Strasbourg, 18 March 2025 **CDL-AD(2025)006**

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

AMICUS CURIAE BRIEF

ON

ALTERNATIVE (NON-MILITARY) SERVICE

Adopted by the Venice Commission
at its 142nd Plenary Session
(Venice, 14-15 March 2025)

On the basis of comments by

Mr Nicos ALIVIZATOS (Member, Greece)
Ms Regina KIENER (Member, Switzerland)
Mr Tuomas OJANEN (Member, Finland)
Mr Andreas PAULUS (Substitute Member, Germany)

Table of Contents

I. Introduction

1. By letter of 4 December 2024, the Acting Chairman of the Constitutional Court of Ukraine requested an *amicus curiae* brief of the Venice Commission on the matter of alternative (non-military) service.

2. The request pertains to a constitutional complaint currently considered by the Constitutional Court of Ukraine concerning the conformity of Article 1.1 of the Law of Ukraine "On Alternative (Non-Military) Service" of 12 December 1991 No. 1975-XII, amended with the Constitution of Ukraine, which provides: "alternative service is a service that is introduced instead of regular military service and is aimed at fulfilling a duty to society".

3. More precisely, in relation to a case pending before it, the Court asked for the following questions:

> 1. Could the constitutional right to freedom of personal philosophy and religion be guaranteed in Ukraine in cases where the performance of military duty contradicts a person's religious convictions, in the content and scope required by European standards on the right to freedom of thought, conscience, and religion?
>
> 2. Do the aforementioned principles allow for constraints on the right to freedom of beliefs, conscience, and religion during mobilisation under martial law in circumstances when military service conflicts with religious beliefs? If so, what are the requirements for such limits, and to what extent are they enforced?
>
> 3. How does the restriction of the constitutional right to freedom of personal philosophy and religion, particularly the right to alternative (non-military) duty, which is permitted under martial law under Article 64.2 of the Ukrainian Constitution, align with the foregoing?
>
> 4. Based on the right to freedom of beliefs, conscience, and religion (the constitutional right to freedom of personal philosophy and religion), could the state (including Ukraine) have a positive obligation to ensure (and in what way) a right to conscientious objection to military service in case of conscription during a martial law mobilisation if performing military duty contradicts such convictions?
>
> 5. Does the definition of "alternative service" in Article 1.1 of the Law (as service that is introduced only as an alternative to regular military service to perform a duty to society), as well as the inability to substitute military service under conscription during mobilisation with alternative service under martial law, comply with European standards on the right to freedom of beliefs, conscience, and religion and the principle of the rule of law?

4. Mr Alivizatos, Ms Kiener, Mr Ojanen and Mr Paulus acted as rapporteurs for this opinion.

5. This *amicus curiae* brief was prepared in reliance on the English translation of the applicable legislation. The translation may not accurately reflect the original version on all points.

6. This *amicus curiae* brief was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission at its 142nd Plenary Session (Venice, 14-15 March 2025).

II. Background and scope of the *amicus curiae* brief

7. The request for an *amicus curiae* brief was made in the context of the full-scale war of aggression of the Russian Federation against Ukraine, which led to the application of martial law to the whole Ukrainian territory. The Venice Commission is conscious of the dramatic situation resulting from the occupation of an important part of the Ukrainian territory as well as of the

massive damage to infrastructure and the environment, involving war crimes and massive human rights violations. It recognises the right of Ukraine to self-defence.

8. The questions asked by the Constitutional Court to the Venice Commission have been raised in a constitutional complaint against an indictment for evading military service by a conscientious objector who is a longtime member of the Seventh-day Adventist Church, which is recognised as a religious organisation whose doctrine neither allows for the use of weapons nor for the mere integration in military non-armed service. The Court of Appeal and Court of Cassation ruled that Ukrainian law did not provide for the substitution of military service during mobilisation and the right to manifest one's religion or belief was not absolute but subject to the constitutional duty to defend the state's territorial integrity and sovereignty against foreign aggression.

9. According to the European Bureau for Conscientious objection,[1] objection to military service has ceased to be recognised in Ukraine since the full-scale aggression started on 24 February 2022. Under the current mobilisation, no applications for alternative service have been granted, policies of total compulsory military registration and conscription were intensified, and conscientious objection ruled out. The new legislation on mobilisation aims at coercing everyone to register under fear of sanctions, fines, warrants and forced transportation to military recruitment centres by police.

10. The relevant provisions of the Constitution of Ukraine are Articles 35 and 64. Article 35 (right to freedom of personal philosophy and religion) reads as follows:

> 1 Everyone has the right to freedom of personal philosophy and religion. This right includes the freedom to profess or not to profess any religion, to perform alone or collectively and without constraint religious rites and ceremonial rituals, and to conduct religious activity.
> 2 The exercise of this right may be restricted by law only in the interests of protecting public order, the health and morality of the population, or protecting the rights and freedoms of other persons.
> 3 The Church and religious organisations in Ukraine are separated from the State, and the school - from the Church. No religion shall be recognised by the State as mandatory.
> 4 No one shall be relieved of his or her duties before the State or refuse to perform the laws for reasons of religious beliefs. In the event that the performance of military duty is contrary to the religious beliefs of a citizen, the performance of this duty shall be replaced by alternative (non-military) service.

11. Article 64 (restriction of constitutional rights) reads as follows:

> 1 Constitutional human and citizens' rights and freedoms shall not be restricted, except in cases envisaged by the Constitution of Ukraine.
> 2 Under conditions of martial law or a state of emergency, specific restrictions on rights and freedoms may be established with the indication of the period of effectiveness of these restrictions. The rights and freedoms envisaged in Articles 24, 25, 2 7, 28, 29, 40, 47, 51, 52, 55, 56, 57, 58, 59, 60, 61, 62 and 63 of this Constitution shall not be restricted.

12. The Venice Commission will examine the matter submitted to it by the Constitutional Court of Ukraine and will answer the questions posed by it exclusively on the basis of European and other international standards. The interpretation and application of the Ukrainian Constitution falls

[1] https://ebco-beoc.org: "The European Bureau for Conscientious Objection (EBCO) was founded in 1979 as an umbrella organisation for national associations of conscientious objectors, with the aim of promoting collective campaigns for the release of the imprisoned conscientious objectors and lobbying the European governments and institutions for the full recognition of the right to conscientious objection to military service."

to the constitutional court. Moreover, taking a stance on the case before the Constitutional Court falls outside of the remit of the Venice Commission.[2]

13. The Venice Commission will not address each of the questions raised by the Constitutional Court of Ukraine separately and in detail since these questions partly relate to the assessment of the constitutionality of the Ukrainian legislation which is not the task of the Venice Commission. The Venice Commission will focus on the request of the Constitutional Court about the European standards related to the constitutional assessment of the constitutional complaints. The questions raised by the Constitutional Court can thus be reduced to two: 1) the state of international and European human rights law including comparative constitutional law regarding conscientious objection; 2) conscientious objection in the case of a situation of defensive war in which the very existence of the State is at stake.

14. The Opinion will first give an overview of the right to conscientious objection under international human rights law. As Ukraine is a party to both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), the focus is on the ECHR and the case law of the European Court of Human Rights (ECtHR), as well as the ICCPR, as seen in the light of the jurisprudence of the UN Human Rights Committee (HRC). The opinion will then analyse possible restrictions of and derogations to the right to conscientious objection, in particular in time of war, as well as alternative service as a consequence of the recognition of conscientious objection.

III. Analysis

1. Sources of the international standards applying to alternative (non-military) service/conscientious objection

a. The European Convention on Human Rights

15. Freedom of religion and belief is protected under *Article 9 ECHR.* The European Court of Human Rights (ECtHR) has dealt with the issue of conscientious objection to military service on several occasions but has not dealt with conscientious objection in the event of martial law, war or mobilisation.

16. The ECHR does not explicitly refer to a right to conscientious objection. During the Cold War the European Commission of Human Rights considered that Article 9 of the ECHR could not be construed as implying the right to conscientious objection. The Commission had interpreted Article 9 in conjunction with Article 4 prohibiting forced and compulsory labour, which makes an exception to this prohibition in its § 3 (b) for "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 only provision of the ECHR which refers explicitly to conscientious objectors. The Commission had interpreted Article 4 § 3 (b) ECHR[3] as including a recognition "that civilian service might be imposed on conscientious objectors as a substitute for military service".[4]

---

[2] See e.g. Venice Commission, CDL-AD(2021)037, Albania - *Amicus Curiae Brief* on the competence of the Constitutional Court regarding the validity of the local elections held on 30 June 2019, para .5.

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

[4] Cf. ECtHR, *Bayatyan v. Armenia* [GC], no. 23459/03, 7 July 2011, §§ 93ff, referring to European Commission of Human Rights, *Grandrath v. Germany*, no. 2299/64, Commission report of 12 Dec. 1966, Yearbook 10, p. 626, as well as *G.Z. v. Austria,* no. 5591/72, Commission decision of 2 April 1973, Collection 43, p. 161 and *X v. Germany*, no. 7705/76, Commission decision of 5 July 1977, Decisions and Reports (DR) 9, p. 201.

17. However, the ECtHR reversed this position of the European Commission of Human Rights on the question of the applicability of Article 9 to conscientious objection in the case of *Bayatyan v. Armenia* in 2011, when it ruled that the right to conscientious objection is guaranteed by Article 9 ECHR. The judgment in the case of *Bayatyan* is by a Grand Chamber of the ECtHR and should thus be seen as setting a precedent. After reviewing the relevant legislation in the overwhelming majority of member States, the Court reiterated its jurisprudence that the Convention is a "living instrument" and held that the sole purpose of the phrase "in countries where conscientious objection is recognised" of sub-paragraph (b) of Article 4 § 3 was a factual reference to alternative service wherever it existed, not a rule on whether such service was discretionary or mandatory under the Convention. The Court provided a further elucidation of the notion "forced or compulsory labour" and did not leave out conscientious objection of the scope of Article 9.[5] In addition, the Grand Chamber referred to the fact that at the time of the judgment, all States, including the respondent State, had recognised the right to conscientious objection in their domestic legal systems. The Court thus held:

> "Article 9 [of the European Convention on Human Rights] does not explicitly refer to a right to conscientious objection. However, [the European Court of Human Rights] 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 … 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."[6]

18. In addition, the ECtHR stated that, since "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 [...]; 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".[7] In particular, in a system that failed to allow "any conscious-based exceptions" to compulsory military service, penalising those who refuse to perform this obligation could not be considered a measure necessary in a democratic society. Moreover, the Court pointed out the fact that the State concerned had committed itself to adopt a law on alternative service – and adopted it less than one year after the applicant's final conviction. This was 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; the conviction for refusal to perform military service did not serve a pressing social need.[8]

19. In the Bayatyan case, the Court found it entirely credible that the applicant's beliefs, as member of the religious group Jehovah's Witnesses, included "the conviction that service, even unarmed, with the military is to be opposed." He 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". Thus, there was "no reason to doubt that his 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". His situation could not be compared to general obligations with "no specific conscientious implications in itself, such as a general tax obligation." Military service was thus an interference in his religious beliefs prohibiting such service.[9]

20. The Court left open the question of whether the government pursued a legitimate aim due to its pledge to the Council of Europe to introduce alternative civilian service. In any event, the

[5] *Bayatyan v. Armenia*, §§ 100, 104, 109.
[6] *Bayatyan v. Armenia*, § 110 (emphasis added).
[7] *Bayatyan v. Armenia*, § 123.
[8] *Bayatyan v. Armenia*, § 127.
[9] *Bayatyan v. Armenia*, §§ 111-112, 124.

prosecution of the applicant was not "necessary in a democratic society" as required for justifications of interferences in the freedom of religion by Article 9 § 2. The court emphasised, in particular, the benefits of religious pluralism.[10]

21. Since, at the time of the applicant's conviction, no alternative civilian service was provided for in Armenia, "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 the citizens an obligation which had potentially serious implications for conscientious objectors, while failing to allow any conscious 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 as a measure necessary in a democratic society. Still less can it be seen as necessary considering 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".[11]

22. The issue of conscientious objection to military service was addressed by the Court at several other occasions, making the principles defined in the *Bayatyan* case established case-law.[12] The guarantees of Article 9 apply not only to compulsory military service in the strict sense of the term, but also to recurring *service as a reservist*, following the main phase of compulsory service and constituting an extension of military duty.[13] The Court has also held that in cases of conscientious objections, fugitives from the draft could only be punished once and not in every instance of non-compliance with the draft.[14]

b. The International Covenant on Civil and Political Rights (ICCPR)

23. Like the ECHR, the Covenant does not explicitly refer to a right to conscientious objection. In its early jurisprudence, the Human Rights Council (HRC) took the view that Article 18 of the ICCPR, enshrining the right to freedom of thought, conscience and religion, cannot be construed as implying the right to conscientious objection.[15]

24. The HRC shifted its position in 1993 by its General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion) in which the Committee noted as follows as regards conscientious objection to military service:

> "11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws

[10] *Bayatyan v. Armenia*, §§ 117, 126.
[11] *Bayatyan v. Armenia*, § 124.
[12] See the factsheet of the European Court of Human Rights: Conscientious objection and the Guide on Article 9 of the European Convention on Human Rights, updated on 31 August 2024, pp. 33-34, and references, in particular *Adyan and Others v. Armenia*, no. 75604/11, 12 October 2017 , §§ 60, 63 f.; *Teliatnikov v. Lithuania*, no. 51914/19, 7 June 2022, §§ 91 ff.; *Kanatlı v. Türkiye*, no. 18382/15, 12 March 2024, §§ 24, 42; *Ülke v. Türkiye*, , no. 39437/98, 24 January 2006, §§ 59 ff.
[13] ECtHR *K Kanatlı v. Türkiye*, *op. cit.*, §§ 49-50, 66.
[14] ECtHR*, Adyan and Others v. Armenia*, *op.cit.*, §§ 67 f.
[15] See e.g. HRC, *L.T.K. v. Finland*, Communication no. 185/1984, decision 9 July 1985, para. 5.2: "The Human Rights Committee observes in this connection that, according to the author's own account he was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service. The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as implying that right. The author does not claim that there were any procedural defects in the judicial proceedings against him, which themselves could have constituted a violation of any of the provisions of the Covenant, or that he was sentenced contrary to law."

> exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. 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. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service."

25. In its later jurisprudence, starting by two Views on Communications involving the Republic of Korea,[16] the HRC has clearly stated that a right to conscientious objection is covered by Article 18 of the ICCPR. The HRC opined that the applicants'[17] conviction and sentence because of their refusal of compulsory military service amounted to a restriction on their ability to manifest their religion or belief.[18] The Republic of Korea had argued with its national security, especially with its "specific security circumstances facing a hostile Democratic People's Republic of Korea (DPRK)" and also the "equality of the performance of military service duty",[19] but to no avail.[20] According to the HRC, the State party had failed to show what special disadvantage would follow, if the rights of the authors were fully respected in light of alternatives to compulsory military service involving both social goods and equivalent burdens on the applicants.[21]

26. Subsequently, the HRC has regularly recalled its General Comment No. 22 on the right of conscientious objection to military service in the following terms:

> "The Committee recalls its general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, in which it considers that the fundamental character of the freedoms enshrined in article 18, paragraph 1, of the Covenant is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4, paragraph 2, of the Covenant. The Committee recalls its prior jurisprudence that, although the Covenant does not explicitly refer to a right of conscientious objection, such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience.[22] The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if such service cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion. A State may, if it wishes, compel the objector to

[16] Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communications Nos. 1321/2004 and 1322/2004, *Yeo-Bum Yoon & Myung-Jin Choi*, Communications Nos. 1321/2004, 1322/2004, adopted on 3 Nov. 2006, in: HRC, 88th session 2006, UN Doc. CCPR/C/88/D/1321-1322/2004, 23 Jan. 2007.
[17] The HRC speaks of "authors" of the communications.
[18] Id., para. 8.3.
[19] Id., para 4.3-4.6.
[20] Of the two dissents, one wanted to go further than the Committee with regard to the consequences, whereas only one dissenter disagreed on the violation, id., pp. 12 et seq. The dissenter, Prof. Ruth Wedgwood, argued that Article 18 does not suggest that a person motivated by religious belief has a protected right to withdraw from the otherwise legitimate requirements of a shared society. For example, citizens cannot refrain from paying taxes, even where they have conscientious objections to state activities.
[21] Id., at 8.4.
[22] See, *inter alia*, *Yeo-Bum Yoon and Myung-Jin Choi* v. *The Republic of Korea*, *op. cit.*, para. 8.3; and 1786/2008; *Jong-nam Kim et al.* v. *The Republic of Korea*, Views adopted on 25 October 2012, para. 7.3; and communications no. 1642-1741/2007, *Min-kyu Jeong et al* v. *The Republic of Korea*, Views adopted on 24 March 2011, para. 7.3; see also communication no. 2179/2012*, Young-kwan Kim et al. v. The Republic of Korea*, Views adopted on 15 October 2014, para. 7.3.

undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights.[23] The Committee notes that the State party disagrees with this position on the grounds that the claim of conscientious objection could be extended in order to justify acts such as refusal to pay taxes or refusal of mandatory education. However, the Committee considers that military service, unlike schooling and payment of taxes, implicates individuals in a self-evident level of complicity with a risk of depriving others of life."[24]

c. Other sources

27. The Committee of Ministers in its *Recommendation No. R (87)8* regarding conscientious objection to compulsory military service holds as basic principle that anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service, on the conditions set out hereafter. Such persons may be liable to perform alternative service.

28. The recognition of this right later has become a *requirement for states seeking accession to the Council of Europe*.[25]

29. As to the members of the European Union, Article 10 § 2 of the EU Charter of Fundamental Rights[26] regards conscientious objection as part of the freedom of thought, conscience and religion (Article 10 § 1). According to Article 52 § 3 of the EU Charter of Fundamental Rights, insofar as the rights in the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, are the same as those laid down by the ECHR.

2. Scope of the right to conscientious objection

30. Both international and European human rights law require the introduction of an alternative service instead of regular military service. Such service must be entirely separate from the military to allow conscientious objectors to serve if they reject any service within the military including service not involving the use of armed force.[27] The scope of the right to conscientious objection remains however to be defined.

31. The ECtHR accepts that the Contracting States have a certain *margin of appreciation* in defining the circumstances in which they recognise the right to conscientious objection and in establishing mechanisms for examining a request for conscientious objection. According to the Court, it is therefore legitimate that the national authorities conduct a prior examination of a request for recognition of conscientious objector status.[28]

32. There is no precise established *definition* of conscientious objection. The ECtHR and the United Nations Human Rights Committee consider that conscientious objection is based on the right to freedom of thought, conscience and religion where it clashes with the compulsory use of force at the cost of human lives. By applying Article 9 of the Convention, the Court has limited conscientious objection to "*religious or other convictions comprising, in particular, a firm,*

[23] See *Min-kyu Jeong et al* v. *The Republic of Korea* , para. 7.3; and *Jong-nam Kim et al*.v. *Republic of Korea*, *op.cit*, para. 7.4.
[24] See communication no. 1853-1854/2008, *Cenk Atasoy and Arda Sarkut v. Türkiye*, Views adopted on 29 March 2012, Appendix, Section II.
[25] Venice Commission, Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, CDL-AD(2012)022, §§ 45-47.
[26] "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right." Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391 (397).
[27] ECtHR, *Adyan and Others v. Armenia*, no. 75604/11, 12 October 2017, § 69.
[28] ECtHR, *Enver Aydemir v. Türkiye*, no. 26012/117, 7 June 2016, § 81.

permanent and sincere objection to any involvement in war or the bearing of arms."[29] If the objection to performing compulsory military service is founded on personal convictions that are *not motivated by religious or other beliefs* which are in serious and insurmountable conflict with the obligation to perform military service under any circumstances, the request doesn't fall within the scope of Article 9 of the Convention, and the Court will declare the complaint inadmissible as being incompatible with the Convention in accordance with Article 35 § 3.[30] In this respect, States may require some level of substantiation of genuine belief and, if that substantiation is not forthcoming, to reach a negative conclusion.

33. Most of the case-law refers to Jehovah's witnesses, a religious group whose beliefs include opposition to military service, irrespective of any requirement to carry weapons.[31] the Court also dealt with (and found violations of) Article 9 in several cases of *pacifists* who mentioned no religious beliefs. In those cases, the Court concentrated on the State's positive obligations, finding a violation because of the lack of an effective and accessible procedure whereby the applicants might have ascertained whether they could claim conscientious objector status.[32]

3. Possible restrictions to the right to conscientious objection

a. Under the European Convention on Human Rights

34. In general, refusal of a special exemption bestowed upon a person or group of persons due to their religious beliefs or convictions constitutes an *interference* with their freedom to manifest one's religion or beliefs. Such interference is only permissible under the Convention if the requirements or Article 9 (2) are fulfilled. Article 9 (2) ECHR reads as follows:

> "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."

35. Accordingly, the conditions under which the restriction can be imposed on the right to conscientious objection to military service are as follows: (i) the conditions under which the restriction is imposed must be prescribed clearly by law, in legislation or regulations which must be accessible to the individual concerned, and protect that individual from arbitrariness through, *inter alia*, precision and foreseeability; (ii) the objective must be legitimate and correspond to a pressing social need listed in Article 9, paragraph 2, of the ECHR; and (iii) the means chosen must be proportionate to the end pursued so that they can be considered necessary in a democratic society. The three conditions listed above are cumulative, each having an autonomous function.

36. How precisely the fulfilment of these conditions should be assessed in the context of conscientious objection is a matter of contextual, case-by-case determination as the ECtHR has held that the answer to the question whether and to what extent objection to military service falls within the scope of Article 9 will depend on the specific circumstances of each case.[33]

---

[29] ECtHR, *Enver Aydemir v. Türkiye*, §§ 81 and 47.
[30] See for instance ECtHR, *Enver Aydemir v. Türkiye,* §§ 79-84.
[31] See for instance the cases of *Bayatyan v. Armenia* [GC], no. 23459/03, 7 July 2011; *Erçep v. Türkiye*, no. 43965/04, 22 November 2011; *Adyan and Others v. Armenia*, no. 75604/11, 12 October 2017; *Avanesyan v. Armenia*, no. 12999/15, 20 July 2021, and *Teliatnikov v. Lithuania*, no. 51914/19, 7 June 2022.
[32] ECtHR *Savda v. Türkiye*, no. 42730/05, 12 June 2012; ECtHR *Tarhan v. Türkiye*, no. 9078/06, 17 July 2012, and ECtHR *Kanatlı v. Türkiye*, no. 18382/15, 12 March 2024, § 67. On access to an effective and accessible procedure, see also ECtHR, *Papavasilakis v. Greece*, no. 66899/14, 15 September 2016, §§ 51-52.
[33] *Bayatyan v. Armenia* [GC], *op. cit.*, §§ 92-111; Enver Aydemir v. Türkiye, *op.cit.*, § 75.

37. *First*, the interfering measure must be *based on a domestic law* 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.[34] Whether the Ukrainian Law No. 1975 is entirely in accordance with these standards is not obvious. While Article 1.1 defines alternative service as "a service that is introduced instead of regular military service", it does say that mobilisation or defence against aggression do not fall under "regular" military service. Article 1.2 allows for certain restrictions in the event of martial law or a state of emergency – without specification – whereas Article 2 appears to be unconditional in the case of explicitly listed religious beliefs.

38. *Second*, the enumeration of *legitimate aims* in Article 9 (2) is strictly *exhaustive* and the definition of the aims is necessarily *restrictive*; if a limitation of this freedom is to be compatible with the Convention it must, in particular, pursue an aim that is strictly tailored to one of those listed in this provision and justifying such restrictions.[35] It is implicit in Article 9 § 2 of the Convention that any interference must correspond to a *"pressing social need";* consequently, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable".[36]

39. It is noticeable that Article 9 (2) – other than Articles 8 (2), 10 (2) and 11 (2) of the Convention and Article 2 (3) of Protocol No. 4 – does not include *"national security"* among the legitimate aims. The rationale for this deliberate omission is seen in the fact that it "reflects the primordial importance of religious pluralism … and the fact that a State cannot dictate what a person believes or take coercive steps to make him change beliefs".[37] Thus, the State cannot use the need to protect national security as the sole basis for restricting the exercise of the right of a person or a group of persons to manifest their religion.

40. However, *in time of war*, the defence of the nation and the lives of its people against the continuing aggression of another state should be regarded as a response to the legitimate interest in public safety vis-à-vis the invading forces and in the service of the rights and freedoms of the civilians of the victim state.

41. The recognition that the exercise of self-defence when the very existence of a State is at stake may require special considerations was acknowledged by the Advisory Opinion of the International Court of Justice (ICJ) in the Nuclear Weapons case. In this case, the Court could not reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in such extreme circumstances. The Court stated: "[T]he Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."[38]

42. *Third,* the restriction to the rights under Article 9 should be strictly limited to what is demonstrably necessary for the fulfilment of the legitimate aim or aims pursued and proportionate to these aims. This requires that the legitimate aim or aims pursued cannot be achieved by any less intrusive or radical means.[39] It needs to be emphasised that according to the ECtHR, the

[34] ECtHR, *Bayatyan v. Armenia*, *op.cit.*, § 113 with references.
[35] ECtHR, *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, 14 June 2007, §§ 132 and 137; ECtHR [GC], *S.A.S. v. France*, no. 43835/11, 1 July 2014, § 113; ECtHR, *Executief van de Moslims van België and Others v. Belgium*, no. 16760/22 and 10 others 2024, 13 February 2024, § 91.
[36] ECtHR, *Svyato-Mykhaylivska Parafiya v. Ukraine*, *op. cit.*, § 116.
[37] ECtHR, *Nolan and K v. Russia*, no. 2512/04, 12 February 2009, § 73.
[38] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* ICJ Reports 1996, p. 226, para. 97; see also p. 266 para. 105 (2) E. However, it has to be noted that this non-binding opinion was highly controversial, with the passage in question garnering only 7:7 votes, with the deciding vote of President Bedjaoui.
[39] ECtHR [GC], *Advisory Opinion as to whether an individual may be denied authorisation to work as a security guard or officer on account of being close to or belonging to a religious movement*, no. P16-2023-001, 14 December 2023, § 114.

freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention.[40] The imposition of compulsory military service constitutes a heavy burden for the objecting individual. Without appropriate alternatives such an obligation "would fail to strike a fair balance between the interests of society as a whole and those of the individual."[41] When assessing whether or not an interference is proportionate the Court grants the States Parties to the Convention a certain *margin of appreciation* in evaluating the existence and extent of the need for that interference, notably with a view to the subsidiary role of the Convention mechanism. In the already quoted *Bayatyan* case concerning the case of a conscientious objector, the ECtHR's Grand Chamber acknowledged that:

> "the national authorities are, in principle, better placed than an international court to evaluate local needs and conditions and, as a result, in matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight, particularly where such matters concern relations between the State and religious denominations. As regards Article 9 of the Convention, in principle, the State should be granted a wide margin of appreciation in deciding whether and to what extent a restriction on the right to manifest one's religion or beliefs is "necessary". Nevertheless, in determining the extent of the margin of appreciation in a given case, the Court must also take account of both the specific issue at stake in that case and the general issue covered by Article 9, namely the need to preserve genuine religious pluralism, which is vital for the survival of any democratic society. Major importance should be attached to the necessity of the interference where it must be determined, as required by Article 9 § 1, whether the interference meets an "overriding social need" and is "proportionate to the legitimate aim pursued". Clearly, this margin of appreciation goes hand in hand with European supervision embracing both the law and the decisions applying it, even where they are issued by an independent domestic court. In this connection the Court may also, if appropriate, have regard to any consensus and common values emerging from the practices of the States Parties to the Convention."[42]

43. According to the ECtHR, the extent of the margin of appreciation left to the States varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be *narrower* where the right at stake is crucial to the individual's effective enjoyment of key rights. Accordingly, where a particularly important facet of an individual's existence or identity is at stake, the margin of appreciation accorded to a State will be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be *wider*. There will also usually be a wide margin if the State is required to *strike a balance between competing private and public interests or different Convention rights*.[43] In this respect, opposing public interests which are protected by the constitution are of particular importance.[44]

44. Since almost all member States of the Council of Europe have introduced non-military alternatives to compulsory service, 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".[45]

---

[40] ECtHR, *Adyan and others v. Armenia*, *op. cit.,* §§ 63-65; *Bayatyan v. Armenia*, *op. cit.*, §118; ECtHR, *Teliatnikov v. Lithuania*, Judgment of 7 June 2022 (Application no. 51914/19)), § 95.
[41] *Bayatyan v. Armenia*, §§ 124 f.; see also ECtHR, *Teliatnikov v. Lithuania*, no. 51914/19, 7 June 2022, § 99.
[42] ECtHR [GC], *Bayatyan v. Armenia*, *op. cit.*, §§ 121-122.
[43] ECtHR, *Tonchev and Others v. Bulgaria*, no. 56862/15, 13 December 2022, § 49.
[44] ECtHR (GC), *Leila Sahin c. Türkiye*, no. 44774/98, 10 November 2005, §§ 29, 113-114.
[45] ECtHR, *Bayatyan v. Armenia*, no. 23459/03, 7 July 2011, § 123 with references.

45. The question arises whether there is such a pressing social need that an exception to the admission of conscientious objection is necessary *in cases of mobilisation and self-defence against foreign aggression*.

46. *Objection to the use of lethal force is effective in wartime, not in peacetime.* That is why conscientious objection first appeared as a reaction to war.[46] The definition of conscientious objection by the ECtHR expressly includes "*a firm, permanent and sincere objection to any involvement in war*".[47]

47. According to the review in the *Bayatyan* judgement, in some member States, the right to claim conscientious objector status only applies during peacetime, while in others the right to claim such status by definition applies only in time of mobilisation or war.[48] The Court itself did thus not regard the scope of conscientious objection to be decisive. By not introducing any distinctions, the Court seems to have adopted a broad view on the eventual scope of conscientious objection.[49] *The Venice Commission therefore considers that the very nature of conscientious objection to military service implies that it cannot be completely excluded in time of war*, *albeit the margin of appreciation of the state is wider,* especially in the event of a mobilisation.

48. There is however no doubt that a situation of mobilisation or conscription to fight against a foreign aggressor is a special situation of threat in which a state community can expect special sacrifices from its citizens. Vice versa, the citizens must accept restrictions of their individual rights and freedoms that would be unacceptable in times of peace.[50] This is exactly the situation in which Ukraine finds itself today. However, this does not mean that other rights, such as the

---

[46] For example, since 1660, the Religious Society of Friends (Quakers) has opposed all wars, including WW1 and WW2. In the United Kingdom, France, Germany and even Russia, instead of serving in the army, Quakers provided humanitarian relief for civilians affected by the war, including by building houses to meet the urgent needs of those in the war zone. In 1916-1917, for instance, the Quakers built 1300 houses in the city of Verdun and the surrounding area, they ran hospitals and provided dental, optical and maternity care. In Britain, they formed the *Friends Ambulance Unit* (FAU) as a civilian service, under the auspices of the British Red Cross. No surprise, therefore, that following the Military Service Act of 1916, which introduced conscription in Britain for the first time, the *Non-Combatant Corps* (NCC) was created within the British Army, composed of conscientious objectors, whose members fulfilled non-combatant duties. As held during the Quakers' London Yearly Meeting of 1916, war, in their view, involves the surrender of the Christian ideal and the denial of human brotherhood: "We regard the central conception of the [Military Service] Act as imperilling the liberty of the individual conscience, which is the main hope of human progress": see Quakers and WW I, https://www.quaker.org.uk/faith/our-history/ww1#heading-.

[47] ECtHR, *Enver Aydemir v. Türkiye*, § 81; see also § 47.

[48] ECtHR, *Bayatyan v. Armenia*, *op. cit.*, § 49.

[49] The ECtHR has ruled that a mere reference to the "necessity of defending the territorial integrity of the State" does not in itself constitute grounds capable of justifying the absence of an appropriate alternative service. See *Mushfig Mammadov and Others v. Azerbaijan*, 14604/08 and 3 others, 7 October 2019, § 97. At national level, the German Federal Administrative Court has decided that conscientious objection is also applicable to a career soldier in case of conscientious objection to a military operation abroad not involving an emergency at home, see BVerwG, Judgment of 21 June 2005 - BVerwG 2 WD 12.04 - ECLI:DE:BVerwG:2005:210605U2WD12.04.0, p. 46.

[50] In its much debated judgment on the Aviation Security Act, the German Federal Constitutional Court has discussed 'a solidarity-based obligation' to sacrifice one's life 'in the interest of society as a whole' in cases involving 'the defence against attacks targeting the abolition of society and the destruction of the free and legal state order': BVerfG, Judgment of the First Senate of 15 February, 2006 - 1 BvR 357/05 -, ECLI:DE:BVerfG:2006:rs20060215.1bvr035705, para. 135, https://www.bverfg.de/e/rs20060215_1bvr035705en (12 Jan 2025). According to a recent decision by the Federal Supreme Court, the right to conscientious objection under the German Grundgesetz does not belong to the core rights preventing an extradition of conscientious objectors to Ukraine during wartime, see BGH, Decision of 16 January 2025 – 4 Ars 11/24, paras 47-51, https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=8195&Seite=6&nr=140583&anz=1200&pos=192 (6 March 2025, in German). However, the decision was severely criticised, see Kathrin Groh, Kriegsdienstverweigerung im Kriegsfall verboten, https://verfassungsblog.de/kriegsdienstverweigerung-kriegsfall-bundesgerichtshof/ (6 March 2025), and is based on a somewhat dubious reading of the ECtHR and HRC case law, cf. BGH, paras. 45-46, as well as the relevant precedent by the Federal Constitutional Court, see BVerfGE 69, 1 (54 f.): Even in a situation of self-defense or political tension, a conscientious objector is obliged to serve only without weapons until his status as conscientious objector has been verified (1985).

right to conscientious objection to military service, which derives from freedom of religion, are nullified.

49. Necessity and proportionality must be denied if the state can achieve the aim by less intrusive means. The question to be answered, therefore, is whether the protection of the nation in time of war is an objective that might not be pursued in the same way if non-military service on the grounds of conscientious objection were permitted. In any event, the burden of proof is on the national authorities to show that the availability of the alternative service in situations of mobilisation and self-defence against foreign aggression would hamper the defence effort, for example by encouraging draft evasion..

50. On the one hand, it is certainly arguable that total objection to even non-armed military service would provide a pretext for not fulfilling citizens' duty to contribute to the defence of their fellow citizens against aggression. On the other hand, non-military service, for example by providing aid to distressed citizens or by helping endangered citizens to evacuate from war zones, is not necessarily less dangerous than military service. Additionally, to assess whether refusal of alternative service in situations of mobilisation and self-defence against foreign aggression is necessary and proportionate, it may be important to consider if the government has granted any other exemptions from military duty, as well as the scope of such exemptions.

51. The assertion that military service even in times of war may still encompasses activities that do not require the use of weapons and therefore entail no substantial interference with Article 9 ECHR disregards the incorporation of the individual into a military structure. Placing the individual under military command is contrary to the beliefs of some conscientious objectors.

52. In the recent case of *Teliatnikov v. Lithuania* before the ECtHR,[51] the applicant had never refused to comply with his civic obligations in general but had explicitly requested that the authorities give him the opportunity to perform alternative civilian service. He was prepared to share the social burden of alternative civilian service on an equal footing with his compatriots in military service.

53. In such a situation, the burden is on the State to demonstrate that an alternative service would be incompatible with the duty of the "Defence of the Motherland" (Article 65 of the Ukrainian Constitution). In practice, such defence does not depend on the use of military weapons by every citizen, nor on their inclusion in the military command system, especially if no general mobilisation has been declared. Thus, at least *prima facie,* conscientious objection and the fulfilment of the duties of solidarity towards one's co-citizens are not necessarily incompatible.

54. The Venice Commission is of the opinion that the *essence* of the right to conscientious objection to military service is that under no circumstances may a conscientious objector be obliged to bear or use arms, even in self-defence.[52] In addition, the necessity of the exclusion of an alternative service in the event of mobilisation or defensive war must be demonstrated by the government.

d. Under the ICCPR

55. Until the early 2010s, the HRC tended to regard the right to conscientious objection to military service as an instance of the manifestation of belief in practice, which is subject to

[51] ECtHR, *Teliatnikov v. Lithuania*, 7 June 2022, no. 51914/19, § 102, referring, *mutatis mutandis*, to *Bayatyan v. Armenia*, *op. cit*, § 125.
[52] This is also the view of the German Federal Constitutional Court, see Judgment of 24 April 1985, https://www.servat.unibe.ch/dfr/bv069001.html, paras. 119, 126. (= BVerfGE 69, 1 [54 f., 57]).

limitation under paragraph 3 of Article 18.[53] According to Article 18(3) of the ICCPR, "[f]reedom to manifest one's religion or beliefs "may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". Thus, the right to freedom to manifest one's religion or beliefs is not absolute but can be restricted in the manner set out in Article 18(3) of the ICCPR. The implication of relying on Article 18(3) by the HRC was that circumstances could be envisaged in which the community interests contemplated by the provision could override the individual's conscientious objection to military service.[54]

56. However, it needs to be emphasised that the position by the HRC significantly changed in 2011 when the HRC took the view in the case of *Jeong et al.* v. *Republic of Korea* that the right to conscientious objection to military service is part of the protected right to freedom to have or to adopt a religion or belief under Article 18, paragraph 1, of the ICCPR.[55] Despite the objections of Separate Opinions and some State parties, the HRC has continued to adhere in its majority to this approach in its more recent jurisprudence, *i.e*. that the right to conscientious objection to military service implies the non-derogable right to freedom of thought, conscience and religion under paragraph 1 of Article 18 of the ICCPR only, to the exclusion of paragraph 3.[56] It could even be considered as part of the absolute aspect of the right to freedom of thought, conscience and religion, and thus not allow for any restriction. Additionally, the HRC has criticised State parties that recognise conscientious objection only in peacetime.[57]

57. The HRC's current approach to the right to conscientious objection could be interpreted to mean that States Parties may not restrict the right to conscientious objection to compulsory military service on the grounds of security or for any other reason under Article 18 paragraph 3 of the ICCPR. As a result, there could be no limitation or possible justification under the ICCPR for compelling a person to perform military service, or at least to bear arms, even in self-defence of the country.[58]

---

[53] See communications No. 1321-1322/2004, *Yeo-Bum Yoon and Myung-Jin Choi* v. *The Republic of Korea*, Views adopted by the Committee on 3 November 2006; and No. 1593-1603/2007, *Eu-min Jung et al* v. *the Republic of Korea*, Views adopted by the Committee on 23 March 2010.

[54] This seems to be clear from para. 8.4 of the HRC's Views on communications Nos. 1321-1322/2004,*Yoon and Choi v. the Republic of Korea*. In his dissenting opinion, Mr Solari-Yrigoyen found it inappropriate to deal with the issue under article 18, paragraph 3; according to him, the HRC should have considered it exclusively under article 18, paragraph 1 of the ICCPR.

[55] See *Jeong et al.* v. *Republic of Korea* (communication No. 1642-1741/2007), communications No. 1642-1741/2007, *Min-kyu Jeong et al* v. *The Republic of Korea*, Views adopted on 24 March 2011. In that case, the HRC decided that that the authors' refusal to be drafted for compulsory military service derives from their religious beliefs which, it is uncontested, were genuinely held and that the authors' subsequent conviction and sentence amounted to an infringement of their freedom of conscience, in breach of article 18, paragraph 1 of the Covenant. Repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibit the use of arms, is incompatible with article 18, para. 1 of the Covenant. Thus, the HRC concluded that the facts before the Committee reveal, in respect of each author, violations by the Republic of Korea of article 18, paragraph 1 of the Covenant. See paragraphs 7.3 and 7.4.

[56] For jurisprudence reaffirming that has been established since 2011 in *Jeong et al.* v. *Republic of Korea, see e.g. Atasoy and Sarkut* v. *Turkey* (communication No. 1853- 1854/2008) and in *Jong-nam Kim et al.* v. *Republic of Korea* (communication No. 1786/2008), both of which were decided in 2012. See also *Young-kwan Kim et al*. (communication No. 2179/2012, adopted 15 October 2014).

[57] See Concluding observations of the HRC on Finland, CCPR/CO/82/FIN, 2 December 2004, paragraph 14. Finland subsequently reformed its legislation on non-military service and the current Non-Military Service Act (1446/2007), which entered into force in 2008, allows for applications for non-military service also during mobilisations and serious disturbances.

[58] For the character of the views of the HRC, see also General Comment No 33 (2008), The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33, especially paragraphs 11-15.

4. Derogations to the right to conscientious objection

58. Article 15 of the European Convention on Human Rights allows contracting states to derogate from certain rights guaranteed by the Convention in a time of war or other public emergency threatening the life of the nation. Article 15 ECHR does not exclude Article 9 ECHR, which enshrines the freedom of thought, religion, and conscience, from derogation.

59. It must be emphasised that the fact that Article 9 of the ECHR is not listed in Article 15 of the ECHR as non-derogable does not mean that derogations to the right to freedom of thought, religion, and conscience under Article 9 of the ECHR can lead to the complete abolition of this right, whatever the circumstances, including war or other emergencies. Rather, a State may take measures derogating from its obligations under the Convention *only to the extent strictly required by the exigencies of the situation*, even where a threat to the life of the nation exists within the meaning of Article 15. This requires that a State provides careful justification not only for its decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. In other words, even when derogating from Article 15 ECHR, the Ukrainian authorities are obliged to prove that an applicant's refusal to serve in the army in time of war, despite his willingness to provide his services under the existing alternative civilian service, causes such a disproportionate damage to the nation's effort to defend itself, that it cannot be counterbalanced by the duties he will be called upon to perform as a civilian under the organised alternative civilian service.[59]

60. In 2022, Ukraine notified the Council of Europe of derogations to several articles of the European Convention on Human Rights resulting from the Russian aggression and the ongoing state of war in the country; the derogation initially covered Articles 4, 8, 9, 10, 11, 13, 14, 15 and 16. As of 4 April 2024 the scope of the derogations has been significantly reduced; *the derogations no longer cover* Article 4 § 3 (related to forced or compulsory labour), *Article 9* (freedom of thought, conscience or religion), Article 13 (right to an effective remedy), Article 14 (prohibition of discrimination) and Article 16 (restrictions on political activity of aliens) of the Convention.[60]

61. Moreover, the right to freedom of thought, religion, and conscience is derogable under Article 15 of the ECHR, *but non-derogable under Article 4 of the ICCPR.* The difference between the derogation clauses of the ECHR and the ICCPR is diminished, at least to some extent, by the fact that Article 15 ECHR provides that measures derogating from the ECHR may be taken only to the extent that "such measures are not inconsistent with [the State's] other obligations under international law". Since Ukraine is a party to both the ICCPR and the ECHR, the derogations under Article 15 of the ECHR should be consistent with those under Article 4 of the ICCPR.

62. At any rate, since the derogation of Ukraine to Article 9 ECHR has been lifted (see above), the question does not arise in the case currently pending before the Ukrainian Constitutional Court.

5. Alternative service as a consequence of the recognition of conscientious objection

63. The right to conscientious objection to military service does not prevent citizens from being compelled to provide an alternative service. The Venice Commission will now shortly examine

[59] According to the Venice Commission, CDL-AD(2020)014, Report on Respect for democracy, human rights and the rule of law during states of emergency: Reflections, "Emergency measures should respect certain general principles which aim to minimize the damage to fundamental rights, democracy and rule of law. The measures are thus subject to the triple, general conditions of necessity, proportionality and temporariness" (para. 7). Accordingly, "even in a state of public emergency the fundamental principle of the rule of law must prevail." (para. 9).
[60] Notification of partial withdrawal of derogation, 4 April 2024, https://rm.coe.int/0900001680af4532

the positive obligations arising for states in this field, in particular regarding the nature of this service.

64. According to the Court's case law, States have the positive obligation to set up a *system of alternative service* which strikes a fair balance between the interests of society as a whole and those of conscientious objectors.[61] Failure to do so amounts to an infringement of Article 9 of the Convention: a State which has not introduced a system of alternative service "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'".[62] The Court found a violation of Article 9 ECHR in a case where the criminal prosecution and conviction of the applicants on account of their refusal to perform military service had stemmed from the fact that there was no alternative service system under which they could benefit from conscientious objector status, the scope of which was limited to members of the clergy performing ecclesiastical duties and students in religious schools.[63]

65. According to the HRC, a State "may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights."[64]

66. The system of alternative service must be *sufficiently separated from the military system* as concerns authority, control or applicable rules, as concerns appearances, and as concerns length of the programme in relation to that of military service.[65] Along these lines, the *Venice Commission* stated that "any form of control over alternative service should be of civilian nature and in order to alleviate any ambiguity, the amendment should explicitly state that the military have no supervisory role in the day-to-day operational supervision of those who perform alternative service. In addition, the authorities should make sure that any byelaw, other regulation or practical application measure is fully in line with the principle of civilian control over alternative service."[66] Nevertheless, in addition to civilian service, the state may also provide for unarmed military service, assigning to it only those conscientious objectors whose objections are restricted to the personal use of arms.

67. Moreover, the law must *not discriminate against particular religious groups or philosophical beliefs* in granting access to alternative service. It must establish *fair and transparent mechanisms* to assess applications for alternative service.

68. The CoE Committee of Ministers, in its *Recommendation No. R (87)8* regarding conscientious objection to compulsory military service, set out the basic principles of the alternative service. In particular, it shall be civilian and in the public interest but may also be rendered in the form of unarmed military service, it shall not be of a punitive nature and remain within reasonable time limits (paragraphs 9 and 10).

[61] See for instance ECtHR, *Teliatnikov v. Lithuania*, no. 51914/19, 7 June 2022 or ECtHR, *Kanatlı v. Türkiye*, no. 18382/15, 12 March 2024.
[62] ECtHR [GC], *Bayatyan v. Armenia*, *op. cit.*, § 123.
[63] ECtHR, *Mushfig Mammadov and Others v. Azerbaijan*, 17 October 2019, § 96.
[64] See, for example, *Jeong et al v. the Republic of Korea*, para. 7.3. See also *Atasoy and Sarkut v. Turkey*, para. 10.4.
[65] See for instance ECtHR, *Adyan and Others v. Armenia*, 12 October 2017 or ECtHR, *Teliatnikov v. Lithuania,* 7 June 2022.
[66] Venice Commission, CDL-AD(2011)051, Opinion on amendments and additions to the Law on alternative service of Armenia, § 38.

IV. Conclusion

69. By letter of 4 December 2024, the Acting Chairman of the Constitutional Court of Ukraine requested an *amicus curiae* brief of the Venice Commission on the matter of alternative (non-military) service.

70. The questions asked can be reduced to two: 1) the state of international and European human rights law including comparative constitutional law regarding conscientious objection; 2) conscientious objection in the case of a situation of defensive war.

71. The *international standards on conscientious objection* can be summarised as follows:

- Article 9 ECHR and Article 18 ICCPR, relating to freedom of thought, conscience and religion, guarantee the right to conscientious objection;
- Conscientious objection is based on religious or other convictions comprising, in particular, a firm, permanent and sincere objection to any involvement in war or the bearing of arms; States may require some level of substantiation of genuine belief;
- Under the ECHR, restrictions on the right to conscientious objection must be clearly provided for by law, pursue a legitimate aim, and be strictly limited to what is demonstrably necessary for the fulfilment of the legitimate aim pursued, and proportionate to this aim;
- Under the ECHR – but not under the ICCPR – derogations to the right to conscientious objection are possible, but only to the extent strictly required by the exigencies of the situation;
- Under the ECHR as well as under the ICCPR, States have the positive obligation to set up a system of alternative service which must be separated from the military system, shall not be of a punitive nature and remain within reasonable time limits. Access to alternative service must be non-discriminatory and submitted to fair and transparent mechanisms.

72. The Venice Commission considers that *the very nature of conscientious objection implies that it cannot be fully excluded in time of war, albeit States have a limited margin of appreciation, especially in case of a general mobilisation*. However, it appears to the Venice Commission that under no circumstances may a conscientious objector to military service be obliged to bear or use arms, even in self-defence of the country.

73. The Venice Commission remains at the disposal of the Constitutional Court of Ukraine for further assistance in this matter.