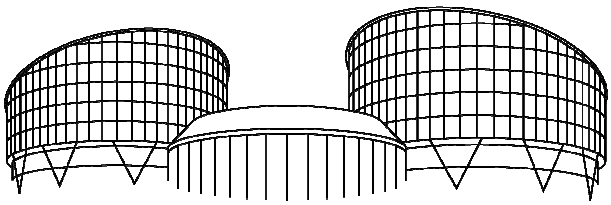

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF BAYATYAN v. ARMENIA

(Application no. 23459/03)

JUDGMENT

STRASBOURG

7 July 2011

This judgment is final but may be subject to editorial revision.

In the case of Bayatyan v. Armenia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Nina Vajić,
Lech Garlicki,
Alvina Gyulumyan,
Dean Spielmann,
Renate Jaeger,
Sverre Erik Jebens,
Päivi Hirvelä,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Mihai Poalelungi,
Nebojša Vučinić,
Guido Raimondi, *judges*,
and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 24 November 2010 and 1 June 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 23459/03) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Vahan Bayatyan ("the applicant"), on 22 July 2003.

2. The applicant was represented by Mr J.M. Burns, a lawyer practising in Georgetown (Canada), Mr A. Carbonneau, a lawyer practising in Patterson (USA), Mr R. Khachatryan, a lawyer practising in Yerevan, and Mr P. Muzny, professor of law at the Universities of Savoy and Geneva. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia at the European Court of Human Rights.

3. The applicant alleged, *inter alia*, that his conviction for refusal to serve in the army had violated his right to freedom of thought, conscience and religion.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 12 December 2006 it was declared partly admissible by a Chamber of that Section composed of the following judges: Boštjan M. Zupančič, *President*, John Hedigan, Corneliu Bîrsan, Vladimiro Zagrebelsky, Alvina Gyulumyan, David Thór Björgvinsson, Isabelle Berro-Lefèvre, *judges*, and also of Vincent Berger, *Section Registrar*. On 27 October 2009 a Chamber of that Section, composed of the following judges: Josep Casadevall, *President*, Elisabet Fura, Corneliu Bîrsan, Boštjan M. Zupančič, Alvina Gyulumyan, Egbert Myjer, Ann Power, *judges*, and also of Stanley Naismith, *Deputy Section Registrar*, delivered a judgment in which it held by six votes to one that there had been no violation of Article 9 of the Convention. Judge Fura expressed a concurring opinion and judge Power expressed a dissenting opinion, which were annexed to the judgment.

5. On 10 May 2010, following a request by the applicant dated 25 January 2010, the panel of the Grand Chamber decided to refer the case to the Grand Chamber under Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

7. The applicant and the Government each filed written observations. In addition, third-party comments were received from Amnesty International, Conscience and Peace Tax International, Friends World Committee for Consultation (Quakers), International Commission of Jurists, and War Resisters' International jointly, and from the European Association of Jehovah's Christian Witnesses, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 24 November 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr G. KOSTANYAN, *Agent*,
Mr E. BABAYAN, *Deputy Agent*;

(b) *for the applicant*
Mr A. CARBONNEAU, *Counsel*,
Mr P. MUZNY, *Counsel*,
Mr V. BAYATYAN, *applicant*.

The Court heard addresses by Mr Carbonneau, Mr Muzny and Mr Kostanyan and their replies to questions put by its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1983 and lives in Yerevan.

A. Background to the case

10. The applicant is a Jehovah's Witness. From 1997 he attended various Jehovah's Witnesses religious services and he was baptised on 18 September 1999 at the age of 16.

11. On 16 January 2000 the applicant was registered as a person liable for military service with the Erebuni District Military Commissariat (*Էրեբունի համայնքի զինվորական կոմիսարիատ*).

12. On 16 January 2001 the applicant, at the age of 17, was called to undergo a medical examination, following which he was declared fit for military service. The applicant became eligible for military service during the 2001 spring draft (April-June).

13. On 1 April 2001, at the outset of the draft, the applicant sent identical letters to the General Prosecutor of Armenia (*ՀՀ գլխավոր դատախազ*), the Military Commissioner of Armenia (*ՀՀ պաշտպանության նախարարության հանրապետական զինկոմիսար*) and the Human Rights Commission of the National Assembly (*ՀՀ ազգային ժողովին առընթեր մարդու իրավունքների հանձնաժողով*), with the following statement:

> "I, Vahan Bayatyan, born in 1983, inform you that I have studied the Bible since 1996 and have trained my conscience by the Bible in harmony with the words of Isaiah 2:4, and I consciously refuse to perform military service. At the same time I inform you that I am ready to perform alternative civilian service in place of military service."

14. In early May a summons to appear for military service on 15 May 2001 was delivered to the applicant's home. On 14 May 2001 an official of the Erebuni Military Commissariat telephoned the applicant's home and asked his mother whether the applicant was aware that he had been called to appear at the Commissariat to commence military service the following day. That same evening the applicant temporarily moved away from his home for fear of being forcibly taken to the military.

15. On 15 and 16 May 2001 officials from the Commissariat telephoned the applicant's mother, demanding to know his whereabouts. They threatened to take him to the military by force if he did not come voluntarily. On 17 May 2001, early in the morning, the officials came to the applicant's home. His parents were asleep and did not open the door. On the same date the applicant's mother went to the Commissariat, where she stated that the applicant had left home and she did not know when he would come back. According to the applicant, the Commissariat made no further efforts to contact his family.

16. On 29 May 2001 the Commission for State and Legal Affairs of the National Assembly (*ՀՀ ազգային ժողովի պետական-իրավական հարցերի հանձնաժողով*) sent a reply to the applicant's letter of 1 April 2001, stating:

> "In connection with your declaration, ... we inform you that in accordance with the legislation of the Republic of Armenia every citizen ... is obliged to serve in the Armenian army. Since no law has yet been adopted in Armenia on alternative service, you must submit to the current law and serve in the Armenian army."

17. In early to mid-June 2001 the applicant returned home, where he lived until his arrest in September 2002.

18. On 12 June 2001 the National Assembly declared a general amnesty which applied only to those who had committed crimes before 11 June 2001 and was to remain in force until 13 September 2001.

B. Criminal proceedings against the applicant

19. On 26 June 2001 the Erebuni Military Commissar (*Էրեբունի համայնքի զինկոմիսար*) gave notice to the Erebuni District Prosecutor (*Էրեբունի համայնքի դատախազ*) that the applicant had failed to report for military service on 15 May 2001 and was intentionally avoiding service in the army.

20. During July and on 1 August 2001 the applicant, together with his father and his defence counsel, went on several occasions to the District Prosecutor's Office to inquire with the relevant investigator about his situation and to discuss the forthcoming proceedings.

21. On 1 August 2001 the investigator instituted criminal proceedings under Article 75 of the Criminal Code on account of the applicant's draft evasion. According to the applicant, the investigator's superior, the prosecutor, refused to bring charges against him until further investigations had been carried out. On 8 August 2001 the applicant, who apparently wanted to benefit from the above amnesty, complained about this to the General Prosecutor's Office (*ՀՀ գլխավոր դատախազություն*). He received no reply to this complaint.

22. On 1 October 2001 the investigator issued five decisions in respect of the applicant: (1) to bring a charge of draft evasion against the applicant under Article 75 of the Criminal Code; (2) to apply to the court for authorisation for the applicant's detention on remand; (3) to declare the applicant a fugitive and institute a search for him; (4) to apply to the court for authorisation to monitor the applicant's correspondence; and (5) to suspend the proceedings until the applicant had been found. This last order stated:

> "... since, having undertaken investigative and search measures, the attempts to find the wanted [applicant] within two months ... have been unsuccessful and his whereabouts are unknown, ... [it is necessary] to suspend the investigation ... and ... to activate the search measures aimed at finding the accused."

23. Neither the applicant nor his family were notified of these decisions, despite the fact that since mid-June 2001 he had been living at the family home and that he had met with the investigator on several occasions in July-August 2001.

24. On 2 October 2001 the Erebuni and Nubarashen District Court of Yerevan (*Երևան քաղաքի Էրեբունի և Նուբարաշեն համայնքների առաջին ատյանի դատարան*) authorised the monitoring of the applicant's correspondence and his detention on remand. Neither the applicant nor his family were notified about these decisions, and the investigating authority made no attempt to contact them until the applicant's arrest in September 2002.

25. On 26 April 2002 the Convention entered into force in respect of Armenia.

C. The applicant's arrest and trial

26. On 4 September 2002, while the applicant was at work, two police officers went to his family home, informed his parents that he was on the wanted list and inquired about his whereabouts.

27. On 5 September 2002 the police officers returned and accompanied the applicant to a local police station, where they drew up a record of the applicant's voluntary surrender which stated that the applicant, having found out that he was on the wanted list, decided to appear at the police station. On the same date the applicant was placed in the Nubarashen detention facility.

28. On 9 September 2002 the investigating authority resumed the criminal proceedings against the applicant.

29. On 11 September 2002 the applicant was served with the 1 October 2001 charge (see paragraph 22 above) for the first time. During his questioning on the same date the applicant submitted that he consciously refused to perform military service because of his religious beliefs but was ready to perform alternative civilian service instead.

30. On the same date the applicant and his defence counsel were granted access to the case file. The bill of indictment was finalised on 18 September 2002 and approved by the prosecutor on 23 September 2002.

31. On 22 October 2002 the applicant's trial commenced in the Erebuni and Nubarashen District Court of Yerevan. The trial was adjourned until 28 October 2002 because the applicant had not been served with a copy of the indictment.

32. On 28 October 2002, at the court hearing, the applicant made the same submissions as during his questioning (see paragraph 29 above).

33. On the same date the Erebuni and Nubarashen District Court of Yerevan found the applicant guilty as charged and sentenced him to one year and six months in prison.

34. On 29 November 2002 the prosecutor lodged an appeal against this judgment, seeking a heavier punishment. The appeal stated:

> "The [applicant] did not accept his guilt, explaining that he refused [military] service having studied the Bible, and as a Jehovah's Witness his faith did not permit him to serve in the armed forces of Armenia.
>
> [The applicant] is physically fit and is not employed.
>
> I believe that the court imposed an obviously lenient punishment and did not take into consideration the degree of social danger of the crime, the personality of [the applicant], and the clearly unfounded and dangerous reasons for [the applicant's] refusal of [military] service."

35. On 19 December 2002 the applicant lodged objections in reply to the prosecutor's appeal in which he argued that the judgment imposed was in violation of his freedom of conscience and religion guaranteed by Article 23 of the Constitution, Article 9 of the Convention and other international instruments. He further argued that the absence of a law on alternative civilian service could not serve as a justification for imposing criminal liability on a person refusing military service for reasons of conscience.

36. On 24 December 2002, in the proceedings before the Criminal and Military Court of Appeal (*ՀՀ քրեական և զինվորական գործերով վերաքննիչ դատարան*), the prosecutor argued, *inter alia*, that a heavier sentence should be imposed also because the applicant had gone into hiding during the investigation. According to the applicant, during the appeal hearing pressure was put on him to abandon his religious beliefs regarding military service; in particular, both the prosecutor and one of the judges

offered to terminate his case if he dropped his objection and performed his military duty.

37. On the same date the Court of Appeal decided to grant the prosecutor's appeal and increased the applicant's sentence to two and a half years, stating that:

> "The court of first instance, when sentencing [the applicant], took into account that the offence [the applicant] had committed was not a grave one, that he was young, he had a clean record, he had confessed his guilt, he had actively assisted in the disclosure of the crime and he had sincerely repented.
>
> However, in the course of the appeal proceedings it was established that not only does [the applicant] not accept his guilt, but he does not regret having committed the crime; not only did he not assist in the disclosure of the offence, but he hid from the investigation and his whereabouts were unknown, so a search for him had to be initiated.
>
> Based on these circumstances, as well as taking into account the nature, motives and degree of social danger of the crime, the Court of Appeal considers that the prosecutor's appeal must be granted, and a heavier and adequate punishment must be imposed on [the applicant]."

38. On an unspecified date the applicant lodged an appeal on points of law against that judgment, in which he raised arguments similar to the ones made in his objections of 19 December 2002 (see paragraph 35 above). He reiterated his willingness to perform alternative civilian service and submitted that, instead of spending two and a half years in prison, he could have done socially useful work. According to him, such a possibility was envisaged under Section 12 of the Military Liability Act (see paragraph 43 below). The applicant further argued that the principle of alternative service was enshrined in Section 19 of the Freedom of Conscience and Religious Organisations Act (see paragraph 44 below), and the absence of appropriate implementation mechanisms could not be blamed on him.

39. On 24 January 2003 the Court of Cassation (*ՀՀ վճռաբեկ դատարան*) upheld the judgment of the Court of Appeal, finding, *inter alia*, that the rights guaranteed by Article 23 of the Constitution were subject to limitations under its Article 44 (see paragraph 41 below), in the interests, for example, of State security, public safety and the protection of public order. Similar limitations were also envisaged by Article 9 § 2 of the Convention.

40. On 22 July 2003 the applicant was released on parole after having served about ten and a half months of his sentence.

II. RELEVANT DOMESTIC LAW

A. The Constitution of Armenia of 1995 (prior to the amendments introduced in 2005)

41. The relevant provisions of the Constitution read as follows:

Article 23

"Everyone has the right to freedom of thought, conscience and religion."

Article 44

"The fundamental rights and freedoms of man and the citizen enshrined in Articles 23-27 of the Constitution can be restricted only by law if necessary for the protection of State security and public safety, public order, public health and morals and the rights, freedoms, honour and reputation of others."

Article 47

"Every citizen shall participate in the defence of the Republic of Armenia in accordance with the procedure prescribed by law."

B. The Criminal Code of 1961 (no longer in force since 1 August 2003)

42. The relevant provisions of the Criminal Code read as follows:

Article 75: Evasion of a regular call-up to active military service

"Evasion of a regular call-up to active military service is punishable by imprisonment for a period of one to three years."

C. The Military Liability Act (in force since 16 October 1998)

43. The relevant provisions of the Military Liability Act read as follows:

Section 3: Military liability

"1. Military liability is the constitutional obligation of citizens to participate in the defence of the Republic of Armenia."

Section 11: Conscription into compulsory military service

"1. Male conscripts and officers of the first category reserve whose age is between 18 and 27 [and] who have been found physically fit for military service in peacetime shall be drafted for compulsory military service."

Section 12: Exemption from compulsory military service

"1. [A citizen] may be exempted from compulsory military service: (a) if the national recruiting commission recognises him to be unfit for military service on account of poor health and strikes him off the military register; (b) if his father (mother) or brother (sister) died while performing the duty of defending Armenia or in [the Armenian] armed forces and other troops, and he is the only male child in the family; (c) by Government decree; (d) if he has performed compulsory military service in foreign armed forces before acquiring Armenian citizenship; or (e) he has a science degree ("Candidate" of Science or Doctor of Science) and is engaged in specialised, scientific or educational activities."

Section 16: Granting deferral of conscription into compulsory military service on other grounds

"2. In specific cases the Government may define categories of citizens and particular individuals to be granted deferral from conscription into compulsory military service."

D. The Freedom of Conscience and Religious Organisations Act (in force since 6 July 1991)

44. The relevant provisions of the Freedom of Conscience and Religious Organisations Act read as follows:

[Preamble]

"The Supreme Soviet of the Republic of Armenia adopts this law on freedom of conscience and religious organisations, ... being guided by the principles of human rights and fundamental freedoms established in international law and faithful to the provisions of Article 18 of the International Covenant on Civil and Political Rights ..."

Section 19

"All civic obligations envisaged by law apply equally to believing members of religious organisations as they do to other citizens.

In specific cases of contradiction between civic obligations and religious convictions, the matter of discharging one's civic obligations can be resolved by means of an alternative principle, according to the procedure prescribed by law, by mutual agreement between the relevant State authority and the given religious organisation."

E. The Alternative Service Act (passed on 17 December 2003 and entered into force on 1 July 2004)

45. The relevant provisions of the Act, with their subsequent amendments introduced on 22 November 2004, read as follows:

Section 2: The notion and types of alternative service

"1. Alternative service, within the meaning of this Act, is service replacing the compulsory fixed-period military service which does not involve the carrying, keeping, maintenance and use of arms, and which is performed both in military and civilian institutions.

2. Alternative service includes the following types: (a) alternative military [service, namely] military service performed in the armed forces of Armenia which does not involve being on combat duty or the carrying, keeping, maintenance and use of arms; and (b) alternative labour [service, namely] labour service performed outside the armed forces of Armenia.

3. The purpose of alternative service is to ensure the fulfilment of a civic obligation to the motherland and society and it does not have a punitive, demeaning or degrading nature."

Section 3: Grounds for performing alternative service

"1. An Armenian citizen whose creed or religious beliefs do not allow him to carry out military service in a military unit, including the carrying, keeping, maintenance and use of arms, may perform alternative service."

III. COMPARATIVE LAW

46. It follows from the material available to the Court on the legislation of the member States of the Council of Europe that almost all the member States which ever had or still have compulsory military service introduced laws at various points recognising and implementing the right to conscientious objection, some of them even before becoming members of the Council of Europe. The earliest was the United Kingdom in 1916, followed by Denmark (1917), Sweden (1920), the Netherlands (1920-1923), Norway (1922), Finland (1931), Germany (1949), France and Luxembourg (1963), Belgium (1964), Italy (1972), Austria (1974), Portugal (1976) and Spain (1978).

47. A big wave of recognitions ensued in the late 1980s and the 1990s, when almost all the then or future member States which had not yet done so introduced such a right into their domestic legal systems. These include Poland (1988), the Czech Republic and Hungary (1989), Croatia (1990), Estonia, Moldova and Slovenia (1991), Cyprus, the former Federal Republic of Yugoslavia (which in 2006 divided into two member States:

Serbia and Montenegro, both of which retained that right) and Ukraine (1992), Latvia (1993), the Slovak Republic and Switzerland (1995), Bosnia and Herzegovina, Lithuania and Romania (1996), Georgia and Greece (1997), and Bulgaria (1998).

48. From the remaining member States the Former Yugoslav Republic of Macedonia, which as early as in 1992 had provided for a possibility to perform non-armed military service, introduced a genuine alternative civilian service in 2001. Russia and Albania, which in 1993 and 1998 respectively had constitutionally recognised the right to conscientious objection, fully implemented it through laws in 2004 and 2003 respectively. Azerbaijan constitutionally recognised the right to conscientious objection in 1995 but no implementing laws have yet been introduced. Conscientious objectors are not recognised in Turkey.

49. In most of the member States where conscientious objection was or is recognised and fully implemented, conscientious objector status could or can be claimed on the basis not only of religious beliefs but also of a relatively broad range of personal beliefs of a non-religious nature, the only exceptions being Romania and Ukraine, where the right to claim conscientious objector status is limited to religious grounds alone. In some member States the right to claim conscientious objector status only applied or applies during peacetime, as in Poland, Belgium and Finland, while in others, like Montenegro and the Slovak Republic, the right to claim such status by definition applies only in time of mobilisation or war. Finally, some member States, like Finland, allow certain categories of conscientious objectors to be exempted also from alternative service.

IV. RELEVANT INTERNATIONAL DOCUMENTS AND PRACTICE

A. European documents

1. The Council of Europe

(a) Armenia specific documents

Opinion No. 221 (2000) of the Parliamentary Assembly of the Council of Europe (PACE): Armenia's application for membership of the Council of Europe

50. On 28 June 2000 the PACE adopted its Opinion No. 221 on Armenia's application to join the Council of Europe. The PACE concluded its opinion by recommending the Committee of Ministers of the Council of Europe to invite Armenia to become a member, on the understanding that a

number of commitments would be fulfilled within stipulated time-limits. The relevant extract from the Opinion reads as follows:

> "13. The Parliamentary Assembly takes note of the letters from the President of Armenia, the speaker of the parliament, the Prime Minister and the chairmen of the political parties represented in the parliament, and notes that Armenia undertakes to honour the following commitments: ... to adopt, within three years of accession, a law on alternative service in compliance with European standards and, in the meantime, to pardon all conscientious objectors sentenced to prison terms or service in disciplinary battalions, allowing them instead to choose, when the law on alternative service has come into force, to perform non-armed military service or alternative civilian service."

(b) General documents

(i) The Parliamentary Assembly of the Council of Europe

51. The right to conscientious objection was first mentioned by the PACE as early as in 1967 in its Resolution 337 (1967), in which it laid down the following basic principles:

> "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."

52. Based on this Resolution, the PACE adopted Recommendation 478(1967), calling upon the Committee of Ministers to invite member States to bring their national legislation as closely as possible into line with the basic principles. The PACE further reiterated and developed the basic principles in its Recommendation 816(1977) and Recommendation 1518(2001). In the latter recommendation it stated that the right to conscientious objection was a "fundamental aspect of the right to freedom of thought, conscience and religion" enshrined in the Convention. It pointed out that only five member States had not yet recognised that right and recommended the Committee of Ministers to invite them to do so.

53. In 2006 the PACE adopted Recommendation 1742(2006) concerning human rights of members of the armed forces, calling upon the member States, *inter alia*, to introduce into their legislation the right to be registered as a conscientious objector at any time and the right of career servicemen to be granted such status.

(ii) The Committee of Ministers

54. In 1987 the Committee of Ministers adopted Recommendation no. R(87)8, recommending the member States to recognise the right to

conscientious objection and inviting the governments which had not yet done so to bring their national law and practice into line with the following basic principle:

> "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 ... [and] may be liable to perform alternative service ..."

55. In 2010 the Committee of Ministers adopted Recommendation CM/Rec(2010)4, recommending the member States to ensure that any limitations on the right to freedom of thought, conscience and religion of members of the armed forces comply with the requirements of Article 9 § 2 of the Convention, that conscripts have the right to be granted conscientious objector status and that an alternative service of a civilian nature be proposed to them. The Explanatory Memorandum to this Recommendation noted, in particular:

> "The right to conscientious objection has not to date been recognised by the Court as being covered by Article 9 of the Convention. However, the current trend in international fora is to consider it part and parcel of the freedom of conscience and religion."

2. The European Union

(a) The European Parliament

56. The principles developed by the Council of Europe bodies were echoed in the resolutions of the European Parliament of 7 February 1983, 13 October 1989, 11 March 1993 and 19 January 1994. The European Parliament similarly considered that the right to conscientious objection was inherent in the concept of freedom of thought, conscience and religion, as recognised in Article 9 of the Convention, and called upon the member States of the European Union to incorporate the right to conscientious objection as a fundamental right in their legal systems.

(b) The Charter of Fundamental Rights of the European Union

57. Article 10 of the Charter, which was proclaimed on 7 December 2000 and entered into force on 1 December 2009, provides:

> "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."

B. Other international documents and practice

1. The United Nations

(a) The United Nations Commission on Human Rights

58. In its Resolution 1987/46 the Commission on Human Rights appealed to the States to recognise the right to conscientious objection and to refrain from subjecting to imprisonment persons exercising that right. In its subsequent Resolution 1989/59 the Commission went one step further and itself recognised the right to conscientious objection as a legitimate exercise of the right to freedom of thought, conscience and religion as laid down in Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights (ICCPR). Further resolutions on the subject – Resolutions 1993/84, 1995/83 and 1998/77 – confirmed and expanded the existing principles. Subsequently, the Commission repeatedly called on States to review their laws and practice in the light of its resolutions. In Resolution 2004/35 it further encouraged States to consider granting amnesties and restitution of rights for those who had refused to undertake military service on grounds of conscientious objection.

(b) The ICCPR and the practice of the United Nations Human Rights Committee (UNHRC)

59. The relevant provisions of the ICCPR, which was adopted by the General Assembly of the United Nations in Resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976 and was ratified by Armenia on 23 June 1993, read as follows:

Article 8

"3. (a) No one shall be required to perform forced or compulsory labour; ...

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include: ...

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; ..."

Article 18

"1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching ..."

60. The UNHRC, the body that monitors implementation of the ICCPR, when examining individual complaints initially took a view that the ICCPR, and in particular its Article 18, did not provide for the right to conscientious objection, especially taking into account Article 8 § 3 (c) (ii). A complaint brought by a Finnish conscientious objector was declared inadmissible on that ground as incompatible with the provisions of the ICCPR (*L.T.K. v. Finland*, Communication no. 185/1984, U.N. Doc. CCPR/C/25/D/185/1984, 9 July 1985).

61. The first shift in the UNHRC's approach took place in its decision of 7 November 1991 in *J.P. v. Canada*, in which it accepted for the first time, albeit as an *obiter dictum*, that "article 18 of the [ICCPR] certainly [protected] the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures" (Communication no. 446/1991, U.N. Doc. CCPR/C/43/D/446/1991, 7 November 1991).

62. In 1993 the UNHRC adopted its General Comment no. 22 on Article 18, providing, *inter alia*, the following interpretation of that provision:

> "11. ... 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 ..."

63. A further development in the UNHRC's position occurred in its views adopted on 3 November 2006 in the cases of *Yeo-Bum Yoon v. Republic of Korea* and *Myung-Jin Choi v. Republic of Korea*, in which the UNHRC for the first time had to deal with complaints of two convicted Jehovah's Witnesses with respect to a country where the right to conscientious objection was not recognised. The UNHRC held as follows:

> "8.2 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 the 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.
>
> 8.3 ... The authors' conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief. 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."

64. The UNHRC went on to conclude that the interference with the applicants' rights guaranteed by Article 18 was not necessary and that there had been a violation of that provision (Communications nos. 1321/2004

and 1322/2004, U.N. Doc. CCPR/C/88/D/1321-1322/2004, 23 January 2007).

(c) The Working Group on Arbitrary Detention

65. The question of detention of conscientious objectors has also been addressed on several occasions under its individual petitions procedure by the Working Group on Arbitrary Detention which was established in 1991 by the United Nations Commission on Human Rights. Until recently the main concern of the Group was the repeated punishment and incarceration of conscientious objectors, which it found arbitrary on the ground that it violated the principle of *ne bis in idem* (see, for example, Opinion no. 36/1999 (Turkey) and Opinion no. 24/2003 (Israel)). In 2008 the Group went one step further and found a single instance in which a conscientious objector in Turkey had been prosecuted, convicted and deprived of his liberty to have been arbitrary (see Opinion no. 16/2008 (Turkey)).

2. Inter-American system of human rights protection

66. Articles 6 § 3 (b) and 12 of the American Convention on Human Rights are similar to Articles 4 § 3 (b) and 9 of the European Convention.

67. In 1997 and 1998 the Inter-American Commission on Human Rights issued recommendations inviting the member States whose legislation still did not exempt conscientious objectors from military or alternative service to review their legal regimes and make modifications consistent with the spirit of international human rights law through legislative amendments providing for exemptions from military service in cases of conscientious objection.

68. On 10 March 2005 the Inter-American Commission decided on the first individual petition concerning the right to conscientious objection. The Commission found that Article 12 was to be read in conjunction with Article 6 § 3 (b) and concluded that conscientious objection was protected under the American Convention only in countries where it was recognised. In doing so, the Inter-American Commission relied heavily on the case-law of the European Commission of Human Rights and the UNHRC as it existed prior to 2005 (see *Cristián Daniel Sahli Vera and Others v. Chile*, Case 12.219, Report no. 43/05, 10 March 2005, §§ 95-97). This approach was later confirmed by the Inter-American Commission in another case (see *Alfredo Díaz Bustos v. Bolivia*, Case 14/04, Report no. 97/05, 27 October 2005, § 19).

3. The Ibero-American Convention on Young People's Rights

69. On 10-11 October 2005 the Ibero-American Convention on Young People's Rights, which sets out a number of specific rights for individuals aged between 15 and 24 years, was adopted in the framework of the

Ibero-American Youth Organisation. Its Article 12, entitled "Right to conscientious objection", reads as follows:

> "1. Youth have the right to make conscientious objection towards obligatory military service.
>
> 2. The States Parties undertake to promote the pertinent legal measures to guarantee the exercise of this right and advance in the progressive elimination of obligatory military service."

4. The Organisation for Security and Cooperation in Europe (OSCE)

70. The OSCE also took up the question of conscientious objection in 1990. The participating States noted at the Human Dimension Conference that the United Nations Commission on Human Rights had recognised the right to conscientious objection and agreed to consider introducing various forms of alternative service in their legal systems. In 2004 the OSCE prepared Guidelines for Review of Legislation Pertaining to Religion or Belief in which it observed that, although there was no controlling international standard on this issue, the clear trend in most democratic States was to allow those with serious moral or religious objections to military service to perform alternative (non-military) service.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

71. The applicant complained that his conviction for refusal to serve in the army had violated Article 9 of the Convention which reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one'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."

A. The Chamber judgment

72. In its judgment of 27 October 2009 the Chamber first noted that the majority of Council of Europe member States had adopted laws providing

for alternative service for conscientious objectors. However, Article 9 had to be read in the light of Article 4 § 3 (b) of the Convention[1], which left the choice of recognising conscientious objectors to each Contracting Party. Thus, the fact that the majority of the Contracting Parties had recognised this right could not be relied upon to hold a Contracting Party which had not done so to be in violation of its Convention obligations. This factor could not therefore serve a useful purpose for the evolutive interpretation of the Convention. The Chamber found that, in such circumstances, Article 9 did not guarantee a right to refuse military service on conscientious grounds and was therefore inapplicable to the applicant's case. It concluded that, in view of the inapplicability of Article 9, the authorities could not be regarded as having acted in breach of their Convention obligations by convicting the applicant for his refusal to perform military service.

B. The parties' submissions

1. The applicant

(a) Applicability of Article 9

73. The applicant submitted that, by refusing to apply the "living instrument" doctrine, the Chamber had crystallised the interpretation made by the European Commission of Human Rights to the effect that Article 4 § 3 (b) limited the applicability of Article 9 to conscientious objectors without justification or explanation. However, Article 4 § 3 (b) could not be legitimately used to deny the right to conscientious objection under Article 9, especially in case of Armenia which had legally committed itself since 2000 to recognise conscientious objectors. Relying on the *Travaux préparatoires*, the applicant claimed that Article 4 § 3 (b) had never been meant to be read in conjunction with Article 9. Its sole purpose was to delimit the right guaranteed by Article 4 § 2 and it neither recognised nor excluded the right to conscientious objection. Article 4 § 3 (b) was not being applied to other provisions of the Convention and there was no reason for it to apply to Article 9 either. If Article 9 was never meant to apply to conscientious objectors, such a restriction could easily have been incorporated by the drafters of the Convention. Hence, by deciding to apply Article 9 to conscientious objectors the Court would not be deriving from the Convention a right which was not included therein at the outset.

[1] The relevant parts of Article 4 of the Convention provide: "2. No one shall be required to perform forced or compulsory labour. 3. For the purpose of this Article the term "forced or compulsory labour" shall not include: … (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service."

74. According to the applicant, present-day conditions supported the recognition of the right to conscientious objection under Article 9, taking into account the gradual recognition of this right in almost all the member States of the Council of Europe. This consensus was also reflected in the position of the organs of the Council of Europe and the European Union. Moreover, recognition of the right to conscientious objection had become one of the pre-conditions for new member States wishing to join the Council of Europe. Furthermore, the Chamber had failed to take into account the important developments concerning the issue before the United Nations organs, including the interpretation given by the UNHRC to the counterpart provisions of the ICCPR. There was a need to clarify the Court's position on this issue because it had always been the Commission, and not the Court, which had refused to apply Article 9 to conscientious objectors. Furthermore, the Chamber's reference to the Commission's position was neither appropriate, since it ran counter to the object and purpose of the Convention, nor accurate, since an evolution in favour of the recognition of the right to conscientious objection could be discerned even in the Commission's position. The applicant lastly claimed that the issue went beyond his case, since it had serious consequences affecting hundreds of young men in a similar situation in the Council of Europe and thousands of others throughout the world.

(b) Compliance with Article 9

75. The applicant submitted that his conviction had amounted to an interference with his right to manifest his religious beliefs. This interference was not prescribed by law because the Armenian authorities, by convicting him, had acted in violation of the legally binding commitment which they had undertaken when joining the Council of Europe, namely to pardon all conscientious objectors sentenced to prison terms. This international obligation had become an integral part of Armenia's domestic legal system and from then on all conscientious objectors who refused to perform military service could reasonably expect to be freed from that obligation and eventually be given the option of performing alternative civilian service. As a result, the domestic law was not sufficiently precise, since it was not harmonised with the legally binding international commitments of Armenia.

76. The applicant further submitted that the interference was not prescribed by law also because Armenia, having become party to the ICCPR in 1993, had failed to be faithful to its Article 18 and the subsequent case-law of the UNHRC as required by the Freedom of Conscience and Religious Organisations Act (see paragraph 44 above).

77. The applicant further argued that the interference was not necessary in a democratic society. First, the fact that he – a conscientious objector who was committed to living peacefully with his neighbours and who had a blank criminal record – was imprisoned and treated like a dangerous

criminal was totally unnecessary in a democratic society. In particular, he had been subjected to a harassing search process, had later been arrested and locked up in a cell without any bedding and with six others detained for various crimes, and had been subjected to insults and verbal abuse by the guards. Second, he had been subjected to wholly disproportionate punishment and treatment considering that he was simply exercising his fundamental right to freedom of thought, conscience and religion. Third, his imprisonment had not been necessary also because the Armenian authorities had pardoned other individuals in a similar situation. Lastly, the military protection of the country would not be disorganised and weakened if persons like him were not punished. In particular, Armenia had 125,000 active conscripts in 2007 and 551,000 potential ones, while only 41 Jehovah's Witnesses were imprisoned. Moreover, since 2002 only three individuals belonging to other religions had decided to become conscientious objectors. Such insignificant numbers could not have a negative impact on the military capacity of Armenia.

2. The Government

(a) Applicability of Article 9

78. The Government submitted that the rights guaranteed by the Convention and the Armenian Constitution, including the right to freedom of thought, conscience and religion, were to be applied to everyone equally and without discrimination. The applicant, an Armenian citizen, was obliged under the Constitution to perform compulsory military service regardless of his religious convictions and the fulfilment of such obligation could not be considered an interference with his rights. The law did not include such grounds for exemption from military service as being a Jehovah's Witness. Thus, exemption from compulsory military service on a ground not prescribed by law would have been in breach of the principle of equality and non-discrimination.

79. The Government agreed that the Convention was a "living instrument". However, the question of whether Article 9 of the Convention was applicable to the present case was to be considered from the point of view of the interpretation of the Convention existing at the material time. The applicant had been convicted in the years 2001-2002 and his conviction at that time had been in line with the approach of the international community and was considered to be lawful and justified under the Convention as interpreted by the Commission and the Court. In particular, the Commission had found in the cases of *Peters v. the Netherlands* (no. 22793/93, Commission decision of 30 November 1994, unreported) and *Heudens v. Belgium* (no. 24630/94, Commission decision of 22 May 1995, unreported), which were the latest decisions on the matter, that the right to freedom of thought, conscience and religion guaranteed by Article 9

did not concern exemption from compulsory military service on religious or political grounds. The Court had not even recognised the applicability of Article 9 in its more recent judgments, where it had not found it necessary to examine the issue (for example, in *Thlimmenos v. Greece* [GC], no. 34369/97, § 43, ECHR 2000-IV, and *Ülke v. Turkey* no. 39437/98, §§ 53-54, 24 January 2006). The Armenian authorities had therefore acted in compliance with the requirements of the Convention. Given the established case-law on this matter, they could not have foreseen the possibility of a new interpretation of Article 9 by the Court and consequently could not have made their actions comply with that possible "new approach".

80. The Government admitted that the majority of member States of the Council of Europe had adopted laws providing for various forms of alternative service for conscientious objectors. However, the provisions of Article 4 § 3 (b), which clearly left the choice of recognising conscientious objectors to each Contracting Party, could not be overlooked, and the fact that the majority of them had recognised this right could not be relied upon to hold a Contracting Party which had not done so to be in violation of its obligations under the Convention. In sum, Article 9 read in the light of Article 4 § 3 (b) did not guarantee a right to refuse military service on conscientious grounds and there had been no interference with the applicant's rights guaranteed by Article 9.

81. The Government further submitted that there were at present about sixty registered religious organisations in Armenia, including the Jehovah's Witnesses, nine branches of religious organisations and one agency. So if each of them insisted that military service was against their religious convictions, a situation would arise in which not only members of Jehovah's Witnesses but also those of other religious organisations would be able to refuse to perform their obligation to defend their home country. Furthermore, members of Jehovah's Witnesses or any other religious organisation might equally assert that, for instance, payment of taxes and duties was against their religious convictions and the State would be obliged not to convict them as this might be found to be in violation of Article 9. Such an approach was unacceptable in view of the fact that, in order to avoid the fulfilment of his or her obligations towards the State, a person could become a member of this or that religious organisation.

82. The Government lastly submitted that, as far as Armenia's obligations undertaken upon accession to the Council of Europe were concerned, on 17 December 2003 the Alternative Service Act was adopted. The authorities had thereby accepted the possibility of exemption from military service on religious grounds, while conscientious objectors were provided with an alternative means of performing their constitutional obligation. Thus, at present conscientious objectors were being convicted only if they also refused to perform the alternative service. As regards the

obligation to pardon all conscientious objectors sentenced to prison terms, the Government insisted that the authorities had complied with it by exempting the applicant from serving the imposed sentence. In particular, after having being sentenced to two years and six months' imprisonment, the applicant had been released six months after the decision of the Court of Cassation.

(b) Compliance with Article 9

83. The Government submitted that, even assuming that there had been an interference with the applicant's rights guaranteed by Article 9, this interference was justified. First, the interference was prescribed by law. In particular, the obligation of every Armenian citizen aged between 18 and 27, who had been found to be physically fit, to serve in the Armenian army, regardless of his religious convictions, was prescribed by Article 47 of the Constitution and Sections 3 and 11 of the Military Liability Act. Furthermore, Article 75 of the Criminal Code prescribed a penalty for draft evasion. These legal provisions were both accessible and sufficiently precise. Moreover, the right to conscientious objection was not recognised under the Armenian law at the material time.

84. Second, the interference had been necessary in a democratic society. It was one of the fundamental principles of any democratic society for all citizens, without discrimination on any grounds, to be entitled to all the rights and freedoms and to be subject to the obligations prescribed by the Constitution and laws. Thus, it would inevitably result in very serious consequences for public order if the authorities allowed the above-mentioned sixty-plus religious organisations to interpret and comply with the law in force at the material time as their respective religious beliefs provided. The most important task of the authorities in these circumstances was to ensure equal application of the law in respect of all Armenian citizens regardless of their religion, which should not be interpreted as an interference incompatible with the Convention.

3. Third-party interveners

(a) Joint observations of Amnesty International, Conscience and Peace Tax International, Friends World Committee for Consultation (Quakers), International Commission of Jurists, and War Resisters' International

85. The intervening organisations provided a general overview of the gradual recognition of the right to conscientious objection at international and regional levels. On the international level, they focused in particular on the developments in the jurisprudence of the UNHRC and its interpretation of the counterpart provisions of the ICCPR, notably its General Comment no. 22 and the case of *Yeo-Bum Yoon and Myung-Jin Choi* (see paragraphs 62-64 above). They further referred to the developments before

other United Nations bodies, such as the United Nations Commission on Human Rights and the Working Group on Arbitrary Detention (see paragraphs 58 and 65 above).

86. On the regional level, the intervening organisations referred in particular to the developments before the Council of Europe organs, notably their recommendations urging recognition and greater protection of the right to conscientious objection (see paragraphs 51-55 above). They also pointed out that the right to conscientious objection had been explicitly recognised by Article 10 of the Charter of Fundamental Rights of the European Union and by Article 12 of the Ibero-American Convention on Young People's Rights (see paragraphs 57 and 69 above). Lastly, in 2005 the Inter-American Commission on Human Rights, in approving a friendly settlement between an applicant and the Bolivian State, recognised the evolving nature of the right to conscientious objection and made an explicit reference to General Comment no. 22 of the UNHRC (see paragraph 68 above).

87. The intervening organisations further submitted that Article 9 § 2 of the Convention did not allow limitations on freedom to manifest one's religion or belief on the ground of national security. They underlined that in the case of *Yeo-Bum Yoon and Myung-Jin Choi*, cited above, the UNHRC, having found that there had been an interference with the applicants' rights guaranteed by Article 18 of the ICCPR, concluded that the interference was not necessary and that there had been a violation of that provision.

88. The intervening organisations argued that, given the near universal recognition of the right to conscientious objection by the member States of the Council of Europe and the above findings of the UNHRC, a State's failure to make any provision for conscientious objection to military service was an interference unjustifiable under Article 9 § 2. They lastly submitted, relying on the dissenting opinions in the cases of *Tsirlis and Kouloumpas v. Greece* (29 May 1997, *Reports of Judgments and Decisions* 1997-III) and *Thlimmenos*, cited above, that even the Commission's approach to the disputed matter had evolved over the years. All the above supported the protection of the right to conscientious objection under Article 9.

(b) The European Association of Jehovah's Christian Witnesses

89. The intervening organisation submitted that Jehovah's Witnesses were a known Christian denomination which involved devotion to high moral standards and included a refusal to take up arms against their fellow man. They would normally accept alternative national service provided it did not violate these core values, including through being administered by the military authorities or addressed to the furtherance of military activity or goals. Jehovah's Witnesses had historically suffered various forms of punishment because of their conscientious objection to military service, especially during wartime. However, post-war developments in many

European countries led to the gradual introduction of alternative civilian service and the eventual abolition of compulsory national service.

90. The intervening organisation further alleged that in Armenia there was no option of performing genuine alternative civilian service free from military control and supervision and young Jehovah's Witnesses continued to object to such service for conscientious reasons and to be imprisoned. There had been 273 persons convicted between 2002 and 2010 and at present 72 persons were serving sentences ranging from 24 to 36 months. Such persons also suffered other forms of harassment, such as refusal of a passport without which employment, opening a bank account or even marriage were impossible.

91. In conclusion, the intervening organisation called upon the Grand Chamber to apply the living instrument doctrine and to bring the case-law in line with present-day conditions. It argued that the imperatives of defence of member States were no longer applicable at the level prevailing at the time of earlier decisions on this matter and the need to make arrangements for national service could be met by member States without overriding the rights guaranteed by Article 9.

C. The Court's assessment

1. Applicability of Article 9

92. The Government contested the applicability of Article 9 to the applicant's case with reference to the Commission's case-law, while the applicant and the third-party interveners argued that this case-law was obsolete and requested that it be brought in line with present-day conditions.

(a) Recapitulation of the relevant case-law

93. The Court observes that the initial position of the European Commission of Human Rights was set out in the case of *Grandrath v. the Federal Republic of Germany* (no. 2299/64, Commission report of 12 December 1966, Yearbook, vol. 10, p. 626) which concerned a Jehovah's Witness who sought to be exempted not only from military but also from substitute civilian service. He alleged a violation of Article 9 of the Convention on the ground that the authorities had imposed on him a service which was contrary to his conscience and religion and had punished him for his refusal to perform such service. The Commission observed at the outset that, while Article 9 guaranteed the right to freedom of thought, conscience and religion in general, Article 4 of the Convention contained a provision which expressly dealt with the question of compulsory service exacted in the place of military service in the case of conscientious objectors. It concluded that, since Article 4 expressly recognised that civilian service

might be imposed on conscientious objectors as a substitute for military service, objections of conscience did not, under the Convention, entitle a person to exemption from such service. The Commission found it superfluous to examine any questions of interpretation of the term "freedom of conscience and religion" used in Article 9 and concluded that that provision considered separately had not been violated.

94. Similarly, in the case of *X. v. Austria* (no. 5591/72, Commission decision of 2 April 1973, Collection 43, p. 161) the Commission stated that, in interpreting Article 9 of the Convention, it had also taken into consideration the terms of Article 4 § 3 (b) of the Convention, which provided that forced or compulsory labour should not include "any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service exacted instead of compulsory military service". By including the words "in countries where they are recognised" in Article 4 § 3 (b), a choice was left to the High Contracting Parties whether or not to recognise conscientious objectors and, if they were so recognised, to provide some substitute service. The Commission, for this reason, found that Article 9, as qualified by Article 4 § 3 (b), did not impose on a state the obligation to recognise conscientious objectors and, consequently, to make special arrangements for the exercise of their right to freedom of conscience and religion as far as it affected their compulsory military service. It followed that these Articles did not prevent a State which had not recognised conscientious objectors from punishing those who refused to do military service.

95. This approach was subsequently confirmed by the Commission in the case of *X. v. the Federal Republic of Germany*, which concerned the applicant's conscientious objection to substitute civilian service (no. 7705/76, Commission decision 5 July 1977, Decisions and Reports (DR) 9, p. 196). In the case of *Conscientious objectors v. Denmark* (no. 7565/76, Commission decision 7 March 1977, DR 9, p. 117) the Commission reiterated that the right to conscientious objection was not included among the rights and freedoms guaranteed by the Convention. In the case of *A. v. Switzerland* (no. 10640/83, Commission decision of 9 May 1984, DR 38, p. 219) the Commission reaffirmed its position and added that neither the sentence passed on the applicant for refusing to perform military service nor the fact of its not being suspended could constitute a breach of Article 9.

96. The finding that the Convention as such did not guarantee a right to conscientious objection was upheld by the Commission on several subsequent occasions (see *N. v. Sweden*, no. 10410/83, Commission decision of 11 October 1984, DR 40, p. 203; see also, *mutatis mutandis*, *Autio v. Finland*, no. 17086/90, Commission decision of 6 December 1991, DR 72, p. 245; *Peters*, cited above; and *Heudens*, cited above). In these cases, nevertheless, the Commission was prepared to accept that,

notwithstanding the above principles, the facts fell within the ambit of Article 9 and the applicants' allegations of discrimination were therefore to be examined under Article 14 of the Convention.

97. In two cases the issue of conviction for conscientious objection was brought before the Court. However, in both cases the Court did not find it necessary to examine the question of applicability of Article 9 and decided to deal with the issue under other provisions of the Convention, namely Articles 14 and 3 (see *Thlimmenos*, cited above, §§ 43 and 53, and *Ülke*, cited above, §§ 53-54 and 63-64).

(b) Whether there is a need for a change of the case-law

98. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 56, ECHR 2007-IV, and *Micallef v. Malta* [GC], no. 17056/06, § 81, ECHR 2009-...). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

99. The Court notes that prior to this case it has never ruled on the question of the applicability of Article 9 to conscientious objectors, unlike the Commission, which refused to apply that Article to such persons. In doing so, the Commission drew a link between Article 9 and Article 4 § 3 (b) of the Convention, finding that the latter left the choice of recognising a right to conscientious objection to the Contracting Parties. Consequently, conscientious objectors were excluded from the scope of protection of Article 9, which could not be read as guaranteeing freedom from prosecution for refusal to serve in the army.

100. The Court, however, is not convinced that this interpretation of Article 4 § 3 (b) reflects the true purpose and meaning of this provision. It notes that Article 4 § 3 (b) excludes from the scope of "forced or compulsory labour" prohibited by Article 4 § 2 "any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service". The Court further notes in this respect the *Travaux préparatoires* on Article 4, whose paragraph 23 states: "In sub-paragraph [(b)], the clause relating to conscientious objectors was intended to indicate that any national service required of them by law would not fall within the scope of forced or compulsory labour. As the concept of conscientious objection was not recognised in many countries, the phrase 'in countries where conscientious

objection is recognised' was inserted". In the Court's opinion, the *Travaux préparatoires* confirm that the sole purpose of sub-paragraph (b) of Article 4 § 3 is to provide a further elucidation of the notion "forced or compulsory labour". In itself it neither recognises nor excludes a right to conscientious objection and should therefore not have a delimiting effect on the rights guaranteed by Article 9.

101. At the same time, the Court is mindful of the fact that the restrictive interpretation of Article 9 applied by the Commission was a reflection of the ideas prevailing at the material time. It considers, however, that many years have elapsed since the Commission first set out its reasoning excluding the right to conscientious objection from the scope of Article 9 in the cases of *Grandrath v. the Federal Republic of Germany* and *X. v. Austria*. Even though that reasoning was later confirmed by the Commission on several occasions, its last decision to that effect was adopted as long ago as 1995. In the meantime there have been important developments both in the domestic legal systems of Council of Europe member States and internationally.

102. The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Kress v. France* [GC], no. 39594/98, § 70, ECHR 2001-VI; and *Christine Goodwin*, cited above, § 75). Since it is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Stafford*, cited above, § 68, and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 104, ECHR 2009-...). Furthermore, in defining the meaning of terms and notions in the text of the Convention, the Court can and must take into account elements of international law other than the Convention and the interpretation of such elements by competent organs. The consensus emerging from specialised international instruments may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 85, 12 November 2008).

103. The Court notes that in the late 1980s and the 1990s there was an obvious trend among European countries, both existing Council of Europe member States and those which joined the organisation later, to recognise the right to conscientious objection (see paragraph 47 above). All in all, nineteen of those States which had not yet recognised the right to conscientious objection introduced such a right into their domestic legal systems around the time when the Commission took its last decisions on the matter. Hence, at the time when the alleged interference with the applicant's rights under Article 9 occurred, namely in 2002-2003, only four other member States, in addition to Armenia, did not provide for the possibility of

claiming conscientious objector status, although three of those had already incorporated that right into their Constitutions but had not yet introduced implementing laws (see paragraph 48 above). Thus, already at the material time there was nearly a consensus among all Council of Europe member States, the overwhelming majority of which had already recognised in their law and practice the right to conscientious objection.

104. Moreover, the Court notes that, subsequent to the facts of the present case, two more member States passed laws fully implementing the right to conscientious objection, thereby leaving Azerbaijan and Turkey as the only two member States not to have done so yet. Furthermore, the Court notes that Armenia itself also recognised that right after the applicant's release from prison and the introduction of the present application.

105. The Court would further point out the equally important developments concerning recognition of the right to conscientious objection in various international fora. The most notable is the interpretation by the UNHRC of the provisions of the ICCPR (Articles 8 and 18), which are similar to those of the Convention (Articles 4 and 9). Initially the UNHRC adopted the same approach as the European Commission, excluding the right of conscientious objection from the scope of Article 18 of the ICCPR. However, in 1993, in its General Comment No. 22, it modified its initial approach and considered that a right to conscientious objection could be derived from Article 18 of the ICCPR inasmuch as the obligation to use lethal force might seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. In 2006 the UNHRC explicitly refused to apply Article 8 of the ICCPR in two cases against South Korea concerning conscientious objectors and examined their complaints solely under Article 18 of the ICCPR, finding a violation of that provision on account of the applicants' conviction for refusal to serve in the army for reasons of conscience (see paragraphs 59-64 above).

106. In Europe, mention should be made of the proclamation in 2000 of the Charter of Fundamental Rights of the European Union, which entered into force in 2009. While the first paragraph of Article 10 of the Charter reproduces Article 9 § 1 of the Convention almost literally, its second paragraph explicitly states that "[t]he right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right" (see paragraph 57 above). Such explicit addition is no doubt deliberate (see, *mutatis mutandis*, *Christine Goodwin*, cited above, § 100, and *Scoppola*, cited above, § 105) and reflects the unanimous recognition of the right to conscientious objection by the member States of the European Union, as well as the weight attached to that right in modern European society.

107. Within the Council of Europe, both the PACE and the Committee of Ministers have also on several occasions called on the member States, which had not yet done so, to recognise the right to conscientious objection

(see paragraphs 51-55 above). Furthermore, recognition of the right to conscientious objection became a pre-condition for admission of new member States into the organisation (see, as an example, paragraph 50 above). In 2001 the PACE, having reiterated its calls made previously, stated specifically that the right to conscientious objection was a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the Convention (see paragraph 52 above). In 2010 the Committee of Ministers, relying on the developments in the UNHRC case-law and the provisions of the European Union Charter of Fundamental Rights, also confirmed such interpretation of the notion of freedom of conscience and religion as enshrined in Article 9 of the Convention and recommended that the member States ensure the right of conscripts to be granted conscientious objector status (see paragraph 55 above).

108. The Court therefore concludes that since the Commission's decision in *Grandrath v. the Federal Republic of Germany* and its follow-up decisions the domestic law of the overwhelming majority of Council of Europe member States, along with the relevant international instruments, has evolved to the effect that at the material time there was already a virtually general consensus on the question in Europe and beyond. In the light of these developments, it cannot be said that a shift in the interpretation of Article 9 in relation to events which occurred in 2002-2003 was not foreseeable. This is all the more the case considering that Armenia itself was a party to the ICCPR and had, moreover, pledged when joining the Council of Europe to introduce a law recognising the right to conscientious objection.

109. In the light of the foregoing and in line with the "living instrument" approach, the Court therefore takes the view that it is not possible to confirm the case-law established by the Commission, and that Article 9 should no longer be read in conjunction with Article 4 § 3 (b). Consequently, the applicant's complaint is to be assessed solely under Article 9.

110. In this respect, the Court notes that Article 9 does not explicitly refer to a right to conscientious objection. However, it considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 (see, *mutatis mutandis*, *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 36, Series A no. 48, and, by contrast, *Pretty v. the United Kingdom*, no. 2346/02, § 82, ECHR 2002-III). Whether and to what extent objection to military service falls within the ambit of that provision must be assessed in the light of the particular circumstances of the case.

111. The applicant in the present case is a member of Jehovah's Witnesses, a religious group whose beliefs include the conviction that service, even unarmed, within the military is to be opposed. The Court therefore has 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. In this sense, and contrary to the Government's claim (see paragraph 81 above), the applicant's situation must be distinguished from a situation that concerns an obligation which has no specific conscientious implications in itself, such as a general tax obligation (see *C. v. the United Kingdom*, no. 10358/83, Commission decision of 15 December 1983, DR 37, p. 142). Accordingly, Article 9 is applicable to the applicant's case.

2. Compliance with Article 9

(a) Whether there was an interference

112. The Court considers that the applicant's failure to report for military service was a manifestation of his religious beliefs. His conviction for draft evasion therefore amounted to an interference with his freedom to manifest his religion as guaranteed by Article 9 § 1. Such interference will be contrary to Article 9 unless it is "prescribed by law", pursues one or more of the legitimate aims set out in paragraph 2 and is "necessary in a democratic society" (see, among other authorities, *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I).

(b) Whether the interference was justified

(i) Prescribed by law

113. The Court reiterates its settled case-law that the expression "prescribed by law" requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct (see, among other authorities, *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 64, ECHR 2004-I).

114. The Court observes that the applicant's conviction was based on Article 75 of the then Criminal Code, which prescribed the penalty for draft evasion. It further observes that at the time of the applicant's conviction there was no law on alternative service and both the Armenian Constitution and the Military Liability Act required all male citizens aged between 18

and 27, unless found to be physically unfit, to perform military service. The Court considers that these provisions, which it is undisputed were accessible, were couched in sufficiently clear terms.

115. It is true that there would appear to be an inconsistency between the above domestic provisions and the commitment undertaken by the Armenian authorities when joining the Council of Europe to adopt a law on alternative service within three years of accession and, in the meantime, to pardon all conscientious objectors sentenced to prison terms, allowing them instead, when the law had come into force, to perform alternative civilian service (see paragraph 50 above). The Court, however, does not find it necessary to resolve the apparent conflict between the domestic law and Armenia's international commitment. Nor does it find it necessary, in the present context, to rule on the alleged failure of the authorities to comply with the provisions of the ICCPR (see paragraph 59 above).

116. Therefore, for the purposes of the present case and in view of its findings concerning the necessity of the interference (see paragraphs 124-128 below), the Court prefers to leave open the question of whether the interference was prescribed by law.

(ii) Legitimate aim

117. The Government referred to the need to protect public order and, implicitly, the rights of others. The Court, however, does not find the 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 (see paragraph 127 below). It, nevertheless, considers it unnecessary to determine conclusively whether the aims referred to by the Government were legitimate within the meaning of Article 9 § 2, since, even assuming that they were, the interference was in any event incompatible with that provision for the reasons set out below.

(iii) Necessary in a democratic society

118. The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A;

Buscarini and Others, cited above, § 34; and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 104, ECHR 2005-XI).

119. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 60, ECHR 2000-XI, and *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 114, ECHR 2001-XII).

120. The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. The State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (see *Manoussakis and Others v. Greece*, 26 September 1996, § 47, *Reports* 1996-IV, and *Hasan and Chaush*, cited above, § 78).

121. According to its settled case-law, the Court leaves to States party 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 (see *Manoussakis and Others*, cited above, § 44; *Metropolitan Church of Bessarabia and Others*, cited above, § 119; and *Leyla Şahin*, cited above, § 110).

122. 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 (see *Manoussakis and Others*, cited above, § 44, and *Metropolitan Church of Bessarabia and Others*, cited above, § 119). The Court may also have regard to any consensus and common values emerging from the practices of the States parties to the Convention (see, *mutatis mutandis*, *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports of Judgments and Decisions* 1997-II, and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-XIII).

123. The Court has already pointed out above 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 interference. In particular, it must

demonstrate that the interference corresponds to a "pressing social need" (see *Manoussakis and Others*, cited above, § 44; *Serif v. Greece*, no. 38178/97, § 49, ECHR 1999-IX; *Metropolitan Church of Bessarabia and Others*, cited above, § 119; *Agga v. Greece (no. 2)*, nos. 50776/99 and 52912/99, § 56, 17 October 2002; and *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, § 62, ECHR 2006-XI).

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

125. The Court admits that any system of compulsory military service imposes a heavy burden on citizens. It will be acceptable if it is shared in an equitable manner and if exemptions from this duty are based on solid and convincing grounds (see *Autio*, cited above). The Court has already found that the applicant had solid and convincing reasons justifying his exemption from military service (see paragraph 111 above). It further notes that the applicant never refused to comply with his civic obligations in general. On the contrary, he explicitly requested the authorities to provide him with the opportunity to perform alternative civilian service. Thus, the applicant was prepared, for convincing reasons, to share the societal burden equally with his compatriots engaged in compulsory military service by performing alternative service. In the absence of such an opportunity, the applicant had to serve a prison sentence instead.

126. The Court further reiterates that pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper

treatment of people from minorities and avoids any abuse of a dominant position (see *Leyla Şahin*, cited above, § 108). Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.

127. The Court would lastly point out that the applicant's prosecution and conviction happened at a time when the Armenian authorities had already officially pledged, upon accession to the Council of Europe, to introduce alternative service within a specific period (see paragraph 50 above). Furthermore, while the commitment not to convict conscientious objectors during that period was not explicitly stated in PACE Opinion no. 221, it can be said to have been implicit in the following phrase: "... in the meantime, to pardon all conscientious objectors sentenced to prison terms ... allowing them instead ..., when the law ... had come into force ... to perform ... alternative civilian service". Such undertakings on the part of the Armenian authorities were indicative of a recognition that freedom of conscience can be expressed through opposition to military service and that it was necessary to deal with the issue by introducing alternative measures rather than penalising conscientious objectors. Hence, the applicant's conviction for conscientious objection was in direct conflict with the official policy of reform and legislative changes being implemented in Armenia at the material time in pursuance of its international commitment and cannot be said, in such circumstances, to have been prompted by a pressing social need. This is even more so, taking into account that the law on alternative service was adopted less than a year after the applicant's final conviction. The fact that the applicant was later released on parole does not affect the situation. Nor did the adoption of the new law have any impact on the applicant's case.

128. For all the above reasons, the Court considers 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. Accordingly, there has been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

129. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

130. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

131. The Government submitted that the amount of non-pecuniary damage claimed was excessive. Furthermore, the applicant had failed to prove that he had actually suffered any non-pecuniary damage. In any event, the finding of a violation should constitute sufficient just satisfaction.

132. The Court considers that the applicant has undoubtedly suffered non-pecuniary damage as a result of his conviction and imprisonment for his refusal to serve in the army on conscientious grounds. Ruling on an equitable basis, it awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

133. The applicant claimed a total of EUR 17,500 for costs and expenses, including EUR 3,000 for the legal fees in the domestic proceedings, 11,500 for the legal fees in the proceedings before the Chamber and EUR 3,000 for the legal fees in the proceedings before the Grand Chamber, including the costs of attending the hearing. The applicant submitted invoices in respect of three lawyers, one domestic and two foreign, containing lump sum amounts payable for each portion of the work done up to and including the taking of a final decision on his case.

134. The Government submitted that the applicant could claim costs and expenses only in respect of his complaints under Article 9, as his complaints under other articles of the Convention had been declared inadmissible. In any event, his claim for costs and expenses was not duly documented and he had failed to demonstrate that those costs had been actually incurred. The invoices submitted by the applicant could not be regarded as proof of payment or an agreement between him and his lawyers to make such payments in the future. Furthermore, it was unacceptable to claim reimbursement of any upcoming costs, such as the costs of attending the hearing. Moreover, the lawyers' fees were inflated, exorbitant and unreasonable and the applicant had employed an excessive number of lawyers, which also resulted in some duplication of work. Lastly, the Government alleged that the two foreign lawyers were residents of Canada and did not therefore meet the relevant criteria to represent the applicant.

135. The Court reiterates that legal costs are only recoverable in so far as they relate to the violation found (see *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002). In the present case, the applicant's initial application to the Court included numerous other complaints under Article 5 §§ 1, 3 and 5, Article 6 and Article 14 of the Convention, which were declared inadmissible. Therefore the claim cannot be allowed in full

and a reduction must be applied. The Court does not, however, agree with the Government that the applicant's claims were not duly documented or that the fees claimed were inflated or unreasonable. Nor does it agree with the Government's submission concerning the two foreign lawyers, as they were both granted leave to represent the applicant before the Court. Making its own estimate based on the information available, the Court awards the applicant EUR 10,000 for costs and expenses.

C. Default interest

136. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that there has been a violation of Article 9 of the Convention;

2. *Holds*, by sixteen votes to one,
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Armenian drams at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 July 2011.

Vincent Berger Jurisconsult	Jean-Paul Costa President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion of Judge Gyulumyan is annexed to this judgment.

J.-P.C.
V.B.

DISSENTING OPINION OF JUDGE GYULUMYAN

To my regret, I am unable to agree with the majority of the Grand Chamber that there has been a violation of Article 9 of the Convention in the present case.

1. The applicant in this case was sentenced for refusing to perform military service on conscientious grounds as no law on alternative civilian service existed in Armenia at the material time. He was sentenced to **two and a half years** in prison and **was released on parole** on 22 July 2003 after having served **about ten and a half months** of his sentence. The Alternative Service Act was finally adopted on 17 December 2003, with effect from 1 July 2004.

2. In expressing my opinion, I do not need to emphasise the importance I attach to freedom of thought, conscience and religion and to the right to conscientious objection, but it is a matter of fact that the latter is not expressly provided for in the Convention.

The Convention and its Protocols do not guarantee, as such, any right to conscientious objection. Article 9 of the Convention does not give conscientious objectors the right to be exempted from military or substitute civilian service. Nor does it prevent a State from imposing sanctions on those who refuse such service.

The Court has reiterated on several occasions that Article 9 does not protect every act motivated or inspired by a religion or belief (see, among many other authorities, *Kalaç v. Turkey*, 1 July 1997, § 27, Reports *of Judgments and Decisions* 1997 IV; *Arrowsmith v. the United Kingdom*, no. 7050/75, Commission's report of 12 October 1978, Decisions and Reports (DR) 19, p. 5; *C. v. the United Kingdom*, no. 10358/83, Commission decision of 15 December 1983, DR 37, p. 142; *Tepeli and Others v. Turkey* (dec.), no. 31876/96, 11 September 2001; and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 105, ECHR 2005 XI).

In its Recommendations 1518(2001) and 1742(2006), the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers **incorporate the right of conscientious objection into the Convention by means of an additional protocol** – a proposal which was not accepted by the Committee of Ministers. Like the Parliamentary Assembly, the European Parliament considered that the right to conscientious objection was inherent in the concept of freedom of thought, conscience and religion and also called **for the incorporation** of that right into the Convention.

I think that the role of this Court is to protect human rights which already exist in the Convention, not to create new rights. One can argue that the evolutive approach to the Convention permits the Court to broaden the rights protected. However, this in my view is not permitted when the

Convention itself leaves the recognition of particular rights to the discretion of the Contracting Parties.

Article 4 § 3 (b) "clearly left the choice of recognising conscientious objectors to each Contracting Party" (see *Bayatyan v. Armenia*, no. 23459/03, § 63, 27 October 2009). This provision excludes from the definition of forced labour "any service of a military character or, in cases of conscientious objectors, **in countries where they are recognised**, service exacted instead of compulsory military service".

3. I am fundamentally in disagreement with the majority's conclusion that Article 9 should no longer be read in conjunction with Article 4 § 3 (b). This goes against the Court's standing approach that the Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Klass and Others v. Germany*, 6 September 1978, § 68, Series A no. 28; and also *Maaouia v. France* [GC], no. 39652/98, § 36, ECHR 2000 X; *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000 XI; and *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005 X).

4. It was only in its most recent recommendation of 2010 that the Committee of Ministers of the Council of Europe considered the right to conscientious objection as an integral part of the freedom of conscience and religion under Article 9, in the light of developments in the international arena.

The European Union Charter of Fundamental Rights, adopted in December 2000, which recognises the right to conscientious objection under the right to freedom of thought, conscience and religion, entered into force only in December 2009.

Not until 2006 did the United Nations Human Rights Committee explicitly refuse to apply Article 8 of the International Covenant on Civil and Political Rights (ICCPR) in two cases against South Korea concerning conscientious objectors, examining their complaints solely under Article 18 of the ICCPR and finding a violation of that provision on account of the applicants' conviction for refusal to serve in the army for reasons of conscience.

I would like to stress also that at the time when the applicant was convicted for refusing to serve in the armed forces because of his religious beliefs, there was an explicit case-law according to which the Convention and its Protocols do not guarantee, as such, any right to conscientious objection. The National Authorities cannot be blamed for following the existing case-law and not implementing an approach reflecting developments which only came about at a later date.

5. As to the recognition of alternative service for conscientious objectors under the international commitments Armenia took on in 2000, upon joining the Council of Europe, in my view, it could not be considered as legally

binding at the time. Armenia committed itself to recognise that right and to pardon all convicted conscientious objectors **not immediately but within three years of accession**. Armenia had complied with its commitments within three years of accession as promised. In that period The Alternative Service Act was adopted, 38 conscientious objectors were pardoned and the applicant himself was released on parole. It is clear, therefore, that this judgment was not necessary to make sure that Armenia would do what it promised to do.

6. If Article 9 is not applicable, it evidently cannot have been breached. That is why I voted against the finding of a violation. I doubt very much that the finding of a violation of Article 9 of the Convention delivered individual justice to the applicant. One may wonder if he can be considered to have been a victim at the time when he applied to this Court. Admittedly, he had been deprived of his liberty; however, he did not complain about that deprivation as such, but rather about the lack of any possibility for conscientious objectors to do alternative service. On the day the present application was lodged, the applicant was released on parole, and six months later the Alternative Service Act was adopted.

In several cases (see *Sisojeva and Others v. Latvia* [GC], no. 60654/00, ECHR 2007 II; *Shevanova v. Latvia* (striking out) [GC], no. 58822/00, 7 December 2007; and *El Majjaoui and Stichting Touba Moskee v. the Netherlands* (striking out) [GC], no. 25525/03, 20 December 2007) the Court found that the matter giving rise to the applicants' complaints could therefore now be considered "resolved" within the meaning of Article 37 § 1 (b), and struck the applications out of its list of cases. In those cases the Court reasoned that "after all, the Convention does not lay down for the Contracting States any given manner for ensuring within their internal law the effective implementation of the Convention. The choice as to the most appropriate means of achieving this is in principle a matter for the domestic authorities, who are in continuous contact with the vital forces of their countries and are better placed to assess the possibilities and resources afforded by their respective domestic legal systems (see *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, § 50, Series A no. 20; *Chapman v. the United Kingdom* [GC], no. 27238/95, § 91, ECHR 2001 I; and *Sisojeva and Others*, cited above, § 90).

8. Lastly, I beg to differ from the judgment of the Court on just satisfaction under Article 41 of the Convention. I consider the sums awarded in respect of non-pecuniary damage and in respect of costs and expenses to be excessive.

First, in my view it is not fair to give compensation to an applicant, as was done in the present case, when the Court departs from its existing case-law.

Secondly, there can be no doubt that the consistency of the Court's case-law in awarding just satisfaction is also of particular importance, and

compensation also has a bearing on foreseeability for a Government. Recently, the Court dealt with an identical issue in *Ülke v. Turkey* (no. 39437/98, 24 January 2006), on account of the anguish caused by nine criminal prosecutions that had all resulted in convictions of imprisonment, and the risk of being arrested again at any time; the award for non-pecuniary damage was the same as in the present case.

Lastly, it has been a long-standing practice of the Court to reduce awards for costs and expenses according to the number of violations found. In the present case, the applicant's initial application to the Court included numerous other complaints under Article 5 §§ 1, 3 and 5, Article 6 and Article 14 of the Convention, which were declared inadmissible. The Court does not properly take into consideration that only one of the six complaints was declared admissible and only one violation was found, although it reiterates in § 135 of judgment that legal costs are only recoverable in so far as they relate to the violation found.