a constituent element of Article 9 ECHR, protecting the right to freedom of thought, conscience and religion. Finally, the paper explores the European Court of Human Rights' jurisprudence on the question of conscientious objection to military service and assesses the importance and impact of *Bayatyan v Armenia*, a landmark decision by the Grand Chamber of the European Court of Human Rights which finally placed objections of conscience to military service firmly within the scope of Article 9 of the European Convention on Human Rights.

1. Introduction

For a number of years, the monitoring bodies of the European Convention on Human Rights [hereinafter 'ECHR'] had been hostile to the idea that the right to conscientious objection to military service should attract the protection of the Convention. In this regard, the European Court of Human Rights [hereinafter 'the European Court'] and the former European Commission on Human Rights [hereinafter 'the European Commission'] had been reluctant in recognising a 'right of conscientious objection to military service' on the basis of an arguably erroneous textual interpretation of two provisions of the Convention, namely Article 4(3)(b) and Article 9 ECHR. This paper provides an in-depth textual analysis of these provisions, and criticises the admittedly quite sparse information of the debate which has accompanied their adoption. It then moves on to examine the practice of key organs of the Council of Europe and their means of approaching the question of conscientious objection since 1967, when the Parliamentary Assembly of the Council of Europe acknowledged, for the first time, that conscientious objection to military service shall be regarded as a right deriving from Article 9 ECHR. The final part of this paper focuses on the evolution of the jurisprudence of the Convention's monitoring bodies from the initially restrictive interpretation of the Convention in *Grandrath v Germany* [a case concerning a total objection to both military and civilian service which gave an opportunity to the European Court to discuss the interpretative limitations posed by Article 4(3)(b) ECHR], to the landmark ruling of the Grand Chamber in *Bayatyan v Armenia*, where it was finally acknowledged that conscientious objection to military service is a 'manifestation of belief' attracting the protection of Article 9 ECHR. The paper concludes that the shift in the Court's

approach and the recognition of conscientious objection to military service as a treaty-protected right signals the need for stronger legal protection of this right by States, and strict adherence to the standard-setting texts of the Council of Europe's key institutions and human rights bodies.

2. The textual restraints of the European Convention on Human Rights

The right to be released from the obligation to perform military service on grounds of conscience has been recognised in the domestic legal systems of a small number of European States long before adoption of the European Convention of Human Rights 1950, the main regional instrument for the protection of human rights in the European region. The European Convention was entered into force in 1950 with a view to give effect to certain rights found in the Universal Declaration of Human Rights and create binding obligations for Member States. Whereas the aim of the Convention was the maintenance and further realisation of human rights and fundamental freedoms, the right to be exempted from military service on grounds of conscience was not clearly stipulated in the text of the Convention. It is worth noting that even in its present form, the only reference to 'conscientious objection' in the European Convention is found under the 'forced labour' clause contained in Article 4(3)(b) ECHR, which concerns the 'prohibition of slavery and compulsory labour'. Indeed, the right to conscientious objection does not appear in Article 9 of the European Convention, the provision protecting the right to freedom of thought, conscience and religion. A close examination of the *travaux preparatoires* of Article 9

ECHR reveals no reference or any statements relating to conscientious objection to military service at the drafting stage of the Convention.[1]

Remarkably, from the drafting history of what became Article 4 ECHR, it appears that initially there was no intention by the drafters of the Convention to make any reference to conscientious objection in Article 4 ECHR.[2] The *travaux preparatoires* of Article 4 ECHR do not appear to reveal – in great detail - the discussions on the text of the Convention in the drafting phase, but only give an indication as to what changes were made to the draft provision until the text was finally adopted.[3] On 6 March 1950, the delegation of the United Kingdom proposed an amendment on the preliminary draft prepared by the Committee of Experts on Human Rights, concerning the provision on slavery and force labour (draft Article 6). The proposed amendment by the United Kingdom was aimed at excluding 'any work carried out by conscientious objectors' from the scope of the prohibition of forced labour. The first draft which incorporated the formulation proposed by the United Kingdom reads:

> […] the term 'forced or compulsory labour' should not include: […] any service of a military character or service in the case of conscientious objectors exacted in virtue of compulsory military service laws. [4]

[1] European Commission on Human Rights, *Preparatory works on Article 9 of the European Convention on Human Rights*, doc. DH (56) 14, 16 August 1956.
[2] D. Ch. Decker and L. Fresa, 'The status of conscientious objection under Article 4 of the European Convention on Human Rights', *New York University Journal of Law and Politics*, vol. 33 (2001), p. 379.
[3] European Commission of Human Rights, *Preparatory works of Article 4 of the Convention*, Doc no. DH (62) 10, 15 November 1962, para 23, available at <http://www.echr.coe.int/Documents/Library_TP_Art_04_DH(62)10_BIL.PDF>, accessed on 2-1-16
[4] Committee of Experts, 'Amendment to Articles 1, 2, 4, 5, 6, 8 and 9 of the Committee's Preliminary Draft Proposed by the United Kingdom', doc. no. CM/WP 1 (50) 2, 6 March 1950, reproduced in European Court of Human Rights, *Preparatory works of Article 4 of the European Convention on*

Considering the above statement, it can be suggested that the only intention of the drafters was to exclude alternative service from being classified as a form of 'forced labour'. Commentators suggest that a possible explanation for the British proposal to include an express mention of 'conscientious objectors' in the forced labour clause was based on the fact that the United Kingdom was previously involved in the drafting of what became Article 8 of the ICCPR where the British delegation submitted similar proposals and therefore wished to include the same in the drafting of the European Convention on Human Rights.[5]

A second draft prepared by the Committee of Experts on Human Rights – the so-called 'Alternative B' draft – contained more detailed definitions relating to the provisions as opposed to the first draft which resembled a more straightforward 'list of rights' for consideration. Slightly amended, draft Article 5(3) provided:

> For the purposes of this article, the term 'forced or compulsory labour' shall not include:
>
> […]

Human Rights, Doc no. DH (70) 5, 5 March 1970, p. 9, available at <http://www.echr.coe.int/Documents/Library_TP_Art_04_CDH(70)5_BIL.PDF> accessed on 6-1-16

[5] D. Ch. Decker and L. Fresa, 'The status of conscientious objection under Article 4 of the European Convention on Human Rights', New York University Journal of Law and Politics, vol. 33 (2001), p. 379. 159 European Commission of Human Rights, Preparatory works of Article 4 of the Convention, Doc no. DH (62) 10, 15 November 1962, available at <http://www.echr.coe.int/Documents/Library_TP_Art_04_DH(62)10_BIL.PDF> accessed on 7-1-16.

(b) any service of a military character or, in the case of conscientious objectors, service exacted instead [replacing 'in virtue' in the British proposal] of compulsory military service laws.[6]

When the amended draft was submitted by the Committee of Experts on Human Rights to the Committee of Ministers for their comments, the Committee of Ministers did not comment on the suggested provision on the prohibition of slavery and forced labour.[7]

At the next stage of consideration, the Conference of Senior Officials examined the previous two drafts and proposed a single unified version. The updated anti-slavery provision as amended by the Conference reads:

3. For the purposes of this article, the term 'forced or compulsory labour' shall not include:

[…]

b. any service of a military character or, in the case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service.[8]

This was the first time that the phrase 'in countries where they are recognized' was added to the text of the provision. According to Decker and Fresa, who carried out a

[6] European Commission of Human Rights, Preparatory works of Article 4 of the Convention, Doc no. DH (62) 10, 15 November 1962, para 10, available at <http://www.echr.coe.int/Documents/Library_TP_Art_04_DH(62)10_BIL.PDF> accessed on 7-1-16

[7] Ibid, excerpts from 'Draft Convention adopted by the Committee of Ministers and submitted by it to the Consultative Assembly for an opinion', p.13.

[8] *ibid*, text of the report submitted by the conference to the Committee of Ministers, p. 16.

systematic examination of the *travaux preparatoires* of both Article 4 and Article 9 of the Convention, there is no guidance as to why the drafters included this new phrase.[9]

The final draft of what, by that stage, was 'draft Article 4' of the Convention, provided:

> 3. For the purposes of this article, the term 'forced or compulsory labour' shall not include:
> b. any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service.[10]

Before its final adoption, the draft was returned to the Committee of Ministers for further amendments; nevertheless the text of the provision remained unchanged. The wording of Article 4(3)(b), as described in the final draft above, was finally accepted during the Conference of the Senior Officials in 1950.[11] According to the *travaux preparatoires* of Article 4, during the First Part of the Second Session of the Consultative Assembly in August 1950, Article 4 was not the subject of any special comments during the debate. The Convention was signed in Rome on 4 November 1950.

[9] D. Ch. Decker and L. Fresa, above n 2
[10] *Travaux preparatoires* of Article 4 ECHR (above n 6), excerpts from 'Draft Convention adopted by the Committee of Ministers and submitted by it to the Consultative Assembly for an opinion', p.13.
[11] European Court of Human Rights, *Preparatory works of Article 4 of the European Convention on Human Rights*, Doc no. DH (70) 5, 5 March 1970, available at <http://www.echr.coe.int/Documents/Library_TP_Art_04_CDH(70)5_BIL.PDF> accessed on 17 October 2013.

Although conscientious objections arise as a result of a person's beliefs (with belief recognised as a protected ground under Article 9 ECHR), Article 4(3)(b) ECHR was the only provision of the Convention containing a statement on conscientious objection.

In conformity with the textual limitation it contains ('in countries where [conscientious objectors] are recognized'), Article 4(3)(b) has been interpreted by the Convention monitoring bodies as not encompassing an obligation for Contracting States to recognise a right to conscientious objection to military service in their domestic legislation or any obligation to provide for alternative civilian service *in lieu* of military service. For these reasons, the text of Article 4(3)(b) ECHR has for a long time been regarded by the Convention monitoring bodies as an obstacle to the recognition of conscientious objection to military service as a manifestation of belief (religious or otherwise) deserving the protection of Article 9 ECHR.

In response to the problems created by the way in which the drafters of the Convention had dealt with the question of conscientious objection to military service in the years following the adoption of the Convention, various attempts have been made by the organs of the Council of Europe, as well as by some EU institutions, to achieve the express incorporation of conscientious objection within the text of the Convention.

In a 2001 recommendation, the Parliamentary Assembly of the Council of Europe called the Committee of Ministers of the Council of Europe to

> […] 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.[12]

The Committee of Ministers rejected the proposal, referring to measures already taken up in Recommendation No. R (87)8.[13] In particular, in its response the Committee of Ministers emphasised that

> […] rather than elaborating an additional protocol amending Articles 4, paragraph 3b, and 9 of the European Convention of Human Rights, as suggested in the Assembly's Recommendation, presently, it is preferable to make a sustained effort to implement the 1987 Recommendation.[14]

3. The European Union's response

Attempts to place the right of conscientious objection within the scope of Article 9 of the European Convention have also been made by organs of the European Union, and in particular by the European Parliament.[15] In 1989, the European Parliament, in

[12] PACE Recommendation 1518 (2001) exercise of the right of conscientious objection to military service in the Council of Europe Member States, text adopted by the Standing Committee acting on behalf of the Assembly on 23 May 2001.
[13] CoM Recommendation No. R (87) 8 regarding conscientious objection to compulsory military service, text adopted by the Committee of Ministers on 9 April 1987, at the 406th meeting of the Ministers' Deputies.
[14] PACE, Reply from the Committee of Ministers on Recommendation 1518 (2001) adopted at the 758th meeting of the Minister's Deputies (26-27 February 2002), Doc. 9379, 1 March 2002.
[15] The European Parliament is one of the EU's main law-making institutions, along with the Council of the European Union ('the Council'). The European Parliament has three main roles. First, debating and passing European laws, with the Council, second, scrutinising other EU institutions, particularly

a resolution promoted by Barbara Schmidbauer (German social democrat MEP, 1987-99), the European Commission[16] and the Member States of the European Union were called '[…] to press for the right to alternative civilian service to be incorporated in the European Convention for the Protection of Human Rights and Fundamental Freedoms, as a human right'.[17]

The *Schmidbauer resolution* quoted above demonstrates the determination of the European Parliament not only to emphasise the need for a more effective recognition of conscientious objection as a Convention right, but also to enable a process of change to ensure that Member States incorporate minimum international standards in their domestic legislation. In the 1990s and before the enlargement of the European Union, three EU Member States adopted legislation recognising conscientious objection to military service and providing for alternative civilian service within their domestic legislation; Portugal (1992), Greece (1997) and Italy (1998). By 1998 all fifteen EU Member States had adopted legislation recognising conscientious objection, while the Member States that joined the Union during the 2004 and 2007 enlargement had already adopted legislation prior to their accession.[18]

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the Commission, to make sure they are working democratically, and thirdly, debating and adopting the EU's budget, with the Council. See D. Judge and D. Earnshaw, *The European Parliament* (Palgrave and McMillan, 2008).

[16] The European Commission is the EU's executive body and represents the interests of Europe as a whole (as opposed to the interests of individual countries). The Commission's main roles are to set objectives and priorities for action, propose legislation to Parliament and Council, manage and implement EU policies and the budget, enforce European Law (jointly with the Court of Justice) and represent the EU outside Europe (negotiating trade agreements between the EU and other countries, etc.). For further information on the role of the European Commission see P. Craig and G. de Burca, EU Law: *Text, cases and materials* (Oxford University Press, 2008), p. 32; M. Horspool and M. Humphreys, *European Union Law* (Oxford University Press, 2012), p. 62.

[17] European Parliament, 'Resolution on conscientious objection and alternative civilian service', Doc. A3-15/89, Official Journal C291 (1989), p. 122, para 11.

[18] *ibid*

The EU Charter of Fundamental Rights, which became binding on EU institutions and national governments when the Treaty of Lisbon entered into force in December 2009,[19] is the only regional human rights instrument that explicitly includes the right to conscientious objection to military service within the same provision protecting the right to freedom of thought, conscience and religion. In this regard, Article 10(2) of the EU Charter provides that 'the right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right'.[20] With its entry into force the Charter is, by principle, binding across all EU Member States when they implement EU policies and law, except Poland and the United Kingdom which have 'opted out'.[21] The Charter applies only when fundamental rights are affected as far as the implementation of EU legislation is concerned. Therefore, if a national authority violates fundamental rights protected under the Charter when implementing EU Law, the European Commission can take the matter to the European Court of Justice.[22] When the issue at stake does not involve the implementation of EU legislation, then the Charter does not apply and the appropriate body that may address an issue is the European Court of Human

[19] For academic commentary on the Charter of Fundamental Rights of the European Union, see D. Denman, 'The Charter of Fundamental Rights', *European Human Rights Law Review*, vol. 4 (2010), p. 349; J. Blackstone, 'The EU Charter of Fundamental Rights: scope and competence', *Justice Journal*, vol. 9(2012), p.19; S. I. Sanchez, 'The Court and the Charter: the impact of the entry into force of the Lisbon Treaty of the ECJ's approach to fundamental rights', *Common Market Law Review*, vol. 49 (2012), p 1565.

[20] Charter of Fundamental Rights of the European Union (above n.**Error! Bookmark not defined.**), Article 10.

[21] Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C 306/156, 17 December 2007 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0156:0157:EN:PDF> accessed on 10-1-16

[22] J. H.H. Weiler, 'Human rights: Member State, EU and ECHR levels of protection', *European Journal of International Law*, vol. 24 (2013), p. 471.

Rights.[23] The Charter is read in accordance with international and European human rights law which it draws its inspiration from.[24]

The Charter is therefore an additional instrument providing human rights protection; the commitments undertaken by EU Member States under the European Convention on Human Rights are independent of their obligations under EU law. In this regard, there is an explicit condition for EU membership that all EU member states must have ratified the ECHR and must be members of the Council of Europe.[25] Although the European Parliament did not achieve the incorporation of the right to conscientious objection in the European Convention on Human Rights earlier, the European Union managed to place the right to conscientious objection in its own human rights treaty for the protection of fundamental human rights several years later. The explicit acknowledgment in the EU Charter of conscientious objection to military service as a manifestation of religion or belief protected under the right to freedom of thought, conscience and religion was a key development in European Union law.

4. Activities of the Council of Europe's monitoring bodies

The first formal recognition of a right to conscientious objection to military service in the context of the Council of Europe predates the analogous recognition by the

[23] European Commission, 2012 Report on the Application of the EU Charter of Fundamental Rights (European Union, 2013), p.20, available at <http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf> accessed on 10-1-16.
[24] EU Network of Independent Experts on Fundamental Rights, Opinion No. 4-2005: The right to conscientious objection and the conclusion by Members States of Concordats with the Holy See, 14 December 2005, p. 4, available at <http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdfopinion4_2005_en.pdf> accessed on 10-1-16
[25] W. Weiss, 'Human rights in the EU: rethinking the role of the European Convention on Human Rights after Lisbon', *European Constitutional Law Review*, vol. 7 (2011), p. 64.

United Nations. Resolution 337, adopted by the Parliamentary Assembly of the Council of Europe [hereinafter "PACE"] in 1967 at the peak of the Vietnam War, is the first resolution on the issue of conscientious objection to military service adopted in the Council of Europe.[26] In Resolution 337, PACE placed the right of conscientious objection to military service within the scope of Article 9 ECHR.[27] At the time Resolution 337 was adopted, the Council of Europe comprised of eighteen member states, nine of which had already adopted legislation on alternative service, six had no legislation recognising the right of conscientious objection, and three (Iceland, Ireland and Malta) had no armed forces. The Parliamentary Assembly noted that

> [the right to conscientious objection] shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9 of the European Convention on Human Rights. [28]

The need to expand the protection of conscientious objectors in all members of the Council of Europe was subsequently expressed in Resolution 478 (1967) where the Parliamentary Assembly recommended that the Committee of Ministers instruct the Committee of Experts on Human Rights, a subsidiary body of the Council of Europe invited by the Committee of Ministers to give its opinion on draft legal and political

[26] PACE, Resolution No. 337 (1967) on the right of conscientious objection, text adopted by the Assembly on 26th January 1967 (22nd Sitting).
[27] *ibid*, '1. Persons liable to conscription for military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from the obligation to perform such service. 2. This right shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9 of the European Convention on Human Rights.'
[28] PACE, Resolution No. 337 (1967), above n 26

texts produced by other bodies,[29] to formulate proposals giving effect to the principles in Resolution 337 through either a legally binding text, i.e. a convention, or a recommendation to governments in order to facilitate the recognition of the right across the Member States of the organisation.[30]

In Recommendation 816 (1977), PACE reiterated this position and recommended that the Committee of Ministers, first, urge the Governments of Member States, insofar as they had not already done so, to bring their legislation in line with the principles set out in Resolution 337 and Recommendation 816, and, second, to introduce the right of conscientious objection to military service into the European Convention on Human Rights.[31] Nevertheless, the Committee of Ministers did not take any action with regard to the recommendations of PACE.

Recognition of the right of conscientious objection by the Committee of Ministers came a few years later in Recommendation R(87)8 of April 1987 where the Committee called upon Members States to bring their national law and practice into line with the basic principles previously laid out by the Parliamentary Assembly and reiterated by the Committee of Ministers.[32] In particular, the Committee echoed the recommendation expressed earlier by PACE in 1967, stating that:

[29] The Committee of Experts on Human Rights was the predecessor of the Steering Committee for Human Rights (CHHD). For more information on the mandate and work of the Committee see <https://wcd.coe.int/ViewDoc.jsp?id=1407039&Site=COE> accessed on 22-1-16.
[30] PACE, Resolution 478 (1967) on the right of conscientious objection, text adopted by the Assembly on 26 January 1967 (22nd Sitting).
[31] PACE, Recommendation 816 (1977) on the right of conscientious objection to military service, text adopted by the Assembly on 7 October 1977 (10th Sitting), Preamble, para 4(b).
[32] CoM, Recommendation No.R (87) 8 regarding conscientious objection to compulsory military service, text adopted by the Committee of Ministers on 9 April 1987, at the 406th meeting of the Ministers' Deputies.

> Anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service, on the conditions set out hereafter. Such persons may be liable to perform alternative service.[33]

New momentum to the progressive recognition of the right to conscientious objection within the Council of Europe came from the events which took place in the territory of the Socialist Federal Republic of Yugoslavia ("SFRY") in the early 1990s. The dissolution of the SFRY led at least 100,000 conscientious objectors and draft resisters to flee the region and request refugee status in other countries on the basis of their refusal to take part in the conflict.[34] The escalation of violence in the region, coupled with the intention of several countries to deport conscientious objectors who fled their countries to avoid persecution[35] meant that the Council of Europe was under pressure to adopt a more robust approach on the question of conscientious objection to military service.

In Resolution No. 1042 (1994) dealing specifically with the question of deserters and draft resisters from the dissolved States of the former SFRY, PACE recalled its Recommendation No. 816 (1977) in which it had expressly classed the right to conscientious objection as a 'human right'.[36]

[33] *Ibid*, para 1.
[34] PACE, Resolution 1042 (1994) on Deserters and Draft Resisters from the Republics of Former Yugoslavia, text adopted by the Assembly on 1 July 1994 (23rd Sitting).
[35] Ibid, para 10.
[36] Ibid, para 7.

Against the background of the conflict which foresaw the secession of Croatia and Bosnia-Herzegovina from the SFRY,[37] PACE noted that, despite the existence of a right of conscientious objection in the Croatian Constitution,[38] Croatia had failed to recognise the right of conscientious objection in practice and severely punished men refusing to take part in military operations deemed by the international community to be serious violations of international law and a form of 'ethnic cleansing'.[39] It further called upon the authorities of Serbia and Montenegro to recognise in practice the right to conscientious objection to military service and declare an amnesty for deserters and draft resisters, and the governments of Croatia and Bosnia-Herzegovina to give protection to all people fleeing the fighting and to refrain from drafting them against their will.[40]

In the following years, the situation in the Balkans remained unsettled since the Croatian and Bosnian conflicts were succeeded by the war in Kosovo and the NATO bombing of the Former Republic of Yugoslavia (Serbia and Montenegro) which ended with the conclusion of an agreement between Kosovo Force ('KFOR'), an international security force established by UN Security Council Resolution 1244 of 10 June 1999,[41] and the governments of the Federal Republic of Yugoslavia and the Republic of Serbia on 9 June 1999.

[37] S. Jansen, 'The violence of memories: Local narratives of the past after ethnic cleansing in Croatia', *Journal of Theory and Practice*, vol. 6 (2002), p. 77.
[38] According to Article 47.2 of the 1990 Constitution of the Republic of Croatia, 'conscientious objection shall be allowed to all those who, for religious or moral beliefs, are not willing to participate in the performance of military duties in the armed forces. Such persons shall be obliged to perform other duties specified by law.' Official Gazette No. 56/90 of 22 December 1990 available at <http://www.servat.unibe.ch/icl/hr00000_.html>accessed on 10-1-16
[39] PACE Resolution 1042 (1994) (above n 34), para 8.
[40] *Ibid*, para 14.
[41] Resolution 1244 (1999) adopted by the Security Council at its 2011th meeting on 10 June 199, para 9.

The turbulent situation in the Balkans during the 1990s and the large numbers of conscientious objectors fleeing the region in fear of persecution played an important role in bringing the question of conscientious objection at the forefront of the human rights debate in Europe.

By the early 2000s, although the right to be exempted from military service on grounds of conscience was recognised in law and practice in many European States, and had progressively been recognised by the organs of the Council of Europe, there were no clear international standards or guidelines as to the actual scope of protection and the guarantees which States should adopt in order to make the right effective in their domestic legal order. PACE Recommendation 1518 (2001) was one of the first texts after the dissolution of the former Yugoslavia that reiterated in more clear terms the standards on conscientious objection as first set out in Resolution 337 of 1967, despite considerable variations with regard to the legal position of conscientious objectors across Europe.[42] Recommendation 1518 was also the first text of the Council of Europe in which the Parliamentary Assembly called Member States to include in their legislation the right for *permanent* members of the armed forces to apply for the granting of conscientious objector status.[43]

Even though PACE had attempted earlier in 1977 to influence the Committee of Ministers to enable the incorporation of a provision in the ECHR that would expressly recognise the right to conscientious objection under Article 9 ECHR, the Committee of Ministers had not taken any action in this regard. In Recommendation 1518 of

[42] PACE Recommendation 1518 (2001) exercise of the right of conscientious objection to military service in the Council of Europe Member States, text adopted by the Standing Committee acting on behalf of the Assembly on 23 May 2001.
[43] *Ibid*, para 5.

2001, PACE made another attempt and recommended the adoption of some amendments to the text of the ECHR, which, in PACE's view, would have allowed the European Court to extend the protection of Article 9 ECHR to cases of conscientious objection. In particular, PACE recommended that the Committee of Ministers call for an amendment of Article 4(3)(b) ECHR in order to ensure the applicability of Article 9 to cases concerning violations of the right of conscientious objection to military service.[44] The proposal was subsequently rejected by the Committee of Ministers.[45]

In addition to the obligation to recognise a right of conscientious objection for conscripts, the various organs of the Council of Europe have encouraged Member States to recognise the right to be exempted from particular military duties on grounds of conscience for professional members of the armed forces. In this regard, PACE, which had first foreshadowed this possibility in 2001,[46] emphasised in 2006 that the right of conscientious objection to military service does not apply exclusively to conscripts, but rather it applies to career servicemen and reservists on an equal footing.[47] In this regard, PACE noted that, as of 2006, only two Council of Europe Member States – Germany and the United Kingdom – had procedures enabling professional soldiers to request demobilisation and discharge from the armed forces on grounds of conscience.[48] In 2010, the Committee of Ministers adopted

[44] Ibid, para 6: 'The Assembly also recommends 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.'
[45] PACE, Reply from the Committee of Ministers on Recommendation 1518 (2001) adopted at the 758th meeting of the Minister's Deputies (26-27 February 2002), Doc. 9379, 1 March 2002.
[46] Recommendation 1518 (2001) (above n 42)
[47] PACE, Recommendation 1742 (2006) Human rights of the members of the armed forces, text adopted by the Assembly on 11 April 2006 (11th Sitting), Doc.10861, para 40.
[48] Committee on Legal Affairs and Human Rights, Human rights of members of the armed forces (Rapporteur: Mr Alexander Arabadjiev, Bulgaria, Socialist Group), Doc. 10861, 24 March 2006, para 40.

Recommendation CM/Rec(2010)4 placing emphasis on the right of professional members of the armed forces to leave the armed forces for reasons of conscience.[49]

5. Early jurisprudence of the European Court of Human Rights

At UN level, the UN Human Rights Committee had struggled for years to recognise the right of conscientious objection to military service as falling within the scope of Article 18 (freedom of thought, conscience and religion). Like the European Convention, the International Covenant on Civil and Political Rights (ICCPR) contained a forced labour clause in Article 8(3)(c)(ii) which included an identical reference to conscientious objectors, but no reference to a right of conscientious objection in Article 18 ICCPR. It was only in 1993 that the UN Human Rights Committee acknowledged that the right to conscientious objection to military service falls within the scope of Article 18(1) of the International Covenant on Civil and Political Rights, the provision that protects the right to freedom of thought, conscience and religion. In General Comment No. 22, the Human Rights Committee expressed the view that, although 'the [ICCPR] does not explicitly refer to a right to conscientious objection, […] 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.'[50] In 2004, the Committee recognised in its *jurisprudence* that failing to provide alternative service

[49] Recommendation CM/Rec (2010)4 of the Committee of Ministers, prepared by the Secretariat in co-operation with the Chairperson of the Committee of Experts for the Development of Human Rights' Group on Human Rights of Members of the Armed Forces (DH-DEV-FA) (Council of Europe, 2010).
[50] UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4.

for conscientious objectors had given rise to a violation of Article 18(1).[51] The UN Human Rights Committee's decision in *Yoon and Choi v the Republic of Korea* [2004] marks the first instance in which the UN Human Rights Committee expressly departed from the restraints imposed by the forced labour clause in Article 8(3)(c)(ii) ICCPR and pointed out that, while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with Article 18(3), against being forced to act against genuinely-held religious belief.[52]

Similar to the position of the UN Human Rights Committee which originally excluded the applicability of Article 18 ICCPR (right to freedom of thought, conscience and religion) in cases concerning conscientious objection to military service, the European Court of Human Rights had been failing to recognise, until relatively recently, that conscientious objection to military service constitutes a manifestation of belief falling under the scope of Article 9 ECHR. In a number of cases decided between 1966 until 2011, the European Court of Human Rights (and the former European Commission on Human Rights) preferred to avoid examining cases concerning conscientious objection to military service in light of Article 9 ECHR and assessed the applicants' claims with reference to other Convention rights. This was largely due to a narrow and arguably erroneous interpretation of the reference to conscientious objection contained in Article 4(3)(b) ECHR as an indication of the fact that there was no *obligation* for Contracting States to recognise the right to conscientious objection within their domestic laws.

[51] Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea, Comm. nos. 1321/2004 and 1322/2004, UN doc. CCPR/C/88/D/1321-1322/2004, 23 January 2007

[52] See also Young-kwan Kim et al. v. Republic of Korea, Comm No. 2179/2012, views adopted on 15-10-2014.

The origins of the problematic interpretation of the European Convention can be traced back to the case of *Grandrath v. the Federal Republic of Germany*, decided by the European Commission on Human Rights in 1966.[53] The case was the first in which the Strasbourg bodies were called to examine issues pertaining to the question of conscientious objection to military service. *Grandrath* concerned a 'total objection', in that the applicant, a Jehovah's Witness who claimed to be a religious minister, argued that his religious and conscientious beliefs entitled him to exemption from *both* military service *and* alternative civilian service.[54] Although the domestic authorities had recognised the applicant as a conscientious objector and requested him to perform substitute civilian service, the applicant refused to undertake the civilian service he was offered and requested an exemption from alternative service, a request that was ultimately rejected by the domestic authorities. Before the Commission, the applicant complained of a breach of Article 9 ECHR; his complaint had two different but arguably inter-linked aspects. First, he claimed that his right to freedom of thought, conscience and religion as protected by Article 9 would have been violated had he been required to perform a service that was contrary to his conscience due to his genuine religious conviction against military service; and secondly, that undertaking civilian alternative service would have restricted his right to manifest his religion as any service would not have allowed him sufficient time to perform his religious duties towards his community.

The German government claimed that Article 9 ECHR did not foresee a right of exemption from military or alternative service on conscientious or religious grounds

[53] *Grandrath v Federal Republic of Germany,* App no 2299/64, 10 *Yearbook of the European Convention on Human Rights* 626.
[54] Ibid, paras 9 and 31.

and that the development and administration of alternative civilian service for conscientious objectors was a question left to the discretion of the State parties to the Convention.[55]

With regards to the aspect of the applicant's Article 9 complaint, the Commission noted that the applicant had not alleged that the compulsory service would have interfered with the private and personal practice of his religion.[56] In relation to the second question, the Commission considered that compulsory alternative service would allow the applicant sufficient time to perform his religious duties; therefore his right to manifest his religion would not have been impaired in those circumstances.[57] Most interestingly, the Commission held that, under the Convention, objections of conscience did not entitle a person to exemption from substitute service and that, on the contrary, Article 4(3)(b) foresees that compulsory alternative service may be imposed as a substitute for military service.[58] Finding 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, the Commission examined the applicant's allegation primarily on the basis of Article 4 of the Convention and concluded that Article 9, considered separately, had not been violated in the applicant's case.[59]

Having dismissed the applicants complain under Articles 9 and 4, the Commission decided *proprio motu* to consider whether the conduct of the authorities had breached the prohibition of discrimination contained in Article 14 ECHR, taken in conjunction with Articles 9 and 4, due to the fact that the applicant had not been

[55] Ibid, para 10.
[56] Ibid, para 30.
[57] Ibid, para 32.
[58] Ibid, para 32.
[59] Ibid, para 33.

granted an exemption from both military and alternative civilian service, an option which, under domestic law, was open to Roman Catholic and Protestant ministers.

With regards to the possible violation of Article 14 taken in conjunction with Article 4 ECHR, the Commission concluded that the applicant had not been subjected to a treatment which was in any way less favourable than that accorded to ministers of other religious communities.[60] This was due to the fact that the applicant's religious ministry was not his principal occupation and that certain differentiations may be legitimate and not precluded by Article 14. Therefore the question whether differential treatment in respect of exemption from compulsory service had been an issue in this case could not be given a conclusive answer in relation to the applicant's occupational status.

In relation to whether there was a breach of Article 14 in conjunction with Article 9, the Commission unanimously concluded that there was no violation in the applicant's case as it had already concluded 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. It was also found that as the applicant had not established that he had been subjected to a treatment which was in any way less favourable than that accorded to ministers of other religious communities the question of discrimination did not arise.[61] Finally, the Commission held that the question of discrimination should be determined solely in the light of Article 4 of the Convention and in this case could only arise from a consideration of Article 14 in conjunction with Article 4 of the

[60] Ibid, para 44.
[61] Ibid, para 44.

Convention. Nevertheless as decided earlier, the applicant could not be considered to have been the victim of a discriminatory treatment in the application of the relevant German legislation, and therefore, the Commission found no violation of Article 14 in conjunction with Article 4.[62]

Although it should be emphasised that the case concerned an objection to both military and civilian service, the case of *Grandrath* provided an early opportunity for members of the Commission to express their views on the relationship between Article 4 and Article 9 of the Convention. One of its members, Constantin Eustathiades, appended an individual opinion, noting that Article 4(3)(b) ECHR defines the notion of forced or compulsory labour within the meaning of the Convention and that this:

> […] should not lead to the conclusion that Article 4(3)(b) 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 […] in this respect and more generally in regard to the limitations laid down in Article 9(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.[63]

Eustathiades' note appears to reflect a more pragmatic interpretation of the relevant provisions of the Convention. Nevertheless, the individual circumstances of the case,

[62] Ibid, para 40.
[63] Ibid, para 47.

i.e. the total objection of the applicant to both forms of service (military and alternative) do not offer an opportunity to conclusively assess the Commission's position on the applicability of Article 9 of the Convention in cases concerning conscientious objections to military service *per se*. However, the legacy of the decision in *Grandrath* is an important one, since reliance upon Article 4(3)(b) ECHR with a view to exclude the existence of an obligation for State parties to recognise a right of conscientious objection to military service in their domestic legislation, would subsequently stir up a heated debate on the reading of Article 4(3)(b) into Article 9 cases.

For instance, in *X v. Austria* the Commission acknowledged that the Austrian Constitutional Court had acted within its margin of appreciation by rejecting the applicability of Article 9 ECHR in a case concerning a Roman Catholic university lecturer convicted by a national court for his refusal to perform compulsory military service.[64]

The applicant had complained of violations of his rights under Articles 9 and 13 ECHR. The European Commission's decision in *X v Austria*, although it makes no reference to Grandrath, echoes a problematic reasoning as the Commission took into consideration Article 4(3)(b) ECHR to find that a choice is left to each State Party as to whether or not to recognise a right to conscientious objection to military service and to provide for the possibility of alternative civilian service.[65] As held by the Commission, the Convention did not prevent a State which has not recognised

[64] *X v. Austria*, App. no. 5591/72 (1973) 43 CD p.161.
[65] Ibid, para 1.

conscientious objectors from punishing those who refused to perform military service.

Similarly, in *A v. Switzerland*, decided in 1984, the Commission observed that in countries where compulsory service existed, the imposition of a penalty for failure to complete military service did not give rise to a violation of Article 9 ECHR since that provision did not require States to provide the option of alternative civilian service to conscientious objectors.[66] The Commission invoked once again Article 4(3)(b) ECHR, and found that Article 9 ECHR was not relevant to the applicant's situation, as 'the Convention does not give conscientious objectors the right to exemption from military service, but leaves each contracting State to decide whether or not to grant such a right'.[67] The same approach was followed in a number of subsequent cases.[68]

However, whenever possible, the Court tried to avoid dealing directly with the question of whether Article 9 was applicable to cases of conscientious objection to military service, but rather preferred to examine claims brought by conscientious objectors under different provisions of the Convention.

Thus, in *Thlimmenos v. Greece* the Court, whilst noting the need to reconsider the Commission's case-law regarding the right to conscientious objection to military service in the light of present-day conditions, [69] decided to examine the case under

[66] *A v. Switzerland*, App. no. 10640/83 (1984) 38 DR 219.
[67] Ibid, p. 223.
[68] See, in particular, *Johansen v. Norway*, App. no. 10600/83 (1985) 44 DR 155, p.162; *Heudens v. Belgium, App* no. 24630/94, Commission decision of 22 May 1995 and *Autio v. Finland,* App no. 17086/90, Commission decision of 6 December 1991.
[69] *Thlimmenos v. Greece* [GC], Reports 2000-IV 263, para 50.

Article 14 in conjunction with Article 9 ECHR, rather than Article 9 taken on its own.[70] Similarly, in *Ülke v. Turkey*, the Court did not find it necessary to pursue its examination of the applicability of Article 9 with reference to the approach followed in *Thlimmenos*, and preferred to examine the case under Article 3 ECHR.[71]

6. Turning point: *Bayatyan v Armenia*

The long lasting debate over the recognition of the right to conscientious objection as a right attracting the protections of Article 9 of the Convention came to an end in 2011. *Bayatyan v Armenia*, a landmark decision that was adopted in 2011, signified that Council of Europe Member States are no longer justified to prosecute individuals holding a genuine conscientious objection to military service and are, in fact, under a legal obligation to allow individuals with moral objections to perform an alternative civilian service that is compatible to their beliefs.

The applicant in *Bayatyan v Armenia* was a Jehovah's Witness who, following his refusal to perform military service due to his religious convictions, was charged with draft evasion and sentenced to two-and-a-half year detention.[72] The applicant complained of his conviction for draft evasion relying on Article 9 of the Convention. He claimed that his refusal to serve in the army was a manifestation of his freedom of thought, conscience and religion and that his conviction amounted to an unlawful interference with this freedom.[73]

[70] Ibid, paras 39-49.
[71] *Ülke v. Turkey*, App no. 39437/98 (2006), reprinted in 48 E.H.R.R. 48, paras 53-54.
[72] *Bayatyan v. Armenia,* App no 23459/03, ECtHR, Chamber judgment of 27 October 2009 (hereinafter '*Bayatyan v. Armenia* [Chamber]'); *Bayatyan v. Armenia,* App. no. 23459/03, ECtHR, Grand Chamber judgment of 7 July 2011 (hereinafter '*Bayatyan v. Armenia* [GC]').
[73] *Bayatyan v. Armenia* [Chamber], para 51.

It should be noted that in 2003, shortly after the applicant's arrest and conviction, a law on alternative service was adopted in Armenia recognising the right to conscientious objection.[74] Nevertheless, at the material time when criminal proceedings were instituted against the applicant, the right to conscientious objection was still not recognised in Armenia and failure to perform military service carried heavy implications.

The adoption of the legislation in question constituted the fulfilment by Armenia of one of the commitments undertaken at the time of accession to the Council of Europe. In this regard, in May 2000, in its report providing information as to Armenia's application for membership to the Council of Europe, the Committee on Political Affairs and Democracy of the Council of Europe[75] indicated that one of the commitments of the country with regard to human rights was 'to adopt, within four years of its accession, a law on alternative military service and, pending the adoption of that law and within six months of its accession, to take measures allowing conscientious objectors to perform military service in non-armed units under the existing legislation and, on the occasion of its accession, to pardon conscientious objectors currently serving prison sentences or in disciplinary battalions'.[76]

[74] Republic of Armenia, *Law on Alternative Service*, adopted on 12 December 2003, amended in 2004, 2006 and 2013.
[75] PACE, Committee on Political Affairs and Democracy, 'Armenia's application for membership of the Council of Europe (Rapporteur: Mr. Demetrio Volcic, Italy, Socialist Group)', Doc. 8747, 23 May 2000, para 13(iv)(c), available at < http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=8942&Language=en> accessed on 8-1-16. See also PACE, Opinion No. 221 (2000), 'Armenia's application for membership of the Council of Europe', text adopted by the Assembly on 28 June 2000 (21st Sitting), para.13.
[76] Ibid, Committee on Political Affairs and Democracy, 'Armenia's application for membership of the Council of Europe, para.13(iv)(d).

In examining the facts of the *Bayatyan* case, the European Court observed that, despite Armenia's pledge at the time of negotiations for accession to the Council of Europe that it would, *inter alia*, pardon all conscientious objectors sentenced to prison terms, the applicant had not been pardoned and therefore he was not released from his prison sentence.

The initial judgment was handed down by a Chamber of the Court in 2009.[77] In examining the applicant's complaint, the court found that the Armenian authorities could not be regarded as having acted in breach of their Convention obligations for convicting the applicant for his refusal to perform military service.[78] This was not unsurprising, considering that a reading of the Chamber's judgment reflects the customary position of the Commission and the Court as to the applicability of Article 9 ECHR in cases concerning conscientious objection to military service. The Chamber thus following the established jurisprudence of the Court on the question of conscientious objection concluded that:

[…] since Article 4(3)(b) clearly left the choice of recognising conscientious objectors to each Contracting Party, the fact that the majority of the Contracting Parties have recognised this right cannot be relied upon to hold a Contracting Party which has not done so to be in violation of its Convention obligations.[79]

The Chamber held that Article 9 of the Convention did not in and of itself guarantee a right to refuse to perform military service on conscientious grounds and that it was

[77] *Bayatyan v. Armenia* [Chamber] (above n 72).
[78] Ibid, para 64.
[79] Ibid, para 63.

therefore inapplicable to the applicant's case.[80] It therefore held by six votes to one that there had been no violation of Article 9 of the Convention.[81]

The decision of the majority of the Chamber endorsing the case law of the former Commission was met with criticism by one of the dissenting judges. In her dissenting opinion, Judge Power emphasised the 'dynamic and evolutive nature of the Convention as a living instrument'[82] and noted that 'the Court cannot but be influenced by the developments and commonly accepted standards and policy of the member states of the Council of Europe'.[83] In this regard, she argued that the majority's finding failed to reflect the almost universal acceptance of freedom of thought, conscience and religion within democratic societies that is recognised in both the Universal Declaration of Human Rights and the European Convention on Human Rights,[84] and went on to criticise the inconsistency of the Court's findings with European standards on conscientious objection to military service.[85] Judge Power concluded that

> […] in view of the foregoing, it would appear that the majority's finding is not just incompatible with current European standards on the question of conscientious objection but that it parts company with the Court itself in

[80] See also *Bayatyan v. Armenia* [Chamber] (above n.72), concurring opinion of Judge Fura, para.3:'the existing case-law on conscientious objection is clear in as much as there is no right of conscientious objection to military service within the Convention generally or under Article 9 in particular. So to apply general law to someone who refuses to do military service on grounds of conscience would not violate Article 9. In some States, however, only religious grounds are accepted and in other States there seems to be no legal system enabling conscientious objectors to be recognised'.
[81] *Bayatyan v. Armenia* [Chamber] (above n 72), para 66.
[82] *Bayatyan v. Armenia* [Chamber] (above n 72), dissenting opinion of Judge Power, para 3.
[83] *Bayatyan v. Armenia* [Chamber] (above n 72), dissenting opinion of Judge Power, para 3 (recalling *Tyrer v. UK*, App. no. 5856/72 (1978), Series A no 26, reprinted in 2 E.H.R.R. 1, para 31).
[84] *Bayatyan v. Armenia* [Chamber] (above n.72), dissenting opinion of Judge Power, para 4.
[85] Ibid, para 5

terms of the overall direction of the jurisprudence as discernible in the case law.[86]

Judge Power then considered the question of 'proportionality' of the interference with the applicant's right to manifest his religion, stating that 'notwithstanding the lawfulness of a permitted interference with a Convention right, the Court retains its supervisory role in assessing the proportionality of any measure taken'.[87] Having noted that that restrictions on the enjoyment of the freedom to manifest one's religion or beliefs under Article 9 were permissible to reconcile the interests of various groups and to ensure respect of the freedom of belief, she noted that Armenia had not provided any justification as to whether a 'pressing social need' existed which justified the limitations imposed on the ability of the applicant to manifest his beliefs by objecting to perform military service[88] and that, in the circumstances, the applicant's imprisonment for refusing to perform military service had not been necessary, thus the State had failed the proportionality test.[89]

The case was referred to the Grand Chamber at the request of the applicant and in accordance to Article 43 ECHR. The Grand Chamber was called upon to reconsider the question of whether conscientious objection fell within the scope of Article 9 ECHR.

The Grand Chamber acknowledged that the Court had 'never ruled on the question of the applicability of Article 9 ECHR to conscientious objectors, unlike the

[86] Ibid.
[87] Ibid, para 2.
[88] Ibid, para 7.
[89] Ibid.

Commission, which refused to apply that Article to such persons'.[90] This, in turn, excluded conscientious objectors from the scope of protection of Article 9 ECHR. The Court explained that it was not convinced of the previous interpretation of Article 4(3)(b) ECHR and indeed, its applicability in the current circumstances, but found that Article 9 ECHR was applicable in that the court had 'no reason to doubt that the applicant's objection to military service was motivated by his religious beliefs, which were genuinely held and were in serious and insurmountable conflict with his obligation to perform military service'.[91]

Having found that Article 9 ECHR was applicable in the present case, and as a first step in finding a violation, the Grand Chamber was required to determine whether the alleged interference with the applicant's right was 'prescribed by law'. It was held that even though the applicant's conviction was based on Article 75 of the then Criminal Code, which prescribed the penalty for draft evasion, at the time of the interference there was no law on alternative service in Armenia.[92] The Grand Chamber held that it was not necessary to to resolve question of whether, in light of the changes in the domestic law since the applicant's conviction and Armenia's commitment to pardon conscientious objectors serving prison terms, the impugned interference was 'prescribed by law'[93] and proceeded to assess whether the measures in question had been 'necessary in a democratic society'.[94] In this regard, it noted that the requirements of 'necessity' or 'proportionality' of the measure in order to achieve one of the legitimate aims included in Article 9(2) implied the determination of whether the impugned measures pursued a 'pressing social

[90] *Bayatyan v. Armenia* [GC] (above n 72), para 99.
[91] *Bayatyan v. Armenia* [GC] (above n 72), para 111.
[92] *Bayatyan v. Armenia* [GC] (above n 72), para 114.
[93] *Bayatyan v. Armenia* [GC] (above n 73), para 116.
[94] Ibid, paras 118-128.

need',[95] and went on to recall that, in assessing whether and to what extent an interference with a Convention right was 'necessary in a democratic society', the domestic authorities enjoyed a 'margin of appreciation'.[96]

The Grand Chamber specifically noted that:

> According to its settled case-law, the Court leaves to State parties to the Convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary. This margin of appreciation goes hand in hand with European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate.
>
> In order to determine the scope of the margin of appreciation in the present case the Court must take into account what is at stake, namely the need to maintain true religious pluralism, which is vital to the survival of a democratic society. The Court may also have regard to any consensus and common values

[95] Ibid, para 123.
[96] *Bayatyan v. Armenia* [GC] (above n 72), para 121; On the 'margin of appreciation' doctrine see F. Marscher, 'Methods of Interpretation of the Convention' in R. McDonald, F. Marscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993), p. 75; G. Letsas, 'Two concepts of the margin of appreciation', *Oxford Journal of Legal Studies*, vol. 26 (2006), p. 705 and S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe, 2000), p. 5.

> emerging from the practices of the States parties to the Convention.[97]

In order to determine whether such consensus existed, the Grand Chamber set out to assess the situation within the Council of Europe in relation to the recognition of a right to conscientious objection and noted that, at the time of the alleged interference with the applicant's rights, the overwhelming majority of its Member States had recognised the right in their domestic laws with the exception of Turkey, Azerbaijan and Armenia.[98]

In light of the evolving consensus over the recognition of the right of conscientious objection and the adoption of legislation on alternative service by the Member States of the Council of Europe, the Court held that the margin of appreciation enjoyed by the domestic authorities was not as wide as it used to be but it was in fact narrowed by considering the acceptance and development of legal standards on conscientious objection both within the United Nations and the Council of Europe.[99] The Grand Chamber specifically noted that:

> […] almost all the member States of the Council of Europe which ever had or still have compulsory military service have introduced alternatives to such service in order to reconcile the possible conflict between individual conscience and military obligations. Accordingly, a State which has not done so enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any

[97] *Bayatyan v. Armenia* [GC] (above n 73), paras 121-122.
[98] Consensus has been taken account by the Court in several occasions in its recent jurisprudence. See. *X, Y and Z v. the United Kingdom*, App. no. 21830/93, ECHR *Reports* 1997-II, para. 44; *Dickson v. United Kingdom* [GC], App. No. 44362/04, ECHR Reports 2007-XIII, para. 78.
[99] *Bayatyan v. Armenia* [GC] (above n 72) para 123.

interference. In particular, it must demonstrate that the interference corresponds to a 'pressing social need'.[100]

The Court made reference to the relevant recommendations and resolutions of the Council of Europe, demonstrating the importance of these guidelines in safeguarding that Member States are not only recognising the right to be exempted from military service and assigned alternative civilian service in their domestic legislation, but most importantly the obligation to provide a legal framework in their domestic legal systems that is practically accessible and effective.[101]

In parallel with developments within the Council of Europe, the Grand Chamber also considered the important developments which had taken place in recent years in the practice of other international human rights monitoring bodies, most notably the UN Human Rights Committee.[102] In addition, the Grand Chamber noted that the Charter of Fundamental Rights of the European Union, adopted in 2000, expressly recognised the right of conscientious objection to military service in Article 10(2).[103]

On the basis of these considerations the Grand Chamber concluded that the applicant's conviction constituted an interference which was not necessary in a democratic society within the meaning of Article 9 of the Convention.[104]

As for the debated question regarding the relevance of the exclusion clause in Article 4(3)(b), the Grand Chamber considered the *travaux preparatoires* of Article 4 ECHR

[100] Ibid, paras 121-123.
[101] Ibid, paras 51-65.
[102] Ibid, paras 59-64.
[103] Ibid, para 86.
[104] *Bayatyan v. Armenia* [GC] (above n 72), para 128.

and concluded that 'the clause relating to conscientious objection was intended to indicate that any national service required of them by law would not fall within the scope of forced or compulsory labour'.[105] It explained that the sole purpose of Article 4(3)(b) was to provide a further elucidation of the notion of forced or compulsory labour; therefore, it neither recognised, nor excluded a right to conscientious objection and should not have had a delimiting effect on the rights guaranteed by Article 9.[106] Although the drafters' intentions cannot be taken conclusively to determine the interpretation of a legal text,[107] it was important for the Court to use the intentions of the drafters in conjunction with the incremental evolution of the Convention as a 'living instrument' to place the meaning of the right to freedom of thought, conscience and religion within a more contemporary setting.

In a passage which undoubtedly constitutes a watershed in the Court's case-law on conscientious objection, the Grand Chamber concluded that:

> […] opposition to military service, where motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or religious or other belief, constitutes a conviction of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.[108]

It may be argued that the paragraph quoted above sets a lower threshold for a claim of conscientious objection to attract the protection of Article 9 ECHR, since the

[105] Ibid, para 100.
[106] Ibid, para 100.
[107] G. Letsas, 'Strasbourg's interpretive ethic: lessons for the international lawyer', *European Journal of International Law*, vol. 21 (2010), p. 509.
[108] *Bayatyan v. Armenia* [GC] (above n 72), para 110.

burden of proof lies with the applicant to demonstrate that there exists a serious and insurmountable conflict between the obligation to serve in the army and their beliefs.

Having found that the right to conscientious objection attracted the protection of Article 9 ECHR, the Grand Chamber proceeded to consider permissible limitations to the enjoyment of the right in question. In this regard, the Armenian Government had argued that, had the Court deemed that the applicant's complaint fell within the scope of Article 9, the applicant's conviction [imprisonment] was in any case a legitimate limitation of his right to *manifest* his beliefs.[109]

The Grand Chamber noted that the possibility of imposing limitations on the enjoyment of the freedom to manifest one's religion or beliefs is expressly provided in the second paragraph of Article 9 and that, as with any other so-called 'qualified right' under the ECHR, for any restriction to the right to manifest one's belief (including through conscientious objection to military service) to be compatible with the Convention, it must be prescribed by law,[110] pursue one of the legitimate aims listed in the qualifying clause, and finally to be justified and necessary in a democratic society.

In relation to the second requirement, the Grand Chamber noted that the aims expressly recognised in the second paragraph of Article 9 are 'public safety, […] the

[109] Ibid, para 83.
[110] *Koppi v. Switzerland*, App. no. 23224/94, Reports 1998-II, p. 540, decision of 25 March 1998, para 53 (legal basis in domestic law); *Silver and others v. United Kingdom*, App. nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75) decision of 23 March 1983 (accessibility of domestic laws and practice); *Sunday Times v. The United Kingdom*, App. no. 6538/74, 2 E.H.R.R. 245, decision of 26 April 1979 (certainty of legal rules).

protection of public order, health or morals, or […] the protection of the rights and freedoms of others'.

It is notable in this regard that, by contrast to the list of legitimate aims contained in the limitation clauses of other rights under the Convention, the list of limitation grounds in Article 9(2) does not include 'national security' considerations.[111]

Finally, the Grand Chamber reiterated that any restriction to the enjoyment of a right must be 'necessary in a democratic society' for the achievement of one of the legitimate aims.[112] The Court went on to emphasise that the principle which entails that an interference must be 'necessary in a democratic society' is embedded in Article 9 ECHR protecting the freedom of thought, conscience and religion and that 'this freedom is one of the foundations of a 'democratic society' within the meaning of the Convention'.[113]

The Grand Chamber then moved on to consider the Government's arguments concerning the compatibility of the limitation on the applicant's right with the Convention. Firstly, according to the Government, the interference was 'prescribed by law' in that the applicant had been convicted pursuant to Article 75 of the former Armenian Criminal Code which prescribed the penalty for draft evasion and that the provision in question had been both accessible and sufficiently precise.[114] The Government further acknowledged that the right to conscientious objection was not

[111] All other 'qualified rights' under the Convention, i.e. Articles 8, 10 and 11 ECHR, contain a limitation also on the basis of 'national security'. This was noted by the third-party interveners; see *Bayatyan v. Armenia* [GC] (above n 73), para 87.
[112] *Bayatyan v. Armenia* [GC] (above n 73) para 83.
[113] Ibid, para 118.
[114] *Bayatyan v. Armenia* [GC] (above n 73), para. 83.

recognised under Armenian law at the material time.[115] On whether the interference was 'necessary in a democratic society', the Government argued that exemption from compulsory military service would have been in breach of the principle of equality and non-discrimination and that the Government had acted in compliance with the requirements of the Convention by following the position of the Court up to the present date as established in its case-law, i.e. that Article 9 did not concern exemptions from compulsory military service on religious or political grounds.[116] According to the respondent Government, non-discrimination on the basis of religion or belief was 'necessary in a democratic society' in order to avoid the unequal application of the law to people of different beliefs.[117] According to the Armenian government 'it would inevitably result in very serious consequences for public order if the authorities allowed the above mentioned sixty-plus religious organisation to interpret and comply with the law in force at the material time as their respective religious beliefs provided'.[118]

In response to the government's claim that the interference was necessary to protect public order and the rights of others, the Grand Chamber held that it did not find 'he Government's reference to these aims to be convincing in the circumstances of the case, especially taking into account that at the time of the applicant's conviction the Armenian authorities had already pledged to introduce alternative civilian service and, implicitly, to refrain from convicting new conscientious objectors'.[119] It however concluded that it was unnecessary to determine conclusively whether the aims referred to by the Government were legitimate within the meaning of Article 9(2),

[115] Ibid.
[116] Ibid, paras. 78-79.
[117] Ibid, para. 83.
[118] Ibid, para 84.
[119] Ibid, para 58.

since the interference was in any event incompatible with that provision on the basis that the interference with the applicant's manifestation of his beliefs had not been 'necessary in a democratic society'.

Emphasising the importance of religious freedom, pluralism in a democratic society and the scope of the 'margin of appreciation' in deciding upon the necessity of an interference with a Convention right, the Grand Chamber noted that, while the applicant had sought to be exempted from military service on the ground of his genuinely held religious convictions, the system in place in Armenia, i.e. forcing objectors to refuse to be drafted into the army and to risk criminal sanctions, failed to strike a fair balance between the interests of society as a whole and those of the applicant.[120]

Furthermore, the Grand Chamber rejected the Government's claim that the restriction on the applicant's right to be exempted from military service was based on need to avoid discrimination between citizens of different beliefs. In this regard the Court expressed the view that the applicant had been 'prepared to share the societal burden equally with his compatriots by performing alternative civilian service'.[121] It further held that:

> […] respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by

[120] Ibid, para 124.
[121] Ibid, para 125.

> the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.[122]

The Grand Chamber further argued that the applicant had not refused to comply with his civic obligations in general, but he requested that he shared the societal burden equally with other Armenian nationals, by expressing the will to perform alternative service of public interest and for the common good.[123] The statement of the Grand Chamber reflects the position of some legal theorists that are in support of the view that conscientious objectors are not in breach of their legal obligations towards the State since their objection entails an intention to be assigned alternative duties in replacement of military service, thus undertaking the performance of an alternative civil obligation.

The Grand Chamber then turned on the meaning of 'democracy', stating that the true objective of a democratic society was to 'ensure the fair and proper treatment of people from minorities and avoid any abuse of a dominant position'.[124] According to the Grand Chamber, in the applicant's case this would have been safeguarded by granting him an opportunity to serve society as dictated by his conscience.[125] Therefore, the Grand Chamber concluded that the conviction of the applicant for draft evasion could not be said to have been prompted by a pressing social need,[126] and that the Armenian government had failed to provide convincing and compelling arguments to justify any interference with the applicant's right to conscientious

[122] Ibid, para 126.
[123] Ibid, para 125.
[124] *Bayatyan v. Armenia* [GC] (above n 72), para 126.
[125] Ibid, para 126.
[126] Ibid, para 127.

objection under Article 9 of the Convention. The majority voted by sixteen votes to one in favour of finding a violation of Article 9 ECHR.

As indicated in the above analysis of the Court's jurisprudence in relation to conscientious objection to military service, prior to the Grand Chamber's judgment in *Bayatyan* it was commonly accepted by the Commission that Article 4(3)(b) of the Convention excluded the applicability of Article 9 to conscientious objection cases. In the words of Nicolas Bratza, in order to escape from their 'self-imposed straitjacket', for a long time the Court had no other option than to rely on provisions other than Article 9 ECHR to provide some degree of protection to conscientious objectors.[127] Since the ground-breaking decision of the Grand Chamber in *Bayatyan*, reliance upon other provisions of the Convention is no longer absolutely necessary, and the right to be exempted from military service on grounds of conscience is now regarded in itself as an autonomous right falling under the scope of Article 9 of the Convention.

[127] N. Bratza, 'The 'precious asset': freedom of religion under the European Convention on Human Rights', *Ecclesiastical Law Journal*, vol. 14 (2012), p.256.

7. Conclusion

In Bayatyan, the European Court finally provided a ruling that acknowledged conscientious objection to military service as a right attracting the protection of Article 9 ECHR. Further to the *Bayatyan* judgment, the duty to enact legislation that is practically accessible has been reaffirmed by the European Court in its recent case law demonstrating that States are not only under a duty to adopt measures with a view to enacting legislation on alternative service, but also to ensure that the legislation eventually adopted is effectively protecting the rights of those lawfully exempted from the obligation to perform military service, including the right not to be discriminated on the basis of religious or other beliefs.[128]

The judgment of the Grand Chamber in *Bayatyan* marks a turning point in the jurisprudence of the European Court of Human Rights, which expressly abandoned its previously restrictive interpretative approach. The case granted an opportunity for the Grand Chamber to revisit its position by elaborating on the use of the 'living instrument' doctrine to interpret the Convention, a doctrine used to enable the Court to creatively update the interpretation of a number of Convention Articles in varied situations.[129]. The acknowledgment by the European Court of Human Rights that the right of conscientious objection to military service is firmly set within the scope of Article 9 of the Convention denotes that the development of legal standards and

[128] *Ercep v. Turkey*, App. no. 43965/04, (ECtHR, 22 November 2011); *Bukharatyan v. Armenia*, App. no. 37819/03 (ECtHR, 10 January 2012), *Tsaturyan v. Armenia*, App. no. 37821/03 (ECtHR, 10 January 2012), *Femi Demirtas v. Turkey*, App. No. 5260/07, Chamber judgment of 17January 2012; *Savda v. Turkey*, App no. 42730/05, Chamber judgment of 12 June 2012; *Tarhan v. Turkey*, App. No. 9078/05, Chamber judgment of 17 July 2012.

[129] A. Mowbray, 'The creativity of the European Court of Human Rights', *Human Rights Law Review*, vol. 5 (2005), p. 57.

obligations on the right to conscientious objection under the Convention will continue to evolve rapidly.

Legal obligations, either positive[130] or negative[131], translate to both contextual and specific measures to be taken by a Member State to prevent similar violations from reoccurring in the future. In a broader sense, these may include the duty to put in place a legal framework that provides effective protection for Convention rights; the duty to prevent breaches of Convention rights, including the duty to provide information and advice relevant to the breach of Convention rights; the duty to respond to breaches of Convention rights; and finally the duty to provide resources to individuals to prevent violations of their Convention rights. The decision provides a strong basis for the development of a framework of binding positive duties and obligations for states in order to provide a more effective protection to those objecting to the undertaking of military duties on grounds of conscience.

[130] *Gül v. Switzerland*, App. no. 23218/94 (1996), reprinted in 22 E.H.R.R. 93; J.F. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the ECHR*, Human Rights Handbooks, No.7 (Council of Europe, 2007), p. 5.
[131] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, '*Theory and Practice of the European Convention on Human Rights'*, (Intersentia, 2006), p. 293.