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TABLE OF CONTENTS

1.	<i>The trial monitoring mission on behalf of Vitaliy Vasylivnych Alekseienco</i>	2
2.	<i>Specifically: compulsory military service and the right to conscientious objection under the legislation of Ukraine</i>	6
3.	<i>On the right to conscientious objection under martial law</i>	9
4.	<i>Compulsory military service and the right to conscientious objection in Europe (overview)</i>	11
	Austria.....	13
	Azerbaijan.....	15
	Greece.....	16
	Russia	19
	Turkey	22
5.	<i>The jurisprudence of the European Court of Human Rights on the right to conscientious objection</i>	24
	<i>Thlimmenos v. Greece</i> case.....	25
	<i>Ülke v. Turkey</i>	26
	<i>Bayatyan v. Armenia</i> case	26
	<i>Case Papavasiliakis v. Greece</i>	27
	<i>Teliatnikov v. Lithuania</i> case.....	28
6.	<i>Ukrainian bar reform plans</i>	28
7.	<i>Diary of trial monitoring mission "How difficult it is to enforce rights in a country at war" il Domani, Dec. 16, 2022</i>	30
	The trial	31
	Ukrainian lawyers.....	33
	Home.....	33

8. *Conclusions (by Mao Valpiana - President of the Italian Nonviolent Movement)*
34

ADDENDUM

Judgment of the Ivano-Frankivsk District Court (9/15/2022)..... 36
Judgment of the Ivano-Frankivsk Court of Appeals (16.1.2023) 42

(unofficial machine translation)

**1. The trial monitoring mission on behalf of Vitaliy Vasylivych
Alekseienko**

Adhering to an appeal by the Nonviolent Movement promoted as part of the "**Objection to War**" campaign, the *trial monitoring* delegation¹ traveled to Ukraine, to the city of Ivano-Frankivsk, capital of the Ivano-Frankivsk Oblast', for the purpose of serving as an international observer at the criminal appeal trial set for Dec. 12, 2022² against Vitaliy



¹ The delegation was composed of lawyer Nicola Canestrini only, although 'experience strongly advises against undertaking an international *trial monitoring* mission alone for security reasons, all the more so on a first mission and in a country at war. Given the non-adherence of others or other observers, the alternative would have been to cancel the mission: the observer's experience accumulated over the years, the knowledge that he could count on an experienced and trusted group to act as a guarantor of security in Italy, the convinced adherence of the Ukrainian National Bar Association UNBA through its Vice-President Valentyn Gvozdiy, and the strong will to allow public opinion to monitor the respect for the rights of the accused meant that the mission was held anyway.

² The hearing was postponed due to a bombing-related power *outage* that prevented the appeals court from being able to acquire the centralized electronic file. At the postponement hearing, which is reported to have been held on Jan. 16, 2023, the Ivano-Frankivsk Court of Appeals rejected the appeal resulting in the

Vasyliovych Alekseienko, conscientious objector on religious grounds, who had already been convicted in the first instance of the crime of "*avoidance of military service during mobilization*" for refusing to serve in the military following compulsory recruitment by the Ukrainian Ministry of Defense³.

Vitaly Vasilovich Alekseienko, born Dec. 2, 1976, was living in Slovyansk in Ukraine's eastern Donetsk region when Russia began its new invasion of Ukraine in February 2022. In 2017, he was registered at the Ukrainian Conscription Office in Slovyansk, but was not issued a military card. However, he was issued a certificate valid until 2022 confirming that he did not serve in the military in the 1990s in Uzbekistan, where he was then living, for reasons of conscience.

Alekseienko arrived in Ivano-Frankivsk as a displaced person in May 2022⁴.

The city's recruiting office, where he was sent by the military commission to which every displaced person is required to notify, summoned him on horseback in the last decade of May 2022. He told them that he could not take up arms because of his religious beliefs as a Christian, pointing out that he had already been exempted from military service in the past because of his work as a laborer in Uzbekistan. After an initial cursory check Alekseienko was exempted from presenting himself to the conscription officer, but on the following May 30 a new summons resulted in his being sent to the medical officer and then to the conscription office. When he refused to be mobilized after the medical examination, in the days immediately following, he had a discussion with a jurist who summarily explained how to fill out the application for exemption at the state administrative commission, which on June 6 denied him the possibility of

imprisonment of the defendant, who was denied a suspended sentence for not regretting his choice not to fight (see <https://www.azionenonviolenta.it/ucraina-in-carcere-lobiettore-vitaly-alekseienko/>).

³ Despite the difficulties of documenting similar cases, the conviction is certainly not isolated but is the first without a suspended sentence. At least four precedents are reported in 2022 in which, moreover, courts have granted conscientious objectors suspended prison sentences and probation:

- May 18, 2022, Andrii Kucher, Mukachevo, suspended 4-year prison sentence;
- June 21, 2022, Dmytro Kucherov, Oleksandriia (Kirovohrad Region), suspended prison sentence of 3 years;
- Aug. 17, 2022, Oleksandr Korobko, Mukachevo, 3-year suspended sentence;
- Aug. 22, 2022, Maryan Kapats, Mukachevo, suspended sentence of 3 years (see <https://www.azionenonviolenta.it/ucraina-in-carcere-lobiettore-vitaly-alekseienko/>).

⁴ The information was gathered by the observer during the interview held on December 12, 2022.

alternative service. He challenged the decision not to accept his application for alternative service to the military because his church would not be included in the list of churches recognized by the Ukrainian government that fall under the religious freedom enabling conscientious objection. Alekseienko was nonetheless criminally charged before the outcome of his administrative appeal the following June 10; during the criminal proceedings he was questioned by the prosecution, given respectful treatment, had full knowledge of the prosecution's file, which did not request precautionary measures against him; he was reassured that he would be eligible for probation if convicted.

After a hearing at which he confessed, waiving his rights of defense because he was not properly informed of the consequences, and during which he was not assisted by a defense counsel, at a second hearing-first postponed-he was assisted by a public defender and sentenced on September 15, 2022, to a term of one year imprisonment; this is a mild sentence compared to the minimum sentence of 3 years, which was reduced for procedural reasons and because the defendant confessed, but despite the assurances he received he was not granted a suspended sentence because he did not show remorse.

As will be discussed further in this *Report*, conscientious objection in the military based on religious beliefs is a right in Ukraine, guaranteed by law as of 1991⁵ and by the Constitution⁶.

The law instituting the right to conscientious objection to the military service provides in Article 1 that this right may be suspended in the event of a "*state of war*" or "*state of emergency*."⁷.

⁵ See "*Law on Alternative (Non-Military) Service*," No. 1975-XII, 12.12.1991 ; text of the law available at the link: <https://zakon.rada.gov.ua/laws/show/1975-12#Text>.

⁶ The Ukrainian Constitution, in Article 35 para. 4, states that "*In the event that the performance of military duty is contrary to a citizen's religious convictions, the performance of this duty shall be replaced by alternative (non-military) service*" (informal translation into Italian by the writer; the text of the Ukrainian Constitution translated into English is available at the link: <https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80#Text>).

⁷ "*Article 1. Alternative service is a service introduced as a substitute for regular military service and aimed at fulfilling a duty to society. Under the conditions of a state of war or state of emergency, specific restrictions may be established on the right of citizens to undergo alternative service, indicating the period of validity of such restrictions*" Informal translation into Italian by the writer.

Currently, a state of war and martial law⁸ introduced by the Ukrainian government due to the war unleashed by the Russian Federation with the invasion of Ukraine, which began in February 2022 and is currently still ongoing, are in force in Ukraine.

It is not entirely clear⁹ from the information gathered whether the right to conscientious objection to military service is permitted under martial law, reasoning that those who refuse to enlist to take part in the "general

⁸ Ukraine proclaimed a state of war and introduced martial law by Presidential Decree No. 64/2022 dd. 24.02.2022: see the official Ukrainian government statement titled "President signed a decree on the imposition of martial law in Ukraine, the Verkhovna Rada approved it" available at the link <https://www.president.gov.ua/en/news/prezident-pidpisav-ukaz-pro-zaprovadzhennya-voyennogo-stanu-73109>. The text of Decree 64/2022 is available at the link: <https://zakon.rada.gov.ua/laws/show/64/2022#Text>.

The duration of martial law, initially 30 days, has been extended several times: until April 25, 2022, until May 25, 2022, until August 25, 2022, then until November 23, 2022, and most recently until February 19, 2023 (<https://www.aa.com.tr/en/russia-ukraine-war/ukraine-extends-martial-law-mobilization-for-90-days-until-feb-19/2733341#>).

⁹ The Ukrainian Pacifist Movement made an official request for information on this matter to the Ukrainian Ministry of Defence. This was the reply received:

"Header:

Ministry of Defence of Ukraine, Main Staff Department of the General Staff of the Armed Forces of Ukraine.

Requirements:

Date of issue 21 August 2022, number 321/4480.

Text:

Your request for information dated 26 July 2022 No. 128 to the Ministry of Defence of Ukraine, duly received by the Directorate of Mobilization of the Main Personnel Department of the General Staff of the Armed Forces of Ukraine, has been taken into consideration. I would like to remind you that, in accordance with the requirements of Article 1 of the Law of Ukraine "On Alternative (Non-Military) Service", alternative service is a service introduced in place of compulsory fixed-term military service and aimed at fulfilling a duty to the Homeland. In addition, in accordance with the requirements of Article 2 of the Law on Alternative Service, Ukrainian citizens may access it if the performance of military service conflicts with their religious beliefs and if these citizens belong to religious organizations operating in accordance with the legislation of Ukraine, whose beliefs do not permit the use of weapons.

Due to the armed aggression of the Russian Federation and the introduction of martial law in Ukraine, in accordance with the Decree of the President of Ukraine of 24.02.2022 No. 64/2022 "On the introduction of martial law in Ukraine", during the period of the legal regime of martial law conscription for fixed-term military service in Ukraine is not carried out from 24.02.2022. Therefore, based on the above, the implementation of the constitutional right of citizens to undergo alternative (non-military) service under the conditions of the legal regime of martial law and during mobilization, due to the absence of conscription for fixed-term military service, is not applicable. Furthermore, we inform you that the Law of Ukraine "On Training and Mobilisation" does not provide for alternative (non-military) service for conscripts called to military service during mobilisation.

Signed by:

Deputy Head of the Main Staff Department of the General Staff of the Armed Forces of Ukraine, Colonel Oleg Khrystenko.

Prepared by Viktor Savonik".

The institutions of the Ukrainian government thus seem to confirm the current impossibility of conscientious objection to military service.

mobilization" proclaimed by the Ukrainian government¹⁰ are criminally sanctioned¹¹.

2. Specifically: compulsory military service and the right to conscientious objection under the legislation of Ukraine

As anticipated *above*, the legislation of Ukraine stipulates that all men who have reached the age of 18 must perform a period of compulsory military service lasting 18 months. At the same time, the right to engage in conscientious objection, and consequently perform a period of alternative civilian service, is provided for, which, however, lasts considerably longer than the period of military service, namely 27 months. Moreover, the declaration of conscientious objection can only be made for reasons inherent in religious belief, which must be duly documented, and it is therefore not considered sufficient to oppose reasons of personal conscience that prevent one from taking up arms.

The normative sources of the right to conscientious objection in Ukraine can be found in Article 35(4) of the Constitution, which states that *"No one may be excused from his duties to the state or refuse to obey the laws on religious grounds. In the event that the performance of military duty is contrary to the religious convictions of a citizen, the performance of such duty shall be replaced by alternative (non-military) service."*¹², and in the *"Law on Alternative (Non-Military) Service,"* No. 1975-XII of 12.12.1991, which in Article 1 provides that *"Alternative service is a service introduced as a substitute for regular military service and aimed at the fulfillment of a duty to society."*¹³.

As mentioned, the only reason for which the right to conscientious objection can be exercised is membership in a religious denomination whose precepts appear incompatible with the use of arms: moreover, the Ukrainian government has compiled a list of ten religious denominations whose members are entitled to make declarations of conscientious

¹⁰ See Presidential Decree No. 65/2022 dd. 24.02.2022 *"On general mobilization"*; text available at link: <https://zakon.rada.gov.ua/laws/show/65/2022#Text>.

¹¹ See also *infra*, ch. 3, ca edited by Hanna Udovenko of the Ukrainian National Bar Association.

¹² See *supra* note no. 3

¹³ See *supra* notes 2 and 4.

objection¹⁴ ; this implies that the right to conscientious objection must be considered precluded not only for those who do not wish to perform military service for non-religious moral reasons, but also for those who belong to a religious denomination that is not included in the list compiled by the government.

Declarations of conscientious objection are examined by local state governments, by commissions composed of officials, serving military personnel and reservists. These commissions enjoy a wide discretion in examining applications: it should be noted, for example, that the application can be rejected if the commission finds "*lack of veracity of the religious beliefs*" represented by the applicant¹⁵ , thus making a judgment on the genuineness or otherwise of the personal beliefs of the applicant, an aspect that should be, in the opinion of the writer, unreviewable by third parties.

For these reasons, the U.N. Human Rights Committee recommended to Ukraine, in its conclusions submitted following the state's eighth observation period, that conscientious objection be made available to all, without discrimination on the basis of conscripts' reasons for not wishing to perform military service, whether or not they are based on religious beliefs. In addition, it has been recommended that Ukraine parameterize the duration of alternative civil service to that of compulsory military service, so that civil service does not have a "sanctioning" character against those who exercise their right to conscientious objection¹⁶ .

Ukraine, however, even as a result of these recommendations, has not changed its legislation; moreover, in the years between 2012 and 2019 the number of people criminally convicted for failure to



A Ukrainian military police patrol searching vehicles for draft dodgers

¹⁴ "Provisions on the Procedure for Alternative (Non-Military) Service" and "List of Religious Organizations Whose Beliefs Do Not Permit the Use of Arms," Order of the Ukrainian Council of Ministers of November 10, 1999 No. 2066, available at the link: <https://zakon.rada.gov.ua/laws/show/2066-99-%D0%BF#Text>

¹⁵ Art. 14 Ordinance 2066/1999, cit.

¹⁶ *Concluding observations on the eighth periodic report of Ukraine*, CCPR, Feb. 9, 2022, para. 30 (<https://digitallibrary.un.org/record/3957960>).

perform compulsory military service increased significantly, to 313 convicted in 2019 for the crime of "*absconding from military service*," an offense under Article 335 of the Ukrainian Criminal Code, punishable by up to 3 years' imprisonment¹⁷.

The increase in the number of people convicted of failing to perform compulsory military service stopped only starting in 2020, and in 2021 there were 152 people convicted of this offense. This trend was accompanied by the intention of the government of Volodymyr Zelenskyj, who became president of Ukraine on May 20, 2019, to abolish compulsory military service.

To this end, the Ukrainian government issued Presidential Decree No. 36/2022 dd. 01.02.2022, which provides for certain measures to incentivize citizens to voluntarily enlist in the Armed Forces personnel (e.g., a threefold increase in the salary provided for professional military personnel), with a view to abolishing compulsory military service for Ukrainian citizens as of January 1, 2024.

However, these policies came to a sudden and radical halt beginning in late February 2022, due to the invasion of Ukraine by the Russian Federation and the subsequent start of the war between the two states, which continues to this day.

As anticipated, following the invasion by the Russian Federation, Ukraine proclaimed a "state of war" throughout the country, and at the same time proclaimed the vigor of martial law in the state; both measures were adopted by Presidential Decree No. 64/2022 dd. 24.02.2022. The vigor of martial law, initially scheduled for a period of 30 days, has been extended several times, most recently until next Feb. 19, 2023¹⁸.

The force of martial law and the "general mobilization" regime determine, as far as it is of interest here:

¹⁷ The text of the Ukrainian Criminal Code in English is available at the link: <https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text>.

¹⁸ See *supra*, in note.

- the enlistment of all conscripts, i.e., those who have received the call for compulsory military service, and reservists, i.e., those who have already completed compulsory military service or have been professional military personnel and are currently on leave;
- the consequent prohibition for those called to arms to exercise their right to conscientious objection;
- A ban on all men between the ages of 18 and 60 from leaving the country.

3. On the right to conscientious objection under martial law ¹⁹

The concept of "alternative (non-military) service" is defined in current legislation in Ukraine. Specifically, Article 35 of the Ukrainian Constitution states that every person has the right to freedom of worldview and religion. This right includes the freedom to profess or not to profess any religion, to worship freely individually or collectively, and to engage in religious activities. If the performance of military duty contradicts a citizen's religious beliefs, the performance of that duty must be replaced by alternative (non-military) service.

This right is also enshrined in Article 4 of the Law of Ukraine "On Military Service and Military Duty," according to which Ukrainian citizens have the right to replace the performance of military duty with alternative (non-military) service in accordance with the Constitution of Ukraine and the Law of Ukraine "On Alternative (Non-Military) Service."

Alternative (non-military) service is thus defined as an activity performed in lieu of regular military service and aimed at fulfilling a duty to society, as defined in Article 1 of the Law of Ukraine "On Alternative (Non-military) Service." According to this law, citizens who are subject to conscription for regular military service and who have personally declared that they cannot perform it because it conflicts with their religious convictions, have documented or otherwise confirmed the veracity of their convictions, and in respect of whom appropriate decisions have been made, are sent to alternative service. These are mainly citizens who are members of some

¹⁹ Difficulties in interpreting the legislation resulted in the need to involve the Ukrainian National Bar Association (UNBA). This chapter is therefore edited by Hanna Udovenko, senior assistant to the Vice President of the Ukrainian National Bar Association, whom we thank.

religious organizations whose statutes prohibit their members from taking up arms. Therefore, those who wish to perform alternative (non-military) service, if necessary, must present a document confirming the veracity of these beliefs, such as a certificate from their religious community from the list of registered organizations that prohibit the use of arms.

Under martial law or a state of emergency, certain restrictions may be imposed on the right of citizens to perform alternative service, specifying the duration of such restrictions. As of Feb. 24, 2022, martial law is in force in Ukraine and certain restrictions on the rights and freedoms of Ukrainian citizens are in effect.

According to Part 2 of Article 35 of the Ukrainian Constitution, the exercise of the right to profess a particular religion and, therefore, not to take up arms, indeed, to perform alternative service may be restricted by law only in the interest of protecting public order, the health and morality of the population or the protection of the rights and freedoms of others.

In addition, the Ukrainian Law "On Training and Mobilization" does not define alternative (non-military) service during war, as there are circumstances when it is necessary to protect public order, health, life and morality of the population, or protect the rights and freedoms of others.

Article 17(2) of the Constitution stipulates that the defense of Ukraine, the protection of its sovereignty, territorial integrity and inviolability are entrusted to the Armed Forces of Ukraine.

Article 65 of the Constitution states that the defense of the Motherland, independence and territorial integrity and respect for its state symbols are the duty of Ukrainian citizens.

So far it is possible to conclude that every Ukrainian citizen has a duty to protect the sovereignty, territorial integrity and inviolability of the state.

Taking the above information into consideration, we have come to the conclusion that today there is a gap in the legislation on the mobilization of believers to be assigned to alternative service.



Nicola Canestrini with Ihor Kolesnikov, Secretary of the UNBA at the entrance to the IVANO-FRANKIVSK courthouse

According to the Law of Ukraine "On Training and Mobilization," we find no mention of a category of people such as believers whose religious beliefs prevent them from participating in hostilities or using weapons. In addition, Article 23 of the law, which regulates the issue of granting a deferment from mobilization, does not deal with categories of believers, and therefore such people do not have a deferment from military service.

Article 1 of the Law "On Alternative (Non-Military) Service" stipulates that under conditions of martial law or a state of emergency, certain restrictions on this right may be established, indicating the period of its validity.

Alternative service, i.e., its use, is a substitute for regular military service in peacetime, and Ukrainian law does not provide for the replacement of military service by alternative (non-military) service during wartime.

Therefore, there can be no non-military alternative service during martial law. In peacetime it is something else, but during war everyone defends the state, the people and their future.

4. Compulsory military service and the right to conscientious objection in Europe (overview)

Even today, many states in Europe still require mandatory military service by law.

The subject is dealt with extensively by the *European Bureau for Conscientious Objection (EBCO)*²⁰ in its latest *Annual Report on Conscientious Objection in Military Service in Europe*²¹, dealing with the relevant legislation of 48 European states (including the 47 members of the Council of Europe-now 46 following the recent exit of the Russian Federation and Belarus, to date having candidate country *status*); of these 48 states, (as many as) 18 still provide for compulsory military service²².

However, in the face of this obligation, the right to conscientious objection is not always effectively guaranteed to those who refuse to serve in the military.

Specifically, although there is only one state-Turkey-that expressly does not recognize the right to conscientious objection, this right does not enjoy sufficient protection in several other European states, which also formally recognize it, namely: Azerbaijan (where there is still no law on alternative service to military service), Armenia, Russia, Ukraine, Greece, Republic of Cyprus, Georgia, Finland, Austria, Switzerland, Estonia, Lithuania and Belarus.

For this reason, EBCO points out that *"In 2021, Europe was not a safe place for many conscientious objectors in several countries as they faced prosecution, arrests, trials by military courts, imprisonment, fines, intimidation, attacks, death threats and discrimination"* (p. 3 Report).

²⁰ The *European Bureau for Conscientious Objection (EBCO)* is an international organization founded in 1979 to coordinate national associations, including the Nonviolent Movement, protecting conscientious objection in Europe, with the aim of promoting collective campaigns for the release of imprisoned conscientious objectors and lobbying European governments and institutions for full recognition of the right to conscientious objection to military service. It has acquired participant *status* in the Council of Europe since 1998 and has been a member of the *Conference of International Non-Governmental Organizations* of the Council of Europe since 2005 (information taken from: <https://www.ebco-beoc.org/aboutebco>).

²¹ *EBCO Annual Report Conscientious Objection to Military Service in Europe 2021*: the full text of the *Report* is available at the link: https://www.ebco-beoc.org/sites/ebco-beoc.org/files/attachments/2022-03-21-EBCO_Annual_Report_2021.pdf.

²² Such 18 states are: Armenia, Austria, Azerbaijan, Belarus, Republic of Cyprus, Denmark, Estonia, Finland, Georgia, Greece, Lithuania, Moldova, Norway, Russia, Sweden, Switzerland, Turkey and Ukraine.

The absence (or inadequacy) of protection of the right to conscientious objection constitutes a violation by the state concerned of Article 9 of the ECHR, which - although it does not expressly provide for this right in its textual wording - is considered the normative basis of the protection of the right to conscientious objection in the military, according to established case law of the European Court of Human Rights²³ .

In any case, the regulatory framework on the subject is very varied: for this reason, please refer to the full reading of the EBCO *Report* for an exhaustive exposition of the regulatory framework on the subject. In this *Report*, information on some of the European states that still impose compulsory military service, selected from those whose legislations present the most critical issues, will be reported below.

- **Austria**²⁴

Under Austrian law, as of 1955, all men between the ages of 18 and 35 have been subject to compulsory military service.

The right to conscientious objection has been recognized since 1975, with the enactment of the Law on Alternative Civilian Service (*Zivildienstgesetz*): initially, declarations of conscientious objection had to be evaluated by a special "Commission on Alternative Service" (*Zivildienstkommission*), which could review whether or not the objection was well-founded, following an interview with the objector. In 1991 the *Zivildienstkommission* was abolished, and as of today it is sufficient to submit a declaration stating that

²³ "Article 9 does not expressly mention the right to conscientious objection, neither in the military nor, moreover, in the civilian sphere. The Court held, however, that the guarantees of the article in question applied in principle to objection to military service where such objection was motivated by a serious and insurmountable conflict between the obligation to serve in the military and a person's conscience or sincere and deeply held convictions, religious or otherwise. The question of whether and to what extent objection to military service falls within the provisions of this provision will have to be resolved according to the circumstances peculiar to each case. (*Bayatyan v. Armenia* [GC], 2011, §§ 92-111; *Enver Aydemir v. Turkey*, 2003, § 75). [...] Therefore, the Court concluded that there was a violation of Article 9 because of the conviction of the appellant, a Jehovah's Witness (whose beliefs entail the belief that one should oppose military service regardless of the need to bear arms), who had shirked compulsory military service, while the law did not provide for substitute civilian service (*Bayatyan v. Armenia* [GC], § 110)." (see *Guide on Article 9 of the European Convention on Human Rights*, produced by the European Court of Human Rights, pp. 24-25).

²⁴ Data also taken from the *Amnesty International Report* entitled: "*AUSTRIA Conscientious objection to military service: a summary of current concerns*," February 1, 1997, available at the link: <https://www.refworld.org/country,,AMNESTY,,AUT,,45b47b5a2,0.html>.

one does not wish to take part in military service for reasons of conscience; following this declaration, the objector is obliged to perform a period of civilian service, lasting 9 months (the duration of compulsory military service is 6 months instead).

The declaration of conscientious objection must be submitted within six months of receiving the call to arms, but no later than two days prior to the date of commencement of compulsory military service.

As a result of the recognition of the right to conscientious objection, Article 9(a) was introduced into the Austrian Constitution, which states that *"Every Austrian citizen has the obligation of military service. He who, for reasons of conscience, refuses to perform military obligations and is exempted from them, shall perform substitute service. The details are regulated by law."*

However, this is not a right guaranteed to all Austrian citizens who wish to exercise it: in fact, Art. 5(a) of the *Zivildienstgesetz* stipulates that certain categories of people may not make a declaration of conscientious objection and consequently perform alternative civilian service, among which the case of those who *"have been definitively sentenced to at least six months' imprisonment for a malicious crime committed with violence or threat of violence with the use of a firearm or explosives"* is particularly problematic (Art. 5(a) No. 1).

This is a provision with an obviously afflictive character, in that it is intended to further punish those who have suffered a criminal conviction for the crimes indicated in the provision with the obligation to perform military service, so that the deprivation of the right to conscientious objection takes the form of a true "accessory penalty."

The critical nature of this regulatory preclusion appears even more evident when one considers that Austrian law provides for a prison sentence for those who do not perform compulsory conscription service.

In fact, according to Section 7(1) of the Military Penal Code (*Militärstrafgesetz*), anyone who fails to comply with the call to perform

military service within 30 days may be sentenced to three months' imprisonment or a fine. In case of persistent non-compliance after 30 days, the penalty increases to a maximum of one year imprisonment (Sec. 7(2)).

The rule is currently still in force, and the sanctions must be understood to apply to those who do not undertake compulsory military service and, at the same time, do not perform alternative civilian service either: and if the application of this sanction may appear to carry minor criticalities with reference to those who *can* perform civilian service but do not, it is undoubtedly very problematic with reference to those who, on the other hand, cannot from the outset opt for civilian service instead of military service, and thus find themselves forced to choose between (compulsory) arming and imprisonment.

On Jan. 10, 2013, a referendum was held in Austria regarding the abolition of the law providing for compulsory military service: however, the results led to the retention of this legislation, as 59.8 percent of voters opposed its abolition²⁵.

- **Azerbaijan**

According to Azerbaijani law, all male citizens who have reached the age of 18 are subject to compulsory military service.

The right to conscientious objection is formally recognized by Article 76 of the country's Constitution, which states: *"I. The defense of the Fatherland is the duty of every citizen. Citizens shall serve in the Armed Forces in accordance with the conditions prescribed by law.*

II. If service in the Armed Forces is contrary to a person's convictions, active military service may be replaced by alternative service in cases provided by law."

However, this right is not in fact guaranteed since no law has ever been enacted to establish the concrete modalities for the exercise of

²⁵ *Austrians vote to keep compulsory military service*, BBC News, January 10, 2013 (<https://www.bbc.com/news/world-europe-21110431>).

conscientious objection. To date, therefore, citizens of Azerbaijan who refuse to perform military service are arrested and subjected to criminal penalties of imprisonment. It should be noted that Azerbaijan was admitted to the Council of Europe, in the year 2001, against an express commitment to pass legislation about civilian service as an alternative to compulsory military service by January 2003.

Azerbaijan was recently condemned by the European Court of Human Rights (case *Mehdiyev and Abilov v. Azerbaijan*, appeals nos. 52773/19 and 54768/19, judgment dd. 07.10.2021) for violating Article 9 of the Convention due to the criminal conviction of two men who refused to perform compulsory military service by carrying out conscientious objection. Azerbaijan had already been convicted of violating Article 9 in an entirely overlapping case just two years earlier (*Mushfig Mammadov et al. v. Azerbaijan*, appeals Nos. 14604/08, 45823/11, 76127/13 and 41792/15, judgment dd. Aug. 21, 2015).

Saadat Novruzova, advisor to the Presidential Administration's Human Rights Protection Unit in Azerbaijan, when asked about the state's latest convictions by the EDU Court for violating Article 9 ECHR, "refused to answer," and said that a law allowing for the exercise of civilian service as an alternative to compulsory military service "is not currently on the agenda" in Azerbaijan²⁶.

- **Greece**

In Greece all male citizens who have reached the age of 19 are required to perform compulsory military service. The right to conscientious objection was recognized in 1997, with Law No. 2510, under which those who do not wish to perform military service may exercise this right, and will be required to perform a period of compulsory civilian service lasting 15 months (compulsory military service, on the other hand, can last from 9 to 12 months, depending on the locality in which it is performed). Failure to comply with compulsory military service-or alternative civilian service,

²⁶ War Resisters' International: *ECtHR: Azerbaijan violated conscientious objectors' human rights* <https://wri-irg.org/en/story/2021/ecthr-azerbaijan-violated-conscientious-objectors-human-rights>.

following the declaration of conscientious objection-is criminally punishable by imprisonment.

However, the right to conscientious objection is not sufficiently guaranteed, due to the high rejection rate of applications for objection made by those who do not wish to perform military service. In fact, according to Greek legislation, every declaration of conscientious objection must be examined by a specific commission established at the Ministry of Defense, which can review whether or not the declaration is well-founded and, consequently, decide whether to accept or reject it.

The Commission enjoys a very wide discretion in considering conscientious objector claims. An emblematic example of this discretion can be found in the case of Charis Vasileiou, a man who in 2020 applied for conscientious objector status and alternative civil service, basing this objection on the circumstance that he grew up in a family of people adhering to the Jehovah's Witnesses religious denomination (whose precepts include a ban on the use of weapons), although he had never formally adhered to that religion. His application was rejected in March 2021 by the Commission at the Greek Ministry of Defense on the basis that "his religious beliefs are not the result of a conscious choice and affiliation with the religious community of Jehovah's Witnesses."

In addition, the UN Human Rights Committee recently found in its own *Report*²⁷ that Greece violated the *International Covenant on Civil and Political Rights* with reference to the case of Lazaros Petromelidis, a man who in 1992 refused to serve in the military by performing conscientious objection. Since there was no such right at the time, he was prosecuted criminally for insubordination. In 1998, after the first alternative civil service law came into force, he made a new declaration of conscientious objection, but this was rejected: he was officially recognized as a conscientious objector only after his first arrest by the Greek authorities. However, he was required to perform 39 months of alternative civil service,

²⁷ Views adopted by the Committee under the Optional Protocol, concerning communication No. 3065/2017, CCPR, 08/24/2022
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f132%2fD%2f3065%2f2017&Lang=en

when a person in his same age condition at that time would have been required to perform only four months of compulsory military service. Finding this obligation discriminatory, Petromelidis refused to perform this period of community service; as a result, the authorities revoked his conscientious objector status, so that he was recalled to perform compulsory military service. Upon further refusal, he was arrested and convicted multiple times for insubordination. In total, from 1992 to 2014, Lazaros Petromelidis was convicted 5 times for insubordination, was remanded in custody at least 4 times, and paid 2 fines.

The UN Human Rights Committee therefore held Greece responsible for violating Article 18(1) of the *International Covenant on Civil and Political Rights*, which protects freedom of thought, conscience and religion. In particular, the Committee found unlawful the discriminatory treatment of Petromelidis who, due to his conscientious objection, was supposed to perform a period of compulsory civilian service almost ten times longer than the corresponding period of military service.

According to the Committee's decision, Greece has an obligation to fully compensate Petromelidis, and thus, among other things, to clear his current criminal record by reason of the conscientious objection he made, to repay all sums paid in fines, and to provide adequate compensation. Greece also has an obligation to take all necessary measures to prevent similar violations from occurring in the future. This means that, according to the Committee, Greece "*should revise its legislation in order to ensure the effective guarantee of the right to conscientious objection under Article 18 (1) of the Covenant, for example, by providing for the possibility of undertaking alternative civilian service that is not punitive and discriminatory in nature.*"

However, the latest legislative reforms adopted by Greece are in a diametrically opposed direction to the Committee's recommendations. In fact, on 15 December 2022, the Greek Ministry of National Defence published a bill that would introduce, among other things, a very stringent provision on the procedures for granting conscientious objector status, in violation of international human rights standards.

Specifically, according to Article 62 of the bill, in the commission that examines conscientious objectors (and then reports to the Ministry of National Defence, which makes the decision), the number of military members is increased (from 1 to 2) and the number of civilian members is reduced (from 4 to 3). This issue, among others, will be the subject of a letter that will be sent in the coming weeks by EBCO and other international organisations to the Human Rights Committee, the Special Rapporteur on freedom of religion or belief, and the Commissioner for Human Rights of the Council of Europe, all of which are institutions within the Council of Europe.

- **Russia**

Russian legislation stipulates that all male citizens who have reached the age of 18 years are required to perform compulsory military service, lasting 12 months. The right to conscientious objection was first recognized in 1993, with the amendment of Article 59 of the Russian Constitution, which to date provides that *"A citizen of the Russian Federation has the right to replace military service with alternative civilian service in cases where his beliefs or religious convictions conflict with military service and also in other cases provided for by federal law."* As of today, therefore, there is the possibility of replacing military service with civilian service lasting 21 months (and thus, almost twice as long as military service, a fact that is already problematic in itself).

However, although the right to conscientious objection is formally guaranteed, its concrete exercise in Russia faces multiple obstacles.

First of all, it was not until 2002 that a federal law was passed by the *Duma* regulating the specific modalities of exercising the right of conscientious objection, called the *"Law on Alternative Civilian Service"*²⁸. Before that time, the exercise of this right-which was, as mentioned, formally guaranteed by the Constitution-was in fact practically impossible, partly

²⁸ Law No. 113-FZ of 07/25/2002 ("*Федеральный закон от 07/25/2002 N 113-ФЗ "Об альтернативной гражданской службе"*). Summary sheet of the law in English on the official *website* of the Ministry of Defense of the Russian Federation available at the link: <https://eng.mil.ru/en/career/alternative.htm#:~:text=The%20Federal%20Law%20%22On%20Alternative.to%20substitute%20alternative%20civilian%20service.%20%22>

because of opposition from the Courts of the Federation, which often refused to recognize the existence of the right to conscientious objection.

Emblematic in this regard is the case of Aleksandr Seryogin²⁹, a Russian citizen who in March 1996, after being called to perform the period of compulsory military service, had declared that he wished to exercise his right to conscientious objection, and thus to perform a period of alternative civilian service. The Commission territorially competent to examine the application - namely, the "*Military Recruitment Commission*," which is composed of military personnel and constitutes the body responsible for examining declarations of conscientious objection even after the 2002 law came into force - rejected Seryogin's application, without giving specific reasons.

Seryogin therefore appealed to the Sevastopol District Court against the Commission's rejection of his application. The Tribunal, however, rejected the appeal, finding that the right to conscientious objection could not be considered to exist in the Russian legal system. Specifically, the Tribunal held that Article 59 paragraph 3 of the Constitution "*was not in force*," due to the lack of enactment - at the time - of a law specifying the concrete modalities of the exercise of the right to conscientious objection. At the same time, the court sentenced Seryogin to two years' imprisonment for "desertion." The decision was later overturned on appeal.

However, the passage of the "*Law on Alternative Civil Service*" did not result in the cessation of obstacles to exercising the right of conscientious objection.

In fact, to this day applications must still be examined by "*Military Recruitment Commissions*," which are composed of seven members, all of whom are serving military personnel, three of whom are directly employed by the Russian Ministry of Defense. This composition of the Commissions has led to the emergence of doubts as to the actual independence and impartiality in the evaluation of conscientious objection declarations:

²⁹ Case reported by *Amnesty International* in Report: "*Russian Federation - The right to conscientious objection to military service*," April 1997, available at: <https://www.amnesty.org/fr/wp-content/uploads/2021/06/eur460051997en.pdf>.

however, in a recent ruling³⁰ - which has not failed to cause perplexity³¹ - the European Court of Human Rights held that the fact that four of the seven members of the *Recruitment Commissions* are not directly employed by the Russian Ministry of Defense is sufficient for them to be considered sufficiently independent and impartial.

It should also be noted that the relevant criminal penalties under Russian law are particularly severe: failure to comply with compulsory military service (or alternative civilian service, if the declaration of conscientious objection is deemed admissible by the Commissions) is punishable by imprisonment for up to two years (Art. 328 of the Russian Criminal Code); "desertion," defined as *"the unauthorized abandonment of a military unit or place of military service for the purpose of evading military service,"* is punishable by imprisonment for up to seven years; if the act is committed by an armed person or several persons, the offense is punishable by imprisonment for three to ten years (Art. 338).

It is impossible to know statistical data about conscientious objection requests and the percentage of their acceptance, as the Russian government does not provide such data, and NGOs involved in studying these issues cannot carry out activities in the Russian Federation because of the government's harsh crackdown on them: e.g., EBCO was outlawed by the Russian government because it was designated as a *"foreign agent"*³² ; again, the Russian Supreme Court recently ordered the dissolution of *"International Memorial,"* an NGO that studies political repression carried out by the Federation's authorities and protects its victims³³ .

³⁰ *Dyagilev v. Russia* case, appeal no. 49972/16, judgment dd. 10.03.2020.

³¹ As noted by the EBCO, *"In this ruling, the European Court of Human Rights appears to ignore international and national human rights standards relating to applications for conscientious objector status. In 1967 the Parliamentary Assembly of the Council of Europe ruled that: "When the decision concerning the recognition of the right to conscientious objection is made in the first instance by an administrative authority, the decision-making body must be completely separate from the military authorities and its composition must guarantee the utmost independence and impartiality." [...] It is obvious that a military recruitment committee with any representative of the Ministry of Defense, let alone three (3) members out of seven (7), is not "entirely" separate from the military authorities. Moreover, to the extent that it is the military members and not the civilian members who raise questions of independence and impartiality, as seems to be accepted by the European Court of Human Rights [see *Papavasylakis v. Greece*, No. 66899/14], a composition that guarantees the 'maximum' independence and impartiality should be one with minimal [i.e., no] participation of military members"* <https://ebco-beoc.org/russia>, informal translation by the writer).

³² <https://minjust.gov.ru/ru/events/48667/>

³³ <https://www.memo.ru/en-us/memorial/departments/intermemorial/news/690>.

The peace demonstrations carried out in the Federation following the invasion of Ukraine were violently repressed from the outset, with the passage of a law highly repressive of freedom of expression (referred to by the Federation as the "*Law Against Fake News*"³⁴) and a massive use of public force, which resulted in thousands of arrests³⁵ ; the scope of the repression was so extensive³⁶ that it also resulted in the arrest of people displaying simple white sheets of paper in public³⁷ .

The ban on expressing anti-war views has recently been expanded through the passage of a new law, whereby this prohibition-initially limited to public streets and squares-has been extended to universities, schools, churches, hospitals, government buildings, ports, airports, train stations and adjacent to gas, water, electricity and heating infrastructure³⁸ .

- **Turkey**

Turkey's legislation is particularly problematic in that it is the only member state of the Council of Europe that, in the face of the imposition of compulsory conscription for all male citizens over the age of 20, does not provide-not even formally-for the right to engage in conscientious objection.

In fact, although Article 72 of the Turkish Constitution states that "*Serving the homeland is a right and duty for every Turkish citizen. The conditions under which such service shall be performed or deemed to be performed in the armed forces or civil service shall be determined by law,*" thus mentioning the possibility of performing alternative civil service, it expressly demotes the

³⁴ *Putin's gag on information: law against fake news on the military*, Rainews, March 4, 2022.

³⁵ *War in Ukraine: thousands of arrests don't stop Russian pacifists*, euronews, March 4, 2022 (<https://it.euronews.com/2022/03/04/guerra-in-ucraina-manifestazioni-russia-arresti-repressione-pace>).

³⁶ Since February 2022, Russian authorities have opened more than 230 criminal cases against Russian citizens who opposed the so-called 'special operation' in Ukraine. Most of these cases were initiated as a result of non-violent actions, which were nevertheless prosecuted as crimes, such as posting on social networks, peaceful protests and distribution of underground press, or even applying anti-war stickers. The list of Russian prisoners of conscience is published on the Black February website <https://blackfeb.ru>.

³⁷ *Russia, the power of protest: a woman is arrested for exhibiting white sheet*, Courier, March 13, 2022 (<https://video.corriere.it/esteri/russia-forza-protesta-donna-viene-arrestata-perche-esibisce-foglio-bianco/e90b4a18-a2ef-11ec-9cf0-42c4e5b7cf94>);

³⁸ *Russia, Putin signs ban on demonstrations*, AdKronos, Dec. 5, 2022 (https://www.adnkronos.com/russia-putin-firma-il-divieto-di-manifestare_ijpiwAvSUFgYUNiqYjCyH?refresh_ce).

need to establish by law such civil service: a law that has never been enacted by the Turkish state.

In contrast, Law No. 1111 of 1927, called the "*Military Service Law*,"³⁹, stipulates in Article 1 that "*Every Turkish male citizen is obliged to perform military service in accordance with this law.*"

Those who are summoned for compulsory military service and fail to report to perform it are criminally liable under Article 63 of the Turkish Military Penal Code, which punishes such conduct with imprisonment from three months to six years (the penalty increases according to how many days the conscript's absence lasts). The same Article 63, moreover, stipulates that if the conduct of failing to perform compulsory conscription service is committed during a state of war, the punishment imposed may vary (again depending on the length of the conscript's absence) from four months' imprisonment to the death penalty (this is the case for those who are called to arms, fail to report for military service and are arrested after an absence that has lasted for more than three months)⁴⁰.

In the event that a person who does not intend to perform compulsory military service is sanctioned with imprisonment under the aforementioned Article 63, he will be recalled again to perform military service after the execution of such punishment; if he persists in not intending to perform military service, he will be indictable for the crime of "*persistent disobedience*," punishable by Article 87/1 of the same Military Penal Code, which provides for the penalty of: two years' imprisonment is committed in peacetime; five years' imprisonment if it is committed during a state of war; ten years' imprisonment if it is committed when the state is "facing an enemy."⁴¹. Of particular interest is the circumstance whereby a person who has served a prison sentence for the crime of "*persistent disobedience*" is

³⁹ English translation of the law available at the link: <https://www.refworld.org/docid/3ae6b4d020.html>.

⁴⁰ Text of Article 63 of the Turkish Military Penal Code translated into English available at the link: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=topic&docid=3ae6b4d01c&skip=0&coi=TUR&tocid=50ffbce40&toid=50ffbce442&querysi=63&searchin=fulltext&sort=date>.

⁴¹ *Out of the margins the right to conscientious objection to military service in Europe*, Amnesty International, 1997, p. 57

(<https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=topic&docid=45be033b2&skip=0&coi=TUR&tocid=50ffbce40&toid=50ffbce442&querysi=87/1&searchin=fulltext&sort=date>).

again recalled to perform the period of compulsory military service: if he refuses further, he is still held responsible for the same crime, and thus again liable to a prison sentence, with a cycle that is bound to repeat itself without limit (or at least until the person reaches the age of 41, the maximum age for call to arms under Turkish law).

Precisely because of this legally mandated "perpetual detention" of conscientious objectors, Turkey was condemned by the European Court of Human Rights for violating Article 3 of the ECHR, as the Court found that this form of detention constituted "inhuman or degrading treatment."⁴² .

However, despite the Strasbourg Court's censure, EBCO noted that conscientious objectors in Turkey are still being persecuted to this day by being subjected to continuous criminal proceedings that result in the imposition of a prison sentence⁴³ .

5. The jurisprudence of the European Court of Human Rights on the right to conscientious objection⁴⁴

As mentioned in the preceding pages, the European Court of Human Rights has on several occasions dealt with the right to conscientious objection in the military context, examining the compatibility of member states' regulations with Article 9 of the Convention. In fact, although this article does not expressly mention the right to conscientious objection, this right is considered by the Court as an expression of the more general right to free manifestation of thought, which is the primary object of the norm in question.

⁴² Case *Ülke v. Turkey*, Application No. 39437/98, judgment 24.01.2006 (<https://hudoc.echr.coe.int/eng?i=001-72146>).

⁴³ See the statement "*International Conscientious Objection Day: EBCO highlights the courageous struggle of conscientious objectors and activists in Turkey*" issued by EBCO on May 15, 2021 on the occasion of International Conscientious Objection Day (https://www.ebco-beoc.org/sites/ebco-beoc.org/files/attachments/2021-05-15-EBCO_Press-Release_International_CO_Day.pdf).

Moreover, the Turkish section of the Nonviolent Movement had to discontinue its official registration as an organisation and now operates 'non-formally' as Conscientious Objection Watch (COW) recognised only outside Turkey by WRI and EBCO. In July-September 2022 alone there were 44 open procedures for objection and 9 public declarations of conscientious objection to military service, including in opposition to the Russian aggression of Ukraine.

⁴⁴ On this topic, see the summary sheet prepared by the European Court of Human Rights, available at: https://www.echr.coe.int/Documents/FS_Conscientious_objection_ENG.pdf

This principle was first affirmed by the Court in *Bayatyan v. Armenia*, eleven years ago (on which see also *infra*): "Article 9 [of the ECHR] does not explicitly refer to the right to conscientious objection. However, [the European Court of Human Rights] considers that opposition to military service, when motivated by a serious and insurmountable conflict between the obligation to serve in the military and a person's conscience or deeply and genuinely held religious or other convictions, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to determine the operation of the guarantees of Article 9 [...]. Whether and to what extent objection to military service falls within the scope of that provision must be assessed in the light of the particular circumstances of each concrete case" (*Bayatyan v. Armenia*, Application No. 23459/03, judgment dd. 07.07.2011, Grand Chamber, § 110).

The most relevant pronouncements of the EDU Court on the subject will be reported below.

- ***Thlimmenos v. Greece case***⁴⁵

The case deals with the case of Mr. Thlimmenos, a member of the Jehovah's Witnesses religious denomination, who was criminally convicted by Greek authorities for refusing to enlist in the army at a time when Greece did not offer an alternative civil service for conscientious objectors to military service. A few years later, he was unable to practice as an accountant because of his conviction, despite the fact that he had scored highly in the public competition for the position in question provided for under Greek law. The Court found a violation of Article 14 (prohibition of discrimination) in conjunction with Article 9 of the Convention, finding that the exclusion of the plaintiff from the profession of accountant was disproportionate to the objective of ensuring appropriate punishment for persons who refuse to "serve their country," in view of the circumstance that Thlimmenos had already served a prison sentence on account of his failure to perform compulsory military service.

⁴⁵ Appeal No. 34369/97, judgment dd. 06.04.2000, Grand Chamber.

- ***Ülke v. Turkey***⁴⁶

The case involves the case of Mr., a Turkish citizen, who refused to perform military service as a staunch pacifist and publicly burned his call-up papers at a press conference. He was initially convicted of inciting conscripts to evade military service and, after being transferred to a military regiment, was repeatedly sentenced for refusing to wear a military uniform. He served nearly two years in prison and later went into hiding from the authorities. The European Court of Human Rights found a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention, finding in particular that the applicable legal framework did not provide an adequate means to address situations arising from refusal to perform military service because of one's beliefs. Due to the nature of the legislation, the applicant ran the risk of an interminable series of criminal prosecutions and convictions. The continuous alternation of prosecution and prison sentences, coupled with the possibility that the applicant would be liable to prosecution for the rest of his life, was disproportionate to the goal of ensuring that he performed military service.

- ***Bayatyan v. Armenia case***⁴⁷

The case deals with the case of Mr. Bayatyan, a member of the Jehovah's Witnesses religious denomination, who refused to serve in the military for reasons of conscience when he became eligible for conscription in 2001, saying he was willing to perform alternative civilian service. The authorities informed him that since there was no law on alternative service in Armenia, he was obliged to serve in the army. For this reason, he was sentenced to imprisonment for "conscientious objection draft evasion." The appellant complained that his conviction violated his rights under Article 9 of the Convention and argued that the provision should be interpreted in light of current conditions, particularly the fact that the majority of Council of Europe member states have recognized the right to conscientious objection. The Court noted that prior to this case it had never ruled on the question of the applicability of Article 9 of the Convention to conscientious objectors

⁴⁶ Appeal No. 39437/98, judgment 24.01.2006,

⁴⁷ Appeal No. 23459/03, judgment dd. 07.07.2011, Grand Chamber.

criminally sanctioned for exercising this right (in the aforementioned *Thlimmenos v. Greece* case, in fact, the subject of the ruling was the illegality of the applicant's exclusion from a public competition on the grounds of conscientious objection, and not the prison sentence imposed on him for the same cause).

Interpreting the provision in light of social and legislative changes in the decades since the ECHR was drafted, the Court concluded that although Article 9 did not explicitly refer to the right to conscientious objection opposition to military service motivated by a serious and insurmountable conflict between the obligation to serve in the military and an individual's deeply and genuinely held religious or other conscience or belief constituted a conviction or belief of sufficient cogency, seriousness, cohesion and importance to determine the operation of Article 9's guarantees. Considering in particular that effective alternatives existed in the vast majority of European states that could satisfy the competing interests involved, and that the appellant's conviction had occurred at a time when Armenia had already committed itself to introducing an alternative service, the Court found that there had been a violation of Article 9 of the Convention in this case.

- **Case *Papavasylakis v. Greece***⁴⁸

The case concerned the authorities' refusal to grant Mr. Papavasylakis conscientious objector status and to allow him to perform alternative civilian service to compulsory military service. The Court found that there had been a violation of Article 9 of the Convention, finding that the plaintiff had not enjoyed the necessary procedural safeguards in the consideration of his request for alternative civilian service. In particular, the Court found that the Greek authorities had failed in their duty to ensure that the hearing of conscientious objectors by the Army Special Commission took place under conditions that guaranteed the procedural fairness and equal representation required by domestic law. In this regard, the Court noted that: the appellant had been interviewed by a commission composed mainly of military personnel, while two of the commission's civilian members were

⁴⁸ Appeal No. 66899/14, judgment dd. 09/15/2016, Section One.

absent and had not been replaced; the final decision of the Minister of Defense, based on a draft ministerial decision that intervened following the Commission's proposal, did not offer the necessary guarantees of impartiality and independence; the Supreme Administrative Court's review concerned only the legality of the decision, not its merits, and in any case slavishly reproduced the Commission's observations.

- ***Teliatnikov v. Lithuania case***⁴⁹

Mr. Teliatnikov, a minister of religion belonging to the Jehovah's Witnesses religious denomination, had requested to be exempted from military service because of his religious beliefs, a request that was, however, rejected by the Lithuanian authorities. He argued that he had been denied the right to refuse military service despite his true beliefs in this regard, with no possibility of civilian service. The Court found that there had been a violation of Article 9 of the Convention, noting that, on the whole, the Lithuanian conscription system failed to strike a balance between the needs of society as a whole and the rights of conscientious objectors (who, moreover, declared themselves willing to perform alternative civilian service), and that the state's failure to respect the applicant's right to conscientious objection could not be considered "necessary in a democratic society," within the meaning of Article 9.

Regarding alternative civilian service, the Court specifically noted that it was not really an alternative, as it was part of the military superstructure, with conscripts referred to as "conscripts" throughout the regulations. In this regard, the Court reiterated that states must establish alternatives outside the military command structures.

6. On plans to reform the Ukrainian bar.⁵⁰

The attempt to weaken the institution of the bar in Ukraine has been going on for many years.

⁴⁹ Appeal No. 51914/19, judgment dd. 07.06.2022, Section Two.

⁵⁰ Chapter edited by Hanna Udovenko, senior assistant to the Vice President of the Ukrainian National Bar Association, whom we thank.

Currently, there is an unidentified group of people calling themselves the "Working Group on Justice," not known in government offices, judging from official responses, but nevertheless actively promoting the message in the international arena that the Ukrainian Bar is a "threat" to justice reform.

In the Draft Plan for the Restoration of Ukraine prepared by the National Council for the Recovery of Ukraine from the War, this unofficial Working Group expressed criticism of the *Ukrainian National Bar Association* (UNBA). The reform project echoes draft laws that have attempted to undermine the independence of the bar in Ukraine in the past (No. 9055⁵¹ and No. 1013).

Such a position of an organization acting ostensibly under the auspices of the government can be seen as a form of pressure on an independent institution of the bar, as well as undermining the authority of the bar and limiting its powers and status established by law. There is a risk of losing the independence of the institution of advocacy, including through the loss of its self-governance and self-regulation, should the proposal to decentralize the self-governance of lawyers, change the status of the UNBA, and create alternative professional organizations of lawyers be supported.

Unfortunately, the attack on the independence of the Bar Association is being carried out with the support of Ukrainian Ministry of Justice officials, some of whom are affiliated with a competing association.

In light of the above, the independence of the Ukrainian National Bar Association (UNBA) is currently opposed from various fronts and by various seemingly unrelated people. Naturally, this greatly complicates UNBA's activities, especially in times of war⁵².

⁵¹ Bill No. 9055 is titled "On Lawyers and the Practice of Law": the bill included unacceptable parameters for the Bar, a deviation from the already implemented European standards and the exclusion of lawyers from the process of preparing the reform of the relevant legislation, provisions on changing the requirements for acquiring the right to practice law, the introduction of a single bar exam, changes to the procedure for the internship of candidates, and the reform of the Unified Register of Lawyers of Ukraine. The provisions of the text of this dangerous document were unequivocally recognized as corrupt by the relevant parliamentary committee and, therefore, were not implemented.

⁵² Sources: - <https://unba.org.ua/news/7819-vtruchannya-minyustu-v-diyal-nist-organiv-advokats-kogo-samovryaduvannya-e-nepripustimim-rishennya-rau.html>

7. Diary of trial monitoring mission "How difficult it is to enforce rights in a country at war", il Domani⁵³, Dec. 16, 2022

Lawyer Nicola Canestrini was the sole international observer on behalf of the Nonviolent Movement at the trial of Ukrainian conscientious objector Vitaliy Vasyliovych Alekseienco before the Ivano-Frankivsk Court of Appeals. The Nonviolent Movement, together with Un Ponte Per, defends Ukrainian objectors as part of the "Objection to War" campaign. This is his diary of three days in Ukraine.

After a long road approach on Polish territory together with a colleague, Ihor, secretary of the Ukrainian National Bar Association (UNBA) who came to my rescue for this mission, finally here is the border with Ukraine.

A queue of many hours completely throws off our schedules, and gives a glimpse of the different value of time. "It's Ukraine," Ihor will keep repeating.

Welcoming are the machine guns drawn by Ukrainian military personnel who, guns drawn, search every incoming vehicle. A border police official, not satisfied with Ihor's explanation, summons me in front of the mirrored glass and scrutinizes me, even opening the door. She gives me the impression that she is capable of catching every insecurity, hesitation or contradiction of those who have to cross the border.

I pass the visual search, and stamped in my passport, we set off again: the first few miles ahead are marked by flying checkpoints in the opposite

- <https://unba.org.ua/news/7802-naperedodni-profesijnogo-svyata-advokatura-diznalas-sho-ij-ogolosili-vijnu-v-minyusti.html>

- <https://unba.org.ua/news/7702-rada-advokativ-ukraini-provela-special-ne-zasidannya.html>

- <https://advokatpost.com/khorosha-mina-pry-pohanij-hri-abo-iak-advokat-kolomiets-dopomahaie-ukrainskij-advokaturi-pid-chas-vijny-2/>

- <https://unba.org.ua/news/7794-rau-iniciyuvala-zvil-nennya-zastupnici-ministra-yusticii-ukraini-valerii-kolomic-iz-zajmanoi-posadi-ta-iniciyuvannya-prityagnennya-ii-do-disciplinarnoi-vidpovidal-nosti-yak-advokata.html>

- <https://ipress.ua/news/avtorom-zakonu-pro-advokaturu-ie-menedzher-koruptsiynyh-shem-kurchenka-tetyana-chornovol-274217.html>

⁵³ <https://www.editorialedomani.it/giustizia/come-difficile-far-rispettare-i-diritti-in-un-paese-in-guerra-e1d2arnu>

carriageway coming out of Ukraine. Law enforcement officers search for those trying to leave the warring country.

The deeper we go into the territory, the more obvious it becomes that the war is there, and it is impossible not to notice it.

Flashes and flashes of shelling are amplified in the clouds, concrete roadblocks with openings sheltered by sandbags and guarded by military personnel make it clear that here one is prepared to defend every meter. In the weeks following the Russian invasion, Ihor tells me, roadblocks with these forts in the middle of the road were so frequent that a four-hour trip took three days. "It's Ukraine."

Thanks to the chauffeur lawyer, the military-who stay far apart to avoid being mowed down by a single flail or bomb-stops us for a short time, but it is still 15 minutes each time.

Our attitude is also one of utmost caution: we approach at a walking pace, turn off the car's headlights and turn on the interior light to facilitate control.

Tones are formal but cordial, and looks verify name matching with face, always occur backseat and trunk.

Ihor has family, wife and two children (the last born within months of the Russian invasion), displaced to the Czech Republic. "Don't you miss them?" I ask him. "It's Ukraine."

After more than 12 hours of travel, with Internet going from "no service" to 5g in a few meters, we finally arrive in Ivano-Frankivsk.

The capital city of the Oblast looks ghostly, the streets and hotel have lights off, to avoid wasting energy or perhaps not to facilitate any incursions.

However, the heating in the hotel works, the electricity for Internet and to charge the cell phone is there.

Let's see what will happen tomorrow: the biggest risk is that the hearing will be skipped because of a power outage. That happens a lot.

THE TRIAL OF THE OBJECTOR

The day does not start very well, late. At the table, as I gobble down an imitation cappuccino with delicious spicy omelet, I meet my interlocutors who will be friends by evening: Eugenia Mnyshenko, lawyer and

representative of Ukrainian Parliament and ombudsman for Ivano-Frankivsk Oblast and Svetlana Petrova, Chair of Ivano-Frankivsk Regional Bar Council. An unseen Ihor Kolesnikov in a tie, Secretary of the Bar Council of Ukraine and lawyer, is now accompanied by Oleg Klymyuk, lawyer but above all interpreter in Italian.

We cross the street and are in the courthouse, with sandbags leaning against the glass door.

It makes an impression on me: war is the denial of law and rights, and to see war in a courthouse jars. Symbols are important.

The corridors are cold and dark, people are wandering of the dark and bumping into each other. I can see that something is not going right, and indeed the news comes: due to a blackout, the Court of Appeals cannot use the centralized computer system, so the hearing is postponed for an hour. So we all go as a delegation to the president of the Court of Appeals who -- like all magistrates in all courts in the world -- complains about the shortage of magistrates. He reassures us about the independence from the executive power of the judiciary in the judiciary; on the investigative some doubt seems to have it, although they enjoy the same status. We greet each other with esteem: it must not be easy to administer justice in wartime, to combine civilization with barbarism.

No news from the computer system and the hearing is definitely skipped. I talk to the objector's lawyer, Mykhailo O. I make an effort, but I don't understand what the line of defense is.

My colleague tells me that the prosecutor did not ask for pre-trial measures and that the court imposed a low sentence because the defendant acknowledged the facts, but denied parole (i.e., the possibility of not going to jail on condition of good behavior) because he had not "felt remorse."

At 12 noon we are joined by the defendant with his mother, later revealed to be a friend. The boy, an objector for religious reasons, says he would not know what to feel remorse for. He did what he had to do, far from remorse. "You know you risk jail time for this?", "Yes." I promise him that I will

continue to follow his case and hope that my trial deadlines in Italy will allow me to keep my promise.

After lunch, we go to the Bar Council headquarters to speak with the president and regional ombudsmen of the rights of restricted persons who were returning from prison where they had visited a 14-year-old boy who was threatening suicide because his friend had been transferred.

UKRAINIAN LAWYERS

In Ukraine, I met highly motivated colleagues who were not at all ideologized by bellicist rhetoric.

On the contrary: uneasy about certain tendencies of the government, which would like to control the independence of female lawyers and incriminate colleagues for collaborationism if they guarantee defense in Russian-occupied territories.

In the middle of the conversation the power goes out, because at 4 p.m. the power is cut to the neighborhood.

On the way back to the hotel, the road is dark, traffic lights out, and I am told that car accidents have increased.

Improvised pouches and bunkers are a reminder that there is war and invasion was feared, so they were prepared to fight street by street. "Don't take pictures, you would be subject to arrest and extrajudicial custody," don't take pictures, you could be arrested and held in custody, they tell me. That is kidnapping, I think: in fact when faced with the hypothesis of terrorism, all states act the same way.

THE RETURN

In my stay in Ukraine I saw that there is more to this country at war than just bellicose rhetoric. I met a young man with courage to spare, who had the courage to say no to slinging a weapon and finds himself the for that convicted and on trial.

Along the road back, military police are always patrolling for draft dodgers, and checkpoints also seem to be there to stop people from migrating. The impression, however, is that it will not be policemen, bunkers or borders that will stop these people, they will only make their migration more dangerous.

Meanwhile, on the dedicated Viber channel comes the signal of the air-raid alert across Ukraine: hundreds of thousands of people will then be looking for news, shelter, help. And thoughts run to the people I met, the brave lawyers and advocates still fighting for rights, exposed to danger.

8. *Conclusions (by Mao Valpiana - President of the Nonviolent Movement)*

The continuation of the war in Ukraine, which is becoming increasingly bloody, strengthens the reasons of those who call loudly and urgently for a 'ceasefire!': the first necessary and indispensable step to open the way to an international peace conference, the only possibility for a just and shared solution to the current conflict. In Russia, Belarus and the Ukraine, there is a growing number of movements, especially youth movements, that are calling for a way out of the war.

The historical international pacifist and non-violent organisations, such as War Resisters' International (WRI), the International Fellowship of Reconciliation (EBCO-BEOC), the European Bureau for Conscientious Objection (EBCO-BEOC), work to create a link between all those groups, movements, associations that in the countries involved in armed conflict seek an alternative to weapons.

In Italy, the Nonviolent Movement has launched the War Objection Campaign, which aims to provide concrete support to conscientious objectors on all sides.

The Russian and Ukrainian nonviolents are the only voices of the two sides that are talking to each other, creating a bridge over which peace can pass, thanks to the courage and commitment of those in Kiev and Moscow, risking themselves, working for the growth of organised nonviolence.

The concrete closeness to those who, even within the conflict, have chosen nonviolence, was also manifested during the peace mission carried out by the "Stop the war now" Caravan, led by Un Ponte per and the Nonviolent Movement, which travelled to Ukraine between September and October 2022 and strengthened contacts with the Ukrainian Pacifist Movement by providing Ukrainian objectors

with legal support. The Campaign is also engaged on a political level to ask the European institutions and the Italian government to recognise the political refugee status of Russian, Ukrainian and Belarusian objectors, ensuring them asylum and protection.

One year after the outbreak of the bloody war, the Campaign to Object to War has invited a representation of the Russian, Belarusian and Ukrainian non-violent movements to Italy to raise public awareness and to make a different voice heard from the propaganda of war. The next goal is a mission to Russia in solidarity with the Russian Conscientious Objectors Movement and the other organisations that are working to remove thousands and thousands of young people from the ongoing mobilisation.

We share what Antonio Papisca, professor emeritus of International Relations at the University of Padua, wrote: "Pope Francis' affirmation that respect for the right to peace is a necessary precondition for the exercise of all other rights is in perfect consonance with the Universal Law of Rights that assumes the life of the human being as the supreme value. Pope Francis' clear stance is also fully in line with the principle of the interdependence and indivisibility of all rights: civil, political, economic, social cultural; individual and collective. Peace, like development and the environment, are both individual rights, like other rights, and collective rights, i.e. macro rights-synthesis or macro rights-strategy, which touch the very essence of the traditional state-form and demand its transformation. In the presence of the right to peace, the state in fact loses the *ius ad bellum* and is invested with the *officium pacis* as its constitutive attribute'.

The Campaign to Object to War is today a concrete instrument to implement the fundamental human right to peace, which on a political level means for states: the obligation to disarm, the obligation to democratically reform and make the legitimate international collective security bodies function, starting with the United Nations, the obligation to confer part of the armed forces to the UN as provided for in Article 43 of the UN Charter, the obligation to reconvert and train these forces for the exercise of international police functions under supranational command, the obligation to submit to the jurisdiction of the International Criminal Court.

It is possible to support the peace initiatives in Italy, Russia, Ukraine with the "Objection to War" Campaign by making a payment to IBAN IT35 U 07601 11700

0000 18745455, in the name of the Nonviolent Movement, reason for the payment "Objection to War".

Judgment of the Ivano-Frankivsk District Court (9/15/2022)



unofficial machine translation

Case No. 344/7666/22

Proceedings No. 1-kp/344/981/22

ON BEHALF OF UKRAINE

September 15, 2022, Ivano-Frankivs'k

Ivano-Frankivsk city court of the Ivano-Frankivsk region in the composition of president PERSON_1, with the participation of hearing secretary PERSON_2, prosecutor PERSON_3,

the defendant Vitaliy Vasyliovych Alekseienko

defense counsel PERSON_5,

considered in public hearing the criminal case against ALEKSEIENKO , INFORMATION_1 , a native of Sloviansk, Donetsk region, Ukrainian citizen, temporary resident and registered at ADDRESS_1 , with special secondary education, unemployed, divorced, not previously convicted , RNOCPP NUMBER_1 , in the commission of an offense provided for in Article 336 of the Criminal Code of Ukraine, -

WHEREAS.

ALEKSEIENKO evaded conscription for mobilization under the following circumstances.

Yes, on September 28, 2017, conscript ALEKSEIENKO was entered into the military register of conscripts in the Slovyansk OMVK in the Donetsk region with the

assignment to him after completing alternative service in the period from October 14, 1996 to October 14, 1998 to the city of Zaravshan, Republic of Uzbekistan, military accounting specialty "974".

By the Decree of the President of Ukraine No. 69/2022 of February 24, 2022 "On General Mobilization", approved by the Law of Ukraine "On Approval of the Decree of the President of Ukraine "On General Mobilization" of March 3, 2022 , in connection with the introduction of martial law on the territory of Ukraine, in accordance with the Decree of the President of Ukraine No. 64/2022 of February 24, 2022 "On the introduction of martial law in Ukraine", the validity of which was extended, in accordance with Decree of the President of Ukraine No. 133/2022 of March 14, 2022 (the term of martial law in Ukraine was extended from 05:30 on March 26, 2022 for a period of 30 days), no. 259/2022 of April 18, 2022 (the period of martial law in Ukraine was extended from 05:30 on April 25, 2022 for a period of 30 days), no. 341/2022 of May 17, 2022 (the martial law period in Ukraine was extended from 05: 30 of May 25, 2022 for a period of 90 days), in connection with the military aggression of the Russian Federation against Ukraine and for the purpose of ensuring the defense of the state , support of combat readiness and mobilization of the Armed Forces of Ukraine and other military formations, based on the proposal of the National Security and Defense Council of Ukraine, in accordance with Part 2 of Article 102, paragraphs 1, 17, 20, Part 1 of Article 106 of the Constitution of Ukraine, a general mobilization was announced and is underway.

In connection with the active hostilities in the Donetsk region, ALEKSEIENKO arrived in the city of Ivano-Frankivsk on May 30, 2022, where on the same day he was registered as an internally displaced person living temporarily in the city of Ivano-Frankivsk. entered in the military register of conscripts in INFORMATION_2.

According to the certificate of the military medical commission INFORMAZIONI_3 dated May 30, 2022 No. 77/22/4568, conscript ALEKSEIENKO was deemed fit for military service due to his age and health. On June 1, 2022, according to the procedure established by law, conscript ALEKSEIENKO was notified of the order to appear at 10:00. 00 min. June 2, 2022, at the INFORMATION_4 conscription station, located at ADDRESS_2, for the purpose of his conscription for mobilization in the Armed Forces of Ukraine and was warned of prosecution for failure to appear within the specified time limit.

On June 2, 2022, ALEKSEIENKO, upon arrival at INFORMATION_5, refused to report to the military unit, stating that he refused to perform military service because of his religious beliefs. On the same day, conscript ALEKSEIENKO was explained the provisions of the Law of Ukraine "On Alternative (non-military) Service" and received a second summons about his obligation to report to the INFORMATION_4 conscription station at ADDRESS_2 on June 6, 2022 at 09:00. 00 min. for the purpose of his planned mobilization to the Armed Forces of Ukraine.

Notwithstanding this, ALEKSEIENKO, being enlisted, as well as eligible for military service and not having, pursuant to Article 23 of the Law of Ukraine "On Mobilization, Training and Mobilization" the right to deferment from conscription for military service due to mobilization, as well as pursuant to Article 2 of the Law of Ukraine "On Alternative (Non-Military) Service" - the right to alternative service, and being duly notified according to the procedure established by law on the need to get to INFORMATION_5 for further dispatch to team no. NUMBER_2 for military service in connection with the announcement of mobilization and categorically refused to be called to military service in the Armed Forces of Ukraine for mobilization, without providing supporting documents, in order to avoid conscription, to be mobilized in the Armed Forces of Ukraine, which violated the recruitment order of the Armed Forces of Ukraine and Art. 65 of the Constitution of Ukraine, the Law of Ukraine "On the Approval of the Decree of the President of Ukraine "On Full Mobilization" and the Law of Ukraine "On the Preparation and Mobilization of Mobilization," thereby evading the mobilization project.

At the court hearing, the defendant ALEKSEIENKO fully and unconditionally admitted his guilt of committing the charged crime, confirmed all the circumstances set out in the indictment without exception, and explained to the court that he moved from Sloviansk to Ivano-Frankivsk to live in dormitory On May 30, 2022, he was registered with the Central National Police Service as an internally displaced person, from where he was referred to the Military Commissariat. On the same day he presented himself at the Military Commissariat, where he immediately passed the medical examination. On June 1, 2022, the Military Commissariat issued him a summons for June 2, 2022, to be sent to the service. He appeared and explained to the lawyer that because of his religious beliefs he cannot perform military service and take up arms, he can only perform alternative service, which he did previously in Uzbekistan. He was granted an extension to confirm these circumstances until Monday. On June 6, 2022, he appeared at the military

commissariat, where he was refused a deferment for alternative service and was informed of the need to go to a military unit, which he did not agree to, he refused. In this regard, employees of the military commissariat called the police. He also explained that he does not belong to any religious organization, that he does not make p Art. Because of his religious beliefs, he believes he has no reason to repent for the crime he committed and is ready to be punished according to the law.

On the basis of Part 3 of Article 349 of the Criminal Code of Ukraine, with the consent of all participants in the court proceedings, the court established the procedure for the examination of evidence in these criminal proceedings and found it inappropriate to examine evidence concerning the actual circumstances of the proceedings, which are not disputed by anyone and are acknowledged by the defendant himself. The court limited itself to questioning the defendant and studying the written evidence characterizing his identity. At the same time, the court made it clear that the participants in the court proceedings correctly understand the content of these circumstances, there is no doubt about the voluntariness and truthfulness of their position, and it is also clear to them that in this case they will be deprived of the right to challenge these circumstances in the appeal procedure.

Therefore, the court finds the guilt of defendant Alekseienko for the commission of the crime charged against him established and qualifies his actions under Article 336 of the Criminal Code of Ukraine as evasion of conscription for military service during mobilization.

According to Article 65 of the Criminal Code of Ukraine, a person who has committed a crime must receive necessary and sufficient punishment for his or her correction and prevention of new crimes, and according to Article 50 of the Criminal Code of Ukraine, the purpose of punishment is not only punishment, but also the correction of the convicted, as well as the prevention of the commission of new crimes by both the convicted and other persons.

In imposing punishment on the defendant Alekseienko, the court takes into account: the degree of seriousness of the offense committed, which under Article 12 of the Criminal Code of Ukraine is a misdemeanor; information on the identity of the offender; his age; health status; property status; not working; divorced; not registered with a psychiatrist or narcologist.

Mitigating circumstances for punishment are full and unconditional admission of guilt, active assistance in the investigation of a crime, and the fact that Vitaliy Vasyliovych Alekseienko is being held criminally responsible for the first time.

Circumstances that would aggravate the sentence were not covered by the court.

In addition, from the preliminary report of the defendant, it can be seen that the average level of risk of the probability of recidivism and the average level of risk of danger to society, including individuals, and the correction of ALEKSEIENKO without deprivation or restriction of liberty for a certain period is possible and does not pose a high danger to society, including individuals.

Therefore, taking the above into account, the opinion of the prosecutor, who asked to sentence the defendant to imprisonment for 3 years with the institution of a 2-year probationary period, the defendant, who agrees to be punished for what he has committed, and the defense counsel, who asked for the application of Art. 75 of the Criminal Code of Ukraine, as well as taking into account the data on the identity of the offender, the presence of various circumstances that mitigate the punishment and significantly reduce the severity of the crime committed, and the absence of circumstances that aggravate the punishment, the court, on the basis of the principle of individualization of punishment, considers that Vitaliy Vasyliovych Alekseienko should impose the main punishment in the form of imprisonment for a period less than the minimum limit established in the sanction of Article 336 of the Criminal Code of Ukraine, and such punishment will be sufficient, fair and necessary for his correction, as well as to prevent the commission of new crimes both by him and by other persons.

At the same time, there are sufficient legal grounds for the application of the provisions of Article 75 of the Criminal Code of Ukraine, - not established by the court.

A civil case has not been filed, procedural costs and physical evidence are absent in this criminal case.

Preventive measure against the defendant was not imposed.

Having regard to Articles 368, 370, 373, 374, 615 of the Code of Criminal Procedure of Ukraine, court

DECIDES:

Vitaliy Vasyliovych Alekseienco shall be convicted of the offense provided for in Article 336 of the Criminal Code of Ukraine and with the application of Part 1 of Article 69 of the Criminal Code of Ukraine to sentence him to imprisonment for a term of 1 (one) year.

The term of serving the sentence of defendant ALEKSEIENKO shall be counted from the time he is actually detained.

A copy of the verdict shall be delivered to the defendant and the prosecutor immediately after its proclamation, the other participants are entitled to receive a copy in court.

The verdict may be appealed, taking into account the requirements of Part 2 of Article 394 of the Code of Criminal Procedure of Ukraine by appealing to the Ivano-Frankivsk Court of Appeals through the Ivano-Frankivsk City Court within thirty days from the day of its announcement.

The judgment becomes legally binding after the deadline for filing an appeal has expired, if such an appeal has not been filed.

President of the Court Roman KHOROSTIL

Judgment of the Ivano-Frankivsk Court of Appeals (16.1.2023)



unofficial machine translation

Original of the court's judgment <https://reyestr.court.gov.ua/Review/108452452>

Separate opinion <https://reyestr.court.gov.ua/Review/108416324>

Case No. 344/7666/22

Proceedings No. 11-kp/4808/26/23

Category Article 336 of the Criminal Code of Ukraine.

The president of the first instance is PERSON_1

Judge-Rapporteur Povzlo

DECISION

ON BEHALF OF UKRAINE

January 16, 2023, Ivano-Frankivsk

The panel of judges of the judicial chamber for the consideration of criminal cases of the Ivano-Frankivsk Court of Appeals consists of:

Judges PERSON_2, PERSON_3, ALEKSEIENKO, with the participation of secretary PERSON_5,

Considered in public hearing criminal case no. 12022091010000736 based on the appeal of the defendant ALEKSEIENKO against the judgment of the Ivano-Frankivsk city court of the Ivano-Frankivsk region of September 15, 2022, that ALEKSEIENKO, INFORMATION_1, a native of Sloviansk, Donetsk region, Ukrainian

citizen, temporary resident and registered in ADDRESS_1 , with special secondary education, unemployed, divorced, not previously convicted, found guilty of committing the offense provided for Art. 336 of the Criminal Code of Ukraine, and with the application of Part 1 Ukraine was sentenced to imprisonment for 1 (one) year.

With the participation of the prosecutor PERSON_7, the defendant ALEKSEIENKO, defender of PERSON_8,

WHEREAS

Defendant ALEKSEIENKO requests that the court's verdict be modified in terms of the sentence imposed on request Art. 75 of the Criminal Code of Ukraine, to release him from the suspended prison sentence by setting a probationary period of one year.

The appellant believes that the trial court imposed a harsher sentence on him than he deserved, wrongly concluding that he had not repented of the crime he committed.

He stresses that he repented for committing the crime stipulated Art. 336 of the Criminal Code of Ukraine, having celebrated the sacrament of repentance in one of the churches in Ivano-Frankivsk, pleaded guilty, has a minor child born in 2009, which indicates the possibility of applying Article 75, Ukraine with the definition of the examination period.

He informs that the court did not take into account the fact that, due to his religious beliefs, he performed alternative (non-military) service in period 3 from 14/10/1996 to 14/10/1998 according to the legislation of Uzbekistan. Moreover, the court, in sentencing him, failed to take into account a circumstance such as temporary displaced status.

The court of first instance ruled that ALEKSEIENKO evaded mobilization leverage under the following circumstances.

Yes, on September 28, 2017, conscript ALEKSEIENKO was entered into the military register of conscripts in the Slovyansk OMVK in the Donetsk region with the assignment to him after completing alternative service in the period from October 14, 1996 to October 14, 1998 to the city of Zaravshan, Republic of Uzbekistan, military accounting specialty "974."

By the Decree of the President of Ukraine No. 69/2022 of February 24, 2022 "On General Mobilization", approved by the Law of Ukraine "On Approval of the Decree of the President of Ukraine "On General Mobilization" of March 3, 2022 , in connection with the introduction of martial law on the territory of Ukraine, in accordance with the Decree of the President of Ukraine No. 64/2022 of February 24, 2022 "On the introduction of martial law in Ukraine", the validity of which was extended, in accordance with Decree of the President of Ukraine No. 133/2022 of March 14, 2022 (the term of martial law in Ukraine was extended from 05:30 on March 26, 2022 for a period of 30 days), no. 259/2022 of April 18, 2022 (the period of martial law in Ukraine was extended from 05:30 on April 25, 2022 for a period of 30 days), no. 341/2022 of May 17, 2022 (the martial law period in Ukraine was extended from 05: 30 of May 25, 2022 for a period of 90 days), in connection with the military aggression of the Russian Federation against Ukraine and for the purpose of ensuring the defense of the state , combat maintenance and readiness for mobilization of the Armed Forces of Ukraine and other military formations, based on the proposal of the National Security and Defense Council of Ukraine, in accordance with Part 2 of Article 102, paragraphs 1, 17, 20, Part 1 of Article 106 of the Constitution of Ukraine, a general mobilization was announced and is underway.

In connection with active hostilities on the territory of the Donetsk region, ALEKSEIENKO arrived in the city of Ivano-Frankivsk on May 30, 2022, where on the same day he was registered as an internally displaced person living temporarily in the territory of the city of Ivano-Frankivsk and also included in the military register of conscripts in INFORMATION_2.

According to the certificate of the military medical commission INFORMAZIONI_3 dated May 30, 2022 No. 77/22/4568, conscript ALEKSEIENKO was found fit for military service due to his age and health. On June 1, 2022, according to the procedure established by law, conscript ALEKSEIENKO was notified of the order to appear at 10:00. 00 min. June 2, 2022, at the INFORMATION_4 conscription station, located at ADDRESS_2, for the purpose of his conscription for mobilization in the Armed Forces of Ukraine and was warned of prosecution for failure to appear within the specified time.

On June 2, 2022, ALEKSEIENKO, upon arrival at INFORMATION_5, refused to report to the military unit, stating that he refused to perform military service because of his religious beliefs. On the same day, the position was explained to conscript

ALEKSEIENK Law of Ukraine "On alternative (non-military) service "and he received a second summons about his obligation to report to the INFORMATION_4 draft post at ADDRESS_2 on June 6, 2022 at 09:00. 00 min. for the purpose of his planned mobilization to the Armed Forces of Ukraine.

Notwithstanding this, ALEKSEIENKO, being enlisted, as well as eligible for military service and not having, in accordance with Art. 23 of the Law of Ukraine "On mobilization, training and mobilization"-the right to deferment of conscription for military service by mobilization, as well as in accordance with Art. 2 of the Law of Ukraine "On alternative (non-military) service"-the right to alternative service, and having been duly informed in accordance with the procedure established by law about the need to arrive at INFORMATION_5 for further dispatch to team no. NUMBER_1 for military service in connection with the announcement of mobilization and conscription for military service in the Armed Forces of Ukraine for mobilization, without providing supporting documents, in order to evade the project, categorically refused to be mobilized in the Armed Forces of Ukraine, which violated the recruitment order of the Armed Forces of Ukraine and Art. 65 of the Constitution of Ukraine, the Law of Ukraine "On the Approval of the Decree of the President of Ukraine "On Full Mobilization" and the Law of Ukraine "On the Preparation and Mobilization of Mobilization," thus circumventing the mobilization project.

During the appeal:

- the defendant ALEKSEIENKO and the counsel for PERSON_8 supported the claims of the appeal, for the reasons stated therein.
- the prosecutor considered the court's verdict to be legitimate and well-founded, but did not oppose the granting of the defendant's appeal.

After listening to the judge's report, the explanations of the participants in the criminal proceedings, reviewing the materials of the criminal proceedings, and discussing the arguments of the appeal, the court of appeals believes that the appeal should be dismissed and the court's verdict should be left unchanged, for the following reasons.

According to Part 1 Ukraine, the appellate court reviews the lower court's decisions within the framework of the appeal.

According to the results of the appellate review, the defense party's arguments were not upheld.

Since on appeal the defendant PERSONA_6 challenges the court's verdict in the part of the sentence imposed, the appellate court reviews the court's decision in this p Art.

Yes, in parts 1 and 2 Ukraine is established that the court shall impose a punishment:

- 1) within the limits set forth in the sanction of the article (sanction of part of the article) of this Special Part of the Code, which provides for liability for crime committed, except in cases provided for in Part Two Article 53 of this Code;
- 2) in accordance with the provisions of the General Part of this Code document;
- 3) taking into account the degree of seriousness of the offense committed, the identity of the offender, and mitigating and aggravating circumstances of punishment.

A person who has committed a crime must receive a punishment that is necessary and sufficient for his or her correction and prevention of new crimes. A more severe punishment among those prescribed for the crime committed is prescribed only if a less severe punishment is insufficient to correct the person and prevent him from committing new crimes.

According to the requirements of Part 2 Ukraine the purpose of punishment is not only punishment, but also the correction of the convicted, as well as the prevention of the commission of new crimes by both the convicted and other persons.

Accordingly, the requirements of Part 1 of Article. Ukraine the decision of the court must be legal, justified and reasoned. Legal is a decision made by a competent court according to the rules of substantive law in compliance with the requirements for criminal proceedings set forth in this Code. A decision made by the court on the basis of objectively established circumstances confirmed by the evidence examined during the trial and evaluated by the court pursuant to Article 94 of this Code. A reasoned decision is one in which adequate and sufficient grounds and reasons are given for its adoption.

The trial court finds that the trial court has made a full investigation of the circumstances, the clarification of which is of considerable importance to this

criminal proceeding, and the findings of the trial court, set forth in the decision of the court, correspond to the actual circumstances of the criminal proceeding.

According to the contents of Part 1 Art. 337 of the CPC of Ukraine, the trial shall be held only against the person against whom the charge is brought, and only within the limits of the indictment formulated in accordance with the indictment, except for the cases provided for in this Article.

U Article 17 of the Law of February 23, 2006 "On the Execution of Decisions and Application of the Practice of the European Court of Human Rights"(hereinafter - the Court) provides that "when examining cases, the courts shall apply the Convention and the practice of the Court as the source of law."

In the case "Baklanov v. Russia" (decision of June 9, 2005), as well as in the case "Friesen v. Russia" (decision of March 24, 2005), the Court noted that "striking a fair balance between the general interest of society and the requirements of protection of the fundamental rights of the person becomes relevant only if it is established that during the relevant intervention the principle of "lawfulness" was observed and was not arbitrary. In "Izmailov v. Russia" (paragraph 38 of the October 16, 2008 decision), the Court indicated that "in order to be considered proportionate, the intervention must correspond to the seriousness of the crime and not constitute an "undue personal burden on the individual."

After reviewing the arguments in the appeal, the appeals court concluded that the trial court had complied with the requirements of criminal and criminal procedure law and had also taken into account the practice of the European Court of Human Rights.

In imposing punishment on ALEKSEIENKO, the trial court in accordance with the requirements Art. 65 of the Criminal Code of Ukraine took into account the seriousness of the crime committed, which under Art.Ukraine is a misdemeanor; information on the identity of the offender; his age; state of health; his property status; not working; divorced; the absence of a registered psychiatrist or narcologist; the absence of circumstances that aggravate the defendant's punishment; and the presence of circumstances that mitigate the punishment, viz: full and unconditional admission of guilt, active assistance in the investigation of a criminal offense, and the fact that ALEKSEIENKO was charged for the first time with criminal responsibility.

In addition, the court correctly took into account the content of the investigative report, according to which the average level of risk of the likelihood of re-offense and the average level of risk of danger to society, including individuals, is seen, and the correction of ALEKSEIENKO without deprivation or restriction of liberty for a certain period is possible and does not pose a high danger to society, including individuals.

In light of these circumstances, the trial court came to the correct conviction that, based on the principle of individualization of punishment, PERSONA_6 on the basis of Part 1 Art. 69 of the Criminal Code of Ukraine should be imposed the main punishment in the form of imprisonment for a period less than the minimum limit set in the sanction Art. 336 of the Criminal Code of Ukraine, and such punishment will be sufficient, just and necessary for his correction, as well as to prevent the commission of new crimes both by him and others. At the same time, there are sufficient legal grounds for the application of the provisions Art. 75 of the Criminal Code of Ukraine, - the court of first instance did not determine.

The court of appeals believes that the court of first instance took full account of the circumstances mentioned by ALEKSEIENKO in the court of appeals.

In the opinion of the court of appeals, ALEKSEIENKO was punished for Art. 336 of the Criminal Code of Ukraine, taking into account all the factual circumstances of the criminal proceedings, is such as to correspond to the degree of seriousness of the offense and the person of the defendant, necessary and sufficient for its correction and prevention of new crimes both by him and other persons.

The defendant has a minor child living with his ex-wife in another country, and the status of temporarily displaced person is not a circumstance that allows for the application of the punishment of Art.75,76 of the Criminal Code of Ukraine and determine the examination period.

The defendants were not provided with any documents that, according to the legislation of Ukraine, constitute the basis for alternative non-military service based on religious beliefs or entitle them to deferment from conscription.

In the opinion of the court of appeals, the final punishment of ALEKSEIENKO determined by the court of first instance with the application of Part 1 Art. 69 of the Criminal Code of Ukraine in the form of imprisonment for a period of 1 (one) year is legal and fair, corresponds to the principles of individualization of

punishment and humanism, is a balance between the general interests of society and the requirements for the protection of the fundamental rights of the individual.

Under these circumstances, there are no grounds to annul or modify the verdict of the court of first instance based on the results of the examination of ALEKSEIENKO's appeal, and therefore it should be left unchanged.

Having regard to Articles 376,405,407,409,419 of the CPC of Ukraine,

DECIDES:

To dismiss the appeal of the defendant ALEKSEIENKO.

Judgment of the Ivano-Frankivsk City Court of the Ivano-Frankivsk region of September 15, 2022 concerning ALEKSEIENKO for Art. 336 of the Criminal Code of Ukraine, is to be left unchanged.

The decision takes effect from the moment of its announcement and may be appealed in cassation directly to the Supreme Court within three months from the day of its announcement.

Judges PERSON_2 PERSON_3 PERSON_4

Case No. 344/7666/22

Case No. 11-kp/4808/26/23

Ivano-Frankivsk Court of Appeal

CONCURRENT OPINION

"16" January 2023

Judge PERSON_1 on the decision of the Ivano-Frankivsk Court of Appeals of January 16, 2023 in Criminal Proceeding No. , for Art. 336 of the Criminal Code of Ukraine.

By the verdict of the Ivano-Frankivsk City Court of the Ivano-Frankivsk region of September 15, 2022, PERSON_2 was found guilty of committing a crime under Art. 336 of the Criminal Code of Ukraine, and by application of Part 1 Art. 69 of the Criminal Code of Ukraine was sentenced to imprisonment for 1 (one) year.

On January 16, 2023, the panel of judges of the Criminal Trial Chamber of the Ivano-Frankivsk Court of Appeals, by a majority vote, dismissed the appeal of the defendant PERSON_2, and the verdict of the court of first instance remained unchanged.

I believe that, taking into account the specific circumstances of the criminal case and the data on the identity of the defendant PERSON_2, the appeal should be upheld and the judgment of the Ivano-Frankivsk City Court of the Ivano-Frankivsk region of September 15, , 2022 - reformed in the part of the prescribed punishment.

The circumstances of the crime established by the court of first instance and the information about the person of the defendant, taking into account his sincere remorse, made it possible to apply to him the requirements of Art. Art. 75,76 of the Criminal Code of Ukraine.

Such punishment would correspond to the task of the Criminal Code of Ukraine, would be necessary and sufficient to correct the defendant PERSON_2 and prevent the commission of new crimes both by him and by other persons.

Judge PERSON_1

On February 18, 2023, a cassation appeal was filed by the defendant, who was summoned to the Ivano-Frankivsk pretrial detention center of the State Department of Ukraine for Execution of Sentences on February 20, 2023; decision on stay of execution due to the cassation appeal is pending.

