



International Covenant on Civil and Political Rights

Distr.: General
17 December 2015

Original: English

Human Rights Committee

Communication No. 2223/2012

Views adopted by the Committee at its 115th session (19 October-6 November 2015)

<i>Submitted by:</i>	Sunnet Japparow (represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Turkmenistan
<i>Date of communication:</i>	3 September 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 5 December 2012 (not issued in a document form)
<i>Date of adoption of Views:</i>	29 October 2015
<i>Subject matter:</i>	Conscientious objection to compulsory military service; inhuman and degrading treatment; deprivation of liberty
<i>Procedural issues:</i>	Admissibility – exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of conscience; inhuman and degrading treatment; deprivation of liberty
<i>Articles of the Covenant:</i>	7, 10 and 18 (1)
<i>Articles of the Optional Protocol:</i>	5 (2) (b)



Annex

Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights (115th session)

concerning

Communication No. 2223/2012*

Submitted by: Sunnet Japparow (represented by counsel)

Alleged victim: The author

State party: Turkmenistan

Date of communication: 3 September 2012 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 October 2015,

Having concluded its consideration of communication No. 2223/2012, submitted to it on behalf of Sunnet Japparow under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5 (4) of the Optional Protocol

1.1 The author of the communication is Sunnet Japparow, a national of Turkmenistan born in 1990. He claims that the State party violated his rights under articles 7 and 18 (1) of the Covenant. Although the author does not invoke this provision specifically, the communication also appears to raise issues under article 10 of the Covenant. The Optional Protocol entered into force for Turkmenistan on 1 August 1997. The author is represented by counsel.

1.2 In his initial submission, the author requested that the Committee seek assurances from the State party that as an interim measure it would not subject him to a second round of criminal prosecution until the Committee had dealt with the communication. On 7 December 2012, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to accede to this request.

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

The text of a joint opinion of Committee members Yuji Iwasawa, Anja Seibert-Fohr, Yuval Shany and Konstantine Vardzelashvili (concurring) is appended to the present Views.

The facts as submitted by the author

2.1 The author is a Jehovah's Witness. He has never been charged with a criminal or administrative offence other than his criminal conviction for refusing to perform compulsory military service.

2.2 In December 2008, he was called by the Military Commissariat to perform his compulsory military service. After a medical examination he was declared fit to serve. He was supposed to join the army on 12 December 2008. Prior to that date, he had explained in writing in a letter addressed to the Military Commissariat that as a Jehovah's Witness, his religious beliefs did not permit him to perform military service. The Military Commissariat turned the case over to the prosecutor's office. The author met with the prosecutor in an attempt to explain his position. He was told that he would be prosecuted.

2.3 On 23 November 2010, the author was arrested and handed over to the prosecutor's office for refusing to perform military service. He was not allowed to see his relatives before his trial. He was taken into custody and kept at the Department of Internal Affairs, where he was treated in a manner contrary to his human dignity and was abused. In addition, he was later put in a punishment cell for 18 days.

2.4 On 14 December 2010, he was tried before the Turkmenabat City Court. At his trial the author explained in detail why he could not perform military service. The court nevertheless convicted him under article 219 (1) of the Criminal Code and sentenced him to 18 months' imprisonment, to be served in a general regime penitentiary.

2.5 Following his trial, the author was kept in a "24-hour detention cell"¹ for 17 days. On 1 January 2011, he was transferred to the LBK-12 prison near the town of Seydi. Immediately upon his arrival at the prison, he was placed in quarantine for 10 days. The authorities allowed relatives to visit him once every two months but, contrary to the rules, did not allow him to see friends. Like the other prisoners, the author slept in a pea coat because of the cold; the prison was also very hot in the summer. While he was in prison the author contracted tuberculosis. On 8 May 2012, the author was released from prison, but faces the prospect of again being called up for military service and again being sentenced and imprisoned.

2.6 In relation to the alleged violation of his rights under article 18 (1) of the Covenant, the author submits that the national courts have never ruled in favour of a conscientious objector to military service. He thus maintains that he has exhausted the available domestic remedies concerning the alleged violation of article 18 (1) of the Covenant. As to the alleged violation of article 7 of the Covenant, the author maintains that there is no effective domestic remedy available to him to seek redress.

The complaint

3.1 The author claims that his imprisonment because of his religious beliefs in itself constituted inhuman or degrading treatment within the meaning of article 7 of the Covenant.

3.2 He further claims a violation of article 7 of the Covenant on the basis of the conditions at the LBK-12 prison. In this regard, he refers, inter alia, to the report of February 2010 of the Turkmenistan Independent Lawyers Association, which notes that the LBK-12 prison is located in a desert, where temperatures reach -20° Celsius winter and 50° degrees in summer. The prison is overcrowded and prisoners infected with tuberculosis and skin diseases are kept together with healthy inmates. Although the author does not invoke it

¹ No further information was provided by the author regarding the cell in question or its exact location.

specifically, this part of the communication also appears to raise issues under article 10 of the Covenant.

3.3 The author also claims that his criminal prosecution, conviction and imprisonment because of his conscientious objection to military service have violated his rights under article 18 (1) of the Covenant. He notes that he repeatedly informed the competent authorities that he was willing to fulfil his civic duties by performing genuine alternative service; however, the State party's legislation does not provide for the possibility of performing alternative service.

State party's observations on admissibility and the merits

4. In a note verbale dated 17 March 2014, the State party reported that the author's case had been carefully considered by the relevant law enforcement bodies of Turkmenistan and that no reason had been found to appeal the court decision. The criminal offence committed by the author had been determined accurately according to the Criminal Code of Turkmenistan. The State party further noted that under article 41 of the Constitution, the protection of Turkmenistan was the sacred duty of every citizen and that the performance of military service was compulsory for male citizens. In addition, the author had not met the criteria of persons eligible for exemption from military service as provided for under article 18 of the Law on Military Conscription and Military Service.

Author's comments on the State party's observations

5.1 On 14 May 2014, the author noted that the State party did not disagree with any facts set out in the communication. The only justification the State party provided was that he had been convicted and imprisoned as a conscientious objector to military service because he did not qualify for an exemption under article 18 of the Law on Conscription and Military Service. That demonstrated the State party's total disregard for its commitments under article 18 of the Covenant and the Committee's jurisprudence, which upheld the right to conscientious objection to compulsory military service. Furthermore, the State party did not contest the author's allegation that he had suffered inhuman and degrading treatment at the hands of law enforcement and penitentiary officials, contrary to article 7 of the Covenant.

5.2 The author reiterates his claims that his prosecution, conviction and imprisonment violated his rights under articles 7 and article 18 (1) of the Covenant. He requests the Committee to invite the State party (a) to acquit him of the charges under article 219 (1) of the Criminal Code and to expunge his criminal record; (b) to provide him with appropriate monetary compensation for the non-pecuniary damages suffered; and (c) to provide him with appropriate monetary compensation for the legal expenses he incurred before the Committee.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee further recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of

the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the authors.² The Committee notes the author's submission that there are no effective remedies available to him in the State party with regard to his claims under articles 7, 10 and 18 of the Covenant. The Committee further notes the State party's assertion that the author's case had been carefully considered by the relevant law enforcement bodies of Turkmenistan and no reason had been found to appeal the court decision and that the State party has not contested the author's argumentation concerning the exhaustion of domestic remedies. In these circumstances, the Committee considers that in the present case it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the communication.

6.4 The Committee considers that the author's claims raising issues under articles 7, 10 and 18 (1) of the Covenant are sufficiently substantiated for the purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claims concerning the deplorable conditions he endured at the LBK-12 prison during his incarceration from 1 January 2011 to 8 May 2012, including his placement in quarantine for 10 days immediately upon his arrival and the harsh climatic conditions in summer and winter. The Committee also notes that during his incarceration the author was infected with tuberculosis. The Committee further notes that these allegations were not contested by the State party and that they are consistent with the findings of the Committee against Torture in its most recent concluding observations in regard to the State party.³

7.3 The Committee recalls that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners.⁴ In the absence of any other pertinent information on file, the Committee decides that due weight must be given to the author's allegations. Accordingly, the Committee finds that confining the author in such conditions constitutes a violation of his right to be treated with humanity and with respect for the inherent dignity of the human person under article 10 (1) of the Covenant.⁵

7.4 In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, the Committee concludes that it will not consider separately any possible claims made under article 7 in this regard.⁶

7.5 The Committee notes the author's claim that his rights under article 18 (1) of the Covenant have been violated due to the absence in the State party of an alternative to

² See, for example, communication No. 2097/2011, *Timmer v. the Netherlands*, Views adopted on 24 July 2014, para. 6.3.

³ See CAT/C/TKM/CO/1, para. 19.

⁴ See, for example, communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010, para. 6.4.

⁵ See, for example, communications No. 1530/2006, *Bozbey v. Turkmenistan*, Views adopted on 27 October 2010, para. 7.3 and No. 2218/2012, *Abdullayev v. Turkmenistan*, Views adopted on 25 March 2015, para. 7.3.

⁶ See, for example, *Mwamba v. Zambia*, para. 6.4.

compulsory military service, as a result of which his refusal to perform compulsory military service because of his religious beliefs led to his criminal prosecution and subsequent imprisonment. The Committee takes note of the State party's submission that the criminal offence committed by the author was determined accurately according to the Criminal Code of Turkmenistan and that pursuant to article 41 of the Constitution, the "protection of Turkmenistan is the sacred duty of every citizen" and that general conscription is compulsory for male citizens.

7.6 The Committee recalls its general comment No. 22 (1993) on freedom of thought, conscience or religion, in which it considers that the fundamental character of the freedoms enshrined in article 18 (1) is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4 (2) of the Covenant. The Committee recalls its prior jurisprudence stating that although the Covenant does not explicitly refer to a right of conscientious objection, such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of thought, conscience and religion.⁷ The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if such service cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion. A State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights.⁸

7.7 In the present case, the Committee considers that the author's refusal to be drafted for compulsory military service derives from his religious beliefs and that the author's subsequent conviction and sentence amounted to an infringement of his freedom of thought, conscience and religion, in breach of article 18 (1) of the Covenant. In this context, the Committee recalls that repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibit the use of arms, is incompatible with article 18 (1) of the Covenant.⁹ It also recalls that during the consideration of the State party's initial report under article 40 of the Covenant, it expressed its concern that the Law on Conscription and Military Service, as amended on 25 September 2010, does not recognize a person's right to exercise conscientious objection to military service and does not provide for any alternative military service, and recommended that the State party, inter alia, take all necessary measures to review its legislation with a view to providing for alternative service.¹⁰

⁷ See communications No. 1321/2004 and No. 1322/2004, *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea*, Views adopted on 3 November 2006, para. 8.3; No. 1853/2008 and No. 1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012, para. 10.4; No. 1786/2008, *Jong-nam Kim et al. v. the Republic of Korea*, Views adopted on 25 October 2012, para. 7.3; No. 2179/2012, *Young-kwan Kim et al. v. the Republic of Korea*, Views adopted on 15 October 2014; and *Abdullayev v. Turkmenistan*, para. 7.7.

⁸ See communications Nos. 1642-1741/2007, *Min-Kyu Jeong et al. v. the Republic of Korea*, Views adopted on 24 March 2011, para. 7.3; *Atasoy and Sarkut*, para. 10.4; *Jong-nam Kim et al. v. the Republic of Korea*, para. 7.4; and *Abdullayev v. Turkmenistan*, para. 7.7.

⁹ See *Min-Kyu Jeong et al. v. the Republic of Korea*, para. 7.4; *Jong-nam Kim et al. v. the Republic of Korea*, para. 7.5; *Atasoy and Sarkut*, para. 10.4; *Young-kwan Kim et al. v. the Republic of Korea*, para. 7.4; and *Abdullayev v. Turkmenistan*, para. 7.8.

¹⁰ See CCPR/C/TKM/CO/1, para. 16.

8. The Committee, acting under article 5 (4), of the Optional Protocol, is of the view that the facts before it disclose a violation of the author's rights under articles 10 (1) and 18 (1) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, to expunge the author's criminal record and to provide him with adequate compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future, which includes the adoption of legislative measures guaranteeing the right to conscientious objection.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

Appendix

Joint opinion of Committee members Yuji Iwasawa, Anja Seibert-Fohr, Yuval Shany and Konstantine Vardzelashvili (concurring)

We concur with the Committee's conclusion that the State party has violated the rights of the author under article 18 (1) of the Covenant, but for reasons different from the majority of the Committee.^a We will retain our reasoning even though we may not find it compelling to repeat it in future communications.

^a For details, see communications No. 2218/2012, *Abdullayev v. Turkmenistan*, Views adopted on 25 March 2015 (joint individual opinion of Committee members Yuji Iwasawa, Anja Seibert-Fohr, Yuval Shany and Konstantine Vardzelashvili), with reference to communication No. 1853/2008 and No. 1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012 (individual opinion of Committee member Gerald L. Neuman, jointly with members Yuji Iwasawa, Michael O'Flaherty and Walter Kälin); and No. 1786/2008, *Kim et al. v. the Republic of Korea*, Views adopted on 25 October 2012 (individual opinions of Committee member Walter Kälin and Committee members Gerald L. Neuman and Yuji Iwasawa).