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COMMENTARY: The European Court of Human Rights - Out of step on conscientious objection

By Derek Brett , Conscience and Peace Tax International

The European Court of Human Rights in Strasbourg (ECtHR) has recently made a very dangerous judgement for freedom of religion or belief in the Bayatyan v. Armenia case which puts it out of step with the international standards on conscientious objection to military service and with the Council of Europe's own human rights agenda, notes Derek Brett of Conscience and Peace Tax International <http://www.cpti.ws> in a commentary for Forum 18 News Service <http://www.forum18.org>. The Court, apparently unaware of the recent parallel jurisprudence under the International Covenant on Civil and Political Rights, found no violation of the freedom of thought, conscience and religion in the imprisonment of a Jehovah's Witness for his refusal on grounds of conscientious objection to perform military service, or the subsequent increase in the sentence, which had been partly justified by his reasons for refusal. Brett argues that it is vital that the Grand Chamber of the ECtHR agrees to hear the appeal in the Bayatyan case, as it alone can overturn the precedent which this will otherwise set for future ECtHR cases.

Two recent Chamber judgements from the European Court of Human Rights in Strasbourg (ECtHR) have caused considerable disquiet to defenders of freedom of religion or belief; those in the cases of Lautsi v. Italy and Bayatyan v. Armenia. Of the two, the 3 November 2009 Lautsi verdict (Application no. 30814/06) has attracted the most attention. By seeming to invent a right not to be offended by other people's religious symbols, it has been seen by some commentators to pose a serious threat to the linked rights of freedom of expression and freedom of religion or belief, in a way parallel to the long-running debate about so-called "defamation of religions", because all non-religious and religious beliefs, and their symbols, may cause offence to some people.

However the present commentary focuses on the even more dangerous verdict delivered a week earlier, on 27 October 2009, in Bayatyan v. Armenia (Application no. 23459/03) <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=856725&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. a verdict which, as Judge Ann Power observed in a dissenting opinion, is "not just incompatible with current European standards on the question of conscientious objection but (...) parts company with the Court itself in terms of the overall direction of the jurisprudence as discernible in the case law".

ECtHR parts company with international standards

In the Bayatyan verdict, the ECtHR claimed that the imprisonment of a Jehovah's Witness for refusal on grounds of conscience to perform military service did not constitute an unlawful interference with his right to freedom of thought, conscience and religion. In this it "parts company" not just with the European consensus but also with the global international standards on this issue, and, unless it is swiftly overturned by the Grand Chamber, sets a most unfortunate precedent.

In coming to its conclusion, the Chamber on the Bayatyan case chose to be guided, not by Article 9 of the European Convention on Human Rights and Fundamental Freedoms ("freedom of thought, conscience and religion"), but by the wording of a sub-paragraph of Article 4, which deals with forced labour. Overlooking clear evidence that the Armenian appeal court had increased Bayatyan's sentence precisely because of his conscientious objection and religious convictions, the Chamber read this wording out of context in order to address the issue of whether a state might choose not to acknowledge the right of conscientious objection to military service - even though the case arose only after Armenia had conceded such recognition in its accession commitments to the Council of Europe. In its decision, the Chamber felt itself bound by early admissibility decisions of the former Commission, despite a clear lead from the Grand Chamber of the Court that these deserved reconsideration. Worst of all, it deliberated in apparent ignorance of the fact that any possible relevance of forced labour provisions had now been definitively laid to rest in the jurisprudence on the International Covenant on Civil and Political Rights (ICCPR).

Article 4.3 of the European Convention states "For the purpose of this article the term 'forced or compulsory labour' shall not include (...) b) 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[...]." The purpose of this stipulation is clear: to ensure that arrangements excusing conscientious objectors from obligatory military service on condition that they perform alternative non-military service, are not outlawed as forced labour. In 1950, when the European Convention was drafted, the concept of conscientious objection was not as

widely known as it is today, hence the words "in countries where they are recognised".

The spurious argument that the almost identical Article 8.3(c)(ii) of the ICCPR – read in complete isolation even from the rest of the sentence – was primarily intended to make freedom of conscience contingent on national military recruitment legislation was dismissed by the Human Rights Committee in a decision under the ICCPR on the linked cases of Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi v. Republic of Korea (CCPR/C/88/D/1321-1322/2004 of 23 January 2007). In its "View" on these cases the Committee stated categorically that: "Article 8 of the Covenant [the ICCPR] itself neither recognises 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". Article 18 of the ICCPR is, it should be noted, almost identical in wording to Article 9 of the European Convention.

The Committee went on to conclude that conscientious objection to military service is "a protected form of manifestation of religious belief under article 18, paragraph 1." This means that "the conviction and sentence [of conscientious objectors] amounts to a restriction on their ability to manifest their religion or belief". Also, that even where "under the laws of the State party there is no procedure for recognition of conscientious objections against military service", not only must the State demonstrate that "in the [individual] case the restriction in question is necessary, within the meaning of article 18, paragraph 3, of the Covenant." but "such restriction must not impair the very essence of the right in question".

However the Chamber did not note this source in the "relevant international documents" it identified in making the Bayatyan decision. These were only:

1. an opinion from 2000 by the Council of Europe Parliamentary Assembly (PACE) on Armenia's application for membership;
2. a PACE resolution from 2001 on conscientious objection; and
3. Article 10 of the Charter of Fundamental Rights of the European Union (EU)

The third of these is completely irrelevant to Armenia, which is neither an EU member nor a candidate country. Armenia is however a member of the United Nations, has ratified the ICCPR, and is a participating State in the Organisation for Security and Co-operation in Europe (OSCE). The list should therefore at a minimum have included (as well as Recommendation R(87)8, of the Committee of Ministers of the Council of Europe which encouraged all members to recognise the right of conscientious objection to military service): the UN Human Rights Committee's General Comment 22 on Article 18 of the ICCPR, dealing with freedom of thought, conscience or religion, and their above-mentioned "View" in the Korean cases; Resolution 1998/77 of the UN Commission on Human Rights; the relevant politically binding human dimension commitments of the OSCE; and various Opinions of the UN Working Group on Arbitrary Detention – especially Opinions 8/2008 and 16/2008, concerning conscientious objectors in Colombia and Turkey. These Opinions, building on the decision in the Korean case, find that any imprisonment of a conscientious objector could constitute arbitrary detention because it resulted from the exercise of the freedom of thought, conscience and religion.

Direct applicability of Article 9

The Bayatyan case is the first in which the direct applicability of Article 9 ("freedom of thought, conscience and religion") to conscientious objection has been considered by the ECtHR itself. In the 2000 case of *Thlimmenos v. Greece* (Application no. 34369/97), the Grand Chamber of the ECtHR found a breach of Article 14 (discrimination) in conjunction with Article 9, because a convicted conscientious objector had not been distinguished from a common criminal. It however noted that the question arose of "whether, notwithstanding the wording of Article 4.3 (b), the imposition of (...) sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9.1". This implied that the jurisprudence of the Commission, all of which is much earlier, deserved to be reviewed. However, the Chamber sitting on the Bayatyan case seemed to consider that *Thlimmenos* and the 2006 decision in *Ülke v. Turkey* (Application no. 39437/98, see F18News 17 March 2010 http://www.forum18.org/Archive.php?article_id=1423), where repeated pressure on a conscientious objector to perform military service was found to constitute inhuman and degrading treatment, somehow confirmed the earlier jurisprudence. This was not so; in neither case did the freedom of conscience question need to be addressed in order to find a violation of the European Covenant.

Significantly, both cases were decided before the issue had been directly addressed in the Korean case under the ICCPR. Significantly, too, Judge Elisabet Fura (who had also sat on the Chamber which decided *Ülke*) indicated in a less than enthusiastic concurring opinion that she would have preferred in the Bayatyan case "to relinquish and allow the Grand Chamber to re-examine the issue /revisit the case-law/ and maybe to take a step further and to state that to sentence someone who refuses to do military service on grounds of conscience would be in violation of Article 9."

Disturbing features of case

A very disturbing feature of the case is that Bayatyan's sentence had been increased by the Armenian Criminal and Military Court of Appeal on an appeal by the Prosecutor. He based this appeal on the grounds that Bayatyan "did not accept his guilt, explaining that he refused [military] service having studied the Bible, and as one of Jehovah's Witnesses his faith did not permit him to serve in the

armed forces". The Armenian Appeal Court had agreed that as he not only did "not accept his guilt, nor did he repent of having committed the crime (and) taking into account the nature, motives and degree of social danger of the crime, (..) a harsher and adequate punishment must be imposed."

In an admissibility decision of December 2006, which was even more shocking than the final outcome, the European Court had noted that an offer had been made to Bayatyan during this appeal hearing that all charges would be dropped if he abandoned his conscientious objection and agreed to perform military service, but found his claim that this was an attempt to coerce him to change his beliefs to be "manifestly ill-founded"

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=812314&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. The effect of the deal offered is comparable to the repeated trials of conscientious objectors in Turkey and Israel. The UN Working Group on Arbitrary Detention found this in Opinions 36/1999 and 24/2003 to "be tantamount to compelling someone to change his/her mind for fear of being deprived of liberty".

The fact that the prosecution was for Bayatyan's motivation would appear to be in direct conflict with the freedom of thought and conscience and religion. General Comment 22 states that this "is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief" and "protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."

Dilatoriness in fulfilling commitment

Since a 1987 recommendation of the Council of Europe's Committee of Ministers, recognition of conscientious objection to military service has been Council of Europe policy, implemented by all the founder members with the glaring exception of Turkey. After 1989, such a commitment became a routine part of the accession criteria for new members, although Armenia and its neighbour Azerbaijan have been notable for their dilatoriness in fulfilling this commitment.

Armenia undertook to introduce legislation by January 2004. The Council of Europe is however still not satisfied that the resultant Law on Alternative Service offers a genuinely civilian alternative to military service. Conscientious objectors are supervised by the Military Police under regulations laid down by the Defence Ministry, ordered to wear uniform provided by the military, and fed by the military. All breaches of orders or regulations are dealt with by the Military Prosecutor's Office. Meanwhile the number of Jehovah's Witnesses imprisoned (on sentences of between 24 and 36 months) for their conscientious objection has steadily increased – 71 at the last count. This is by far the largest number of conscientious objectors to military service imprisoned in any country which nominally recognises the right, and the sentences too are among the longest imposed on conscientious objectors anywhere (see also F18News 11 December 2008 http://www.forum18.org/Archive.php?article_id=1228).

Azerbaijan has repeatedly assured the Council of Europe that it is drafting legislation to implement the civilian alternative to military service specified in its constitution, but this has still failed to appear; meanwhile it intermittently imprisons conscientious objectors. Samir Huseynov, a Jehovah's Witness, was freed in May 2008 after serving seven months of a ten month sentence (see F18News 14 May 2008 http://www.forum18.org/Archive.php?article_id=1129). More recently, Mushfiq Mammedov, also a Jehovah's Witness, was fined in October 2009 after refusing military service.

The global norm

Recognition of the right of conscientious objection to military service is now the global norm. There are countries with obligatory military service where no conscientious objectors have come forward. But in very few countries are conscientious objectors subject to imprisonment because there is no legislation to enable them to be recognised. These are: Azerbaijan as noted above, Belarus (see eg. F18News 11 November 2009 http://www.forum18.org/Archive.php?article_id=1374), Colombia (before an October 2009 decision of the Constitutional Court), Eritrea, Israel, South Korea, Singapore, Turkey (see F18News 17 March 2010 http://www.forum18.org/Archive.php?article_id=1423) and Turkmenistan (see eg. F18News 1 July 2008 http://www.forum18.org/Archive.php?article_id=1166). There is also the breakaway entity of Nagorno-Karabakh (see eg. F18News 5 January 2009 http://www.forum18.org/Archive.php?article_id=1236).

Europe having once led the way towards international recognition of the right of conscientious objection to military service, its regional jurisprudence is now dangerously out of step with the current interpretation of the ICCPR (to which all Council of Europe members are party), as well as with the attempts of the Council of Europe itself at the political level to spread respect for the freedom of religion and belief to its new members. It is therefore vital that the Grand Chamber of the ECtHR agrees to hear the appeal which Bayatyan's legal representatives have announced they will lodge; it alone can overturn the unfortunate precedent which this will otherwise set for future ECtHR cases. (END)

- Derek Brett, Conscience and Peace Tax International <http://www.cpti.ws> Representative to the UN in Geneva, contributed this comment to Forum 18 News Service. Commentaries are personal views and do not necessarily represent the views of F18News or Forum 18.

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A commentary on and analysis of Turkish non-recognition of the right to conscientious objection is at http://www.forum18.org/Archive.php?article_id=1423.

A compilation of Organisation for Security and Co-operation in Europe (OSCE) freedom of religion or belief commitments can be found at http://www.forum18.org/Archive.php?article_id=1351.

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