



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2846/2016\*, \*\*

<i>Communication submitted by:</i>	Jong-bum Bae et al. (represented by counsel, Dujin Oh)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Republic of Korea
<i>Date of communication:</i>	19 September 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 14 November 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	13 March 2020
<i>Subject matter:</i>	Conscientious objection to military service
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Freedom of conscience; arbitrary detention
<i>Articles of the Covenant:</i>	2 (3) (a), 9 and 18 (1)
<i>Article of the Optional Protocol:</i>	2

1. The authors of the communication are 31 individuals, all nationals of the Republic of Korea.<sup>1</sup> They claim that the State party has violated their rights under articles 9 and 18 (1) of the Covenant by failing to recognize the right to conscientious objection to military

\* Adopted by the Committee at its 128th session (2–27 March 2020).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, Yuval Shany, Héléne Tigroudja, Andreas Zimmermann and Gentian Zyberi.

<sup>1</sup> The 31 authors of the communication are: Jong-bum Bae, born in 1992; Yu-bin Bae, born in 1993; Jong-min Baek, born in 1991; Gyu-seok Cho, born in 1993; Beom-gyun Choi, born in 1988; Gwang-won Choi, born in 1990; Hwa-jin Choi, born in 1993; Jin-kyu Choi, born in 1987; Won-seok Choi, born in 1991; Seong-ho Ha, born in 1989; Soon Jeon, born in 1992; Dong-hyek Jung, born in 1992; Dong-jin Kang, born in 1989; Gu-won Kim, born in 1989; Ha-yeon Kim, born in 1992; Hee-sung Kim, born in 1988; Hyeong-jin Kim, born in 1990; Jin-woong Kim, born in 1988; Jun-hee Kim, born in 1989; Seo-ro Kim, born in 1993; Yu-min Kim, born in 1992; Ha-amin Kwon, born in 1993; Soon-young Kwon, born in 1992; Hyun-myung Lee, born in 1992; Jun-woo Lee, born in 1991; Sang-cheol Lee, born in 1992; Woo-keun Lee, born in 1989; Jae-heon Oh, born in 1991; Joong-yeol Oh, born in 1989; Kyung-gun Park, born in 1992; and Ya-chan Woo, born in 1990.



service and by imprisoning conscientious objectors as a punishment. The Optional Protocol entered into force for the State party on 10 July 1990. The authors are represented by counsel, Dujin Oh.

### Factual backgrounds

2.1 All the authors are Jehovah's Witnesses.<sup>2</sup> The authors received their draft notices to perform military service between June 2011 and October 2013. They refused to perform military service, since it would go against their religious conscience.

2.2 As the authors refused to be drafted for military service, they were charged for violating article 88 of the Military Service Act.<sup>3</sup> In court trials in 2013 and 2014, they were all convicted and sentenced to 18 months' imprisonment for their conscientious objection to mandatory military service. Although they all appealed before the appeal court and then before the Supreme Court, their appeals were rejected and their sentences were confirmed in 2013 or 2014.

2.3 Many of the authors were detained immediately after they were convicted either in the first or the second trial. While some of them were released on parole, many of them were detained for more than one year, including the detention period during their trial process.<sup>4</sup>

### The complaint

3.1 The authors allege that the State party violated article 18 (1) of the Covenant by punishing them on the basis that they refused to be enlisted in the army on the grounds of their conscience or religious beliefs. In this regard, the authors note that the Committee has repeatedly held that article 18 (1) of the Covenant protects the right to conscientious objection to military service by ruling that it derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience, and that the right to conscientious objection inheres in the right to freedom of thought, conscience and religion.<sup>5</sup> The authors refer to the Committee's jurisprudence, in which it has indicated that the right to conscientious objection "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."<sup>6</sup>

3.2 The authors argue that, in their case, their religious conscience does not permit them to participate in military activities, thus their conviction and punishment on the grounds of their religious conscience is incompatible with article 18 (1) of the Covenant.<sup>7</sup> The authors also argue that, as detailed below, the right to conscientious objection is not subject to limitation under article 18 (3) of the Covenant.

<sup>2</sup> While the authors became Jehovah's Witness at different times, many of them have been studying the Bible since childhood, with their families, who are also Jehovah's Witnesses.

<sup>3</sup> Article 88 (1) of the Military Service Act of the Republic of Korea (Evasion of Enlistment) states those who fail to enlist in the army or to comply with the call without any justifiable reason will be punished by imprisonment for one to three years. See [www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=76034&p\\_country=KOR&p\\_count=145](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=76034&p_country=KOR&p_count=145).

<sup>4</sup> In the additional submission dated 28 January 2020, the authors' counsel informed the Committee that, while all 31 authors had been released after spending at least 14 months in prison, the Government had not provided remedies, including expungement of the authors' criminal records.

<sup>5</sup> *Min-kyu Jeong et al. v. Republic of Korea* (CCPR/C/101/D/1642-1741/2007), para. 7.3; and *Young-kwan Kim et al. v. Republic of Korea* (CCPR/C/112/D/2179/2012), para. 7.3.

<sup>6</sup> *Young-kwan Kim et al. v. Republic of Korea*, para. 7.3. The Committee reached the same conclusion in a number of cases, such as *Min-kyu Jeong et al. v. Republic of Korea*, para. 7.3, and *Atasoy and Sarkut v. Turkey* (CCPR/C/104/D/1853-1854/2008), paras. 10.4–10.5.

<sup>7</sup> In this regard, the authors also indicate that the right to conscientious objection to military service has been confirmed by the European Court of Human Rights in *Bayatyan v. Armenia* (application no. 23459/03), judgment of 7 July 2011. The European Court has reiterated this fundamental right in four subsequent judgments: *Erçep v. Turkey* (application no. 43965/04), judgment of 22 November 2011; *Bukharatyan v. Armenia* (application no. 37819/03), judgment of 10 January 2012; *Tsaturyan v. Armenia* (application no. 37821/03), judgment of 10 January 2012; and *Feti Demirtaş v. Turkey* (application no. 5260/07), judgment of 17 January 2012.

3.3 Furthermore, the authors claim that the State party, which imprisoned them for exercising their rights and freedoms enshrined in the Covenant, violated article 9 of the Covenant. The authors argue that the State party's practice of convicting and imprisoning conscientious objectors amounts to arbitrary detention under article 9 of the Covenant, referring also to the opinion of the Working Group on Arbitrary Detention,<sup>8</sup> the Committee's jurisprudence,<sup>9</sup> and its general comment No. 35 (2014) on liberty and security of person, in which it pointed out that "arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary" (para. 17).

3.4 In this regard, the authors note that in its jurisprudence, the Committee has emphasized that arrest or detention that lacks any legal basis is arbitrary<sup>10</sup> and that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.<sup>11</sup> Furthermore, they emphasize that arrest or detention as punishment for exercising certain rights protected by the Covenant, including freedom of opinion and expression (art. 19),<sup>12</sup> freedom of assembly (art. 21),<sup>13</sup> freedom of association (art. 22),<sup>14</sup> freedom of religion (art. 18)<sup>15</sup> and the right to privacy (art. 17),<sup>16</sup> have also been considered as arbitrary.

3.5 The authors argue that the State party should provide them with an effective remedy, giving full recognition to their rights under the Covenant, as required by article 2 (3) (a) of the Covenant. They request that the State party: (a) expunge their criminal records; (b) provide them with suitable monetary compensation for their non-pecuniary damages for the violation of their rights under the Covenant; and (c) provide them with suitable monetary compensation for the legal expenses and fees incurred in the domestic courts and the proceedings before the Committee. They also submit that the State party should release all imprisoned conscientious objectors and enact legislation recognizing the right to conscientious objection.<sup>17</sup>

3.6 The authors also submit that they have exhausted all available domestic remedies, having challenged their conviction to 18 months' imprisonment as conscientious objectors for refusing to perform mandatory military service before both the appeal court and the Supreme Court. The authors consider that the judgments of the Supreme Court satisfy their obligation to exhaust all available domestic remedies.

3.7 The authors submit that they have not submitted a complaint to any other international body.

<sup>8</sup> The Working Group on Arbitrary Detention, in its opinion No. 16/2008 (para. 38), categorized the deprivation of liberty resulting from the exercise of the rights or freedoms guaranteed by the Covenant, including imprisonment of conscientious objectors, as a form of arbitrary detention. See also European Court of Human Rights, *Bayatyan v. Armenia* (application no. 23459/03), judgment of 7 July 2011, para. 65, which referred to that opinion.

<sup>9</sup> *Young-kwan Kim et al. v. Republic of Korea*, para. 7.5.

<sup>10</sup> *Mika Miha v. Equatorial Guinea* (CCPR/C/51/D/414/1990), para. 6.5; *Bousroual v. Algeria* (CCPR/C/86/D/992/2001), para. 9.5; *Yklymova v. Turkmenistan* (CCPR/C/96/D/1460/2006), para. 7.2.

<sup>11</sup> *Gorji-Dinka v. Cameroon* (CCPR/C/83/D/1134/2002), para. 5.1. The authors also note that this broad notion of arbitrariness is also reflected in the area of refugee law. Conscientious objectors may flee their country as a direct result of, or in anticipation of, being called up to the military forces. The authors claim that such protection is considered necessary if the law or practice on conscription or conscientious objection to military service is not compatible with international standards. The authors note that a significant number of States provide international protection for conscientious objectors. *Conscientious Objection to Military Service* (United Nations publications, Sales No. E.12.XIV.), pp. 73 and 81.

<sup>12</sup> *Zelaya Blanco v. Nicaragua* (CCPR/C/51/D/328/1988), para. 10.3; CCPR/C/CAN/CO/5, para. 20; and CCPR/C/RUS/CO/6 and Corr.1, para. 24.

<sup>13</sup> CCPR/C/CAN/CO/5, para. 20; and CCPR/C/MDA/CO/2, para. 8.

<sup>14</sup> CCPR/C/COD/CO/3, para. 23; and CCPR/C/SDN/CO/3, para. 29.

<sup>15</sup> CCPR/C/IRN/CO/3, para. 24.

<sup>16</sup> CCPR/C/CMR/CO/4, para. 12; and CCPR/C/TGO/CO/4, para. 14.

<sup>17</sup> In their submission dated 11 September 2017, the authors noted that some 400 young men who were Jehovah's Witnesses remained in prisons in the Republic of Korea as at September 2017.

### State party's observations on admissibility and the merits

4.1 In a note verbale dated 30 June 2017, the State party submitted its observations on admissibility and the merits.

4.2 With regard to the alleged violation of article 18 (1), the State party argues that conscientious objection to military service is and should be subject to limitations under article 18 (3) of the Covenant. The State party notes that, as conscientious objection is a manifestation of one's religion and conviction, the decision to object to military service clearly surpasses the domain of inner conscience; it cannot therefore be regarded as an absolute domain that is inherent in freedom of conscience. In this regard, the State party argues that the Committee's approach towards conscientious objection needs to be revisited for the following reasons.

4.3 First, the right to freedom of thought, conscience and religion, enshrined in article 18 (1) of the Covenant, cannot be extended to encompass freedom of conscience on all matters. The Covenant differentiates freedom of conscience that is non-derogable from freedom of conscience that may be subject to limitations, as demonstrated in article 18 (1) and (3) of the Covenant and explained by the Committee in its general comment No. 22 (1993) on the right to freedom of thought, conscience and religion. In line with these norms, conscientious objection is an explicit manifestation of one's conscientious decision, which makes it difficult to construe it as an absolute right or a right that is not subject to limitations by nature. In particular, the Committee's interpretation obscures what falls within the meaning of the manifestation of religion and belief as defined under article 18 (3) of the Covenant. This interpretation could invalidate article 18 (3) of the Covenant and may not be compatible with article 18, amounting to the abolishment of that particular provision. Conscientious objection based on religious belief or conscience should be viewed not as an inherent and non-derogable right under article 18 (1) of the Covenant, but as a manifestation of conscience subject to article 18 (3) for the following two reasons: (a) while many religions teach respect for life as part of their creed, not all of them object to military service; and (b) not all members of the same religion and belief as the authors indiscriminately object to performing military service.

4.4 Secondly, the State party argues that the previous decisions of the Committee<sup>18</sup> give individuals leeway to refuse all their duties as citizens of a State on the grounds of freedom of conscience. Based on the interpretation of the Committee, everyone can evade his or her basic responsibilities as citizens (which are the precondition for the existence of a country), such as defending the nation, paying taxes and obeying the laws, on the grounds of conscientious objection, and this will be legitimized in the name of safeguarding freedom of conscience. The Committee noted in a decision in 2014 that it "considers that military service, unlike schooling and payment of taxes, implicates individuals in a self-evident level of complicity with a risk of depriving others of life".<sup>19</sup> Nevertheless, the Committee's view is open to criticism in two ways. First, there is no assurance that one's compliance with obligations regarding property rights and obligations to pay taxes or abide by the law has no direct or indirect relevance to the right to life. Second, the Government provides its citizens with several options when it comes to fulfilling their military duties, allowing for alternative service systems in which the use of weapons is kept to a minimum. This means that conscripts who wish to fulfil their military duties, instead of serving as active duty soldiers, can choose to apply for secondment or positions in civilian service, such as firefighter, police officer or industrial technical personnel.

4.5 Thirdly, the State party argues that the Committee's interpretation of article 18 does not take into consideration those who choose not to reveal themselves as conscientious

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<sup>18</sup> The Committee ruled for the first time that the Government of the Republic of Korea had violated the Covenant by not recognizing the right to conscientious objection in 2006, in *Yeo-Bum Yoon and Myung-Jin Cho v. Republic of Korea* (CCPR/C/88/D/1321-1322/2004) and maintained that view with regard to the 11 authors in *Eu-min Jung et al. v. Republic of Korea* (CCPR/C/98/D/1593-1603/2007) in 2010, the 100 authors in *Min-Kyu Jeong et al. v. Republic of Korea* in 2011, the 388 authors in *Jong-nam Kim et al. v. Republic of Korea* (CCPR/C/106/D/1786/2008) in 2012, and the 50 authors in *Young-kwan Kim et al. v. Republic of Korea* in 2014.

<sup>19</sup> *Young-kwan Kim et al. v. Republic of Korea*, para 7.3.

objectors, and thereby, exercise their rights in a passive manner. In its general comment No. 22, the Committee also clarifies that “in accordance with articles 18 (2) and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief” (para. 3). However, compliance with the Committee’s decision may produce a result that contradicts its interpretation of the right to freedom of expressing conscience as an absolute right, as those who do not wish to disclose their belief are forced to manifest conscience by means of passive inaction in order to fulfil their military duties through the alternative military service system specifically designed for conscientious objectors.

4.6 The State party further notes that the security situation of the State party is dire<sup>20</sup> and necessitates the maintenance of considerable military power within its territory. To this end, the State party is obliged to maintain universal conscription. The State party notes that, although a number of alternative forms of military service are currently in place, conscientious objectors are refusing to undergo even the minimum requirement of four weeks of basic military training for all conscripts, regardless of the type of service they perform thereafter. The State party also alleges that its unique security situation is quite different from that in countries that have introduced alternative service systems. The State party argues that, if it acknowledges the exemption from conscription for conscientious objectors or introduces an alternative service system for conscientious objectors, it would be likely to result in grave threats to national security and to create social tensions. The State party believes that, in view of the length of the military training under the alternative service system and the extraordinary security situation, there is no reasonable ground to grant the authors full exemption from the basic military training, which is not the case with other conscripts of alternative service.

4.7 The State party also notes that the Constitutional Court expressed its concern that recognizing conscientious objection on the basis of religious belief or conscience would be detrimental to social cohesion, should the alternative system for conscientious objectors be introduced.<sup>21</sup> Given that mandatory military service is a duty equally assigned to every able-bodied Korean man regardless of his social class, economic power, education, profession or place of origin, it serves as one of the social indicators proving that the Republic of Korea is a fair society that does not discriminate on the basis of social class or status. Moreover, taking into account the tragic ravages of the Korean War experienced by the Korean people, military service serves a double role of equipping every citizen with the minimum defence capability required to safeguard one’s family and nation, and a social function to confirm the sense of patriotism and love for country from both the conscript and his family. This function of military service, to promote social integration, is the ground on which the Constitutional Court ruled that the criminal sanctioning of conscientious objectors was constitutional, and thereby, did not recognize conscientious objection to military service as a legitimate reason for introducing alternative service.

4.8 Furthermore, the State party alleges that a prison term of 18 months for conscientious objectors cannot be considered an extraordinarily punitive punishment in the light of the principle of fair and equitable draft and national security. It considers that 18 months’ imprisonment is, in terms of length, not longer than military service, which is around 21 to 23 months. It also alleges that a prison term is similar in nature to military service since they both remove the individual from his usual environment with different living conditions, and represent a form of isolation from society, taking into account that discrimination against persons with criminal records is banned, and criminal records eventually lapse.<sup>22</sup>

<sup>20</sup> See letter dated 4 June 2010 from the Permanent Representative of the Republic of Korea to the United Nations addressed to the President of the Security Council (S/2010/281) and the President’s statement thereon (S/PRST/2010/13).

<sup>21</sup> Constitutional Court, decision 2011Hun-Ba16 (30 August 2011).

<sup>22</sup> The State party also notes that conscientious objectors are allowed bail before the sentence is finalized, and parole, if certain conditions are met. The Constitutional Court has also ruled that it is not against the principle of proportionality to impose imprisonment on conscientious objectors (Constitutional Court, decision 2011Hun-Ba16 of 30 August 2011), and that it is also commensurate with the shared sense of justice of the general public. According to a 2016 poll, 53.6 per cent of citizens answered in favour of the existing system and against an alternative military service system

4.9 Thus, the State party argues that the measures taken by the Government – criminal punishment of conscientious objectors without introducing an alternative service system – are necessary, required and proportionate in order to protect public safety and retain social cohesion, in accordance with article 18 (3) of the Covenant and the opinion of the Committee expressed in its general comment No. 22. Therefore, the State party concludes that the authors’ claim with regard to article 18 (1) should be dismissed.

4.10 With regard to the alleged violation of article 9 of the Covenant, the State party argues that the criminal prosecution of the authors does not constitute arbitrary detention as in each case, it was decided through a fair trial by the justice system, within the limits of the law, which puts restrictions on fundamental rights for the sake of national security.<sup>23</sup> In this regard, the State party notes that the imprisonment of the authors is justified under article 18 (3) of the Covenant, as it meets the requirements of prescription of applicable law<sup>24</sup> and of the necessity and proportionality of the restriction on an individual’s right to manifest his or her conscience and/or religion in order to protect public safety, which indicates that conscientious objection is not to be seen as the legitimate exercise of one’s rights. Therefore, the State party argues that the allegation that the authors’ imprisonment constitutes arbitrary detention should also be dismissed.

#### **Author’s comments on the State party’s observations on admissibility and the merits**

5.1 On 11 September 2017, the authors submitted their comments on the State party’s observations.

5.2 With regard to the State party’s claim that conscientious objection to military service is the manifestation of one’s conscience, which may be limited under certain conditions as specified in article 18 (3) of the Covenant, the authors argue that the right to nonfeasance because of one’s conscience or belief constitutes a core element of freedom of conscience and religion. Refusing to speak or act against one’s conscience or belief can be the first step to complying with one’s conscience. However, refusing to join the military because the bearing of arms seriously conflicts with one’s conscience or religious belief is the most fundamental form of obeying one’s conscience or belief. It cannot be compared with refusing to pay taxes or refusing mandatory education, as conscientious objection to military service is based on an objection to the obligation to use lethal force and the level of complicity in the involvement in the feared deprivation of life is not self-evident.<sup>25</sup> The authors reiterate that, as stated by the Committee in its many decisions on this issue, there can be no doubt that the right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion, which is not limited in article 18 (3).

5.3 As for the national security situation in the country, the authors argue that the right to conscientious objection to military service is not to be set aside under any circumstances, considering that article 4 of the Covenant does not permit any derogation from the State party’s obligations under article 18 of the Covenant, even in a time of public emergency that may threaten the life of the nation, and given that, in accordance with the Committee’s jurisprudence, conscientious objection inheres in the right of thought, conscience and religion. The authors also note that the State party has not presented evidence to support the vague fear that the recognition of the right to conscientious objection would threaten its national security. The authors argue that the experience of other States worldwide with conscientious objection confirms that recognition of the right to conscientious objection

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for conscientious objectors, 25.7 per cent of whom are hardliners on the matter. Only 29.4 per cent of citizens were in support of conscientious objection and in favour of alternative military service for conscientious objectors.

<sup>23</sup> The State party requests that the Committee reconsider its previous view on the issue from a fair and objective perspective, taking into full account the security situation of the Republic of Korea and the difficulties the Government faces, as presented in the observations.

<sup>24</sup> The State party notes that the authors’ criminal prosecution was handed down in accordance with the lawful and valid Military Service Act, and with independent and impartial due process of law.

<sup>25</sup> This position is reflected by the Committee in its general comment No. 22, para. 11, and in *Westerman v. Netherlands* (CCPR/C/67/D/682/1996).

does not compromise a country's national security.<sup>26</sup> The authors also add that conscientious objectors such as themselves will never accept to serve in the military, whatever the punishment, including execution, as was demonstrated during the Nazi regime. They will therefore neither strengthen nor weaken the security of nations since they will never join the military. The authors would, however, consider accepting an alternative civilian service if such service was performed in a civilian setting, did not fall under the supervision or control of the military, and was not punitive.<sup>27</sup>

5.4 The authors also refute the State party's view that the general sentence of 18 months' imprisonment for conscientious objectors is not extraordinarily punitive. The authors consider it wholly inappropriate to compare the imprisonment and criminalization of an individual to what is experienced by someone who joins the military. When a conscientious objector is prosecuted as a criminal and sentenced to a prison term, his life, reputation and self-esteem suffer a terrible blow. The negative effects of such treatment, both emotionally and economically, continue for years after the conviction. There can be no comparison whatsoever between an individual who is willing to join the military and someone who is prosecuted, convicted and imprisoned for refusing to do so. The authors also note that the discrimination that conscientious objectors face after their release from prison was noted by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in its 2017 analytical report on conscientious objection to military service. It stated that conscientious objectors in the Republic of Korea reportedly bore the consequences of having a criminal record, which hindered their capacity to find employment in the private sector, and that their stigmatization as holders of a criminal record and "traitors" reportedly had other consequences in the social sphere, such as difficulties contracting marriage and ostracization from their families (A/HRC/35/4, para. 42).

5.5 Regarding the arbitrary detention claim under article 9, the authors reiterate the previous argument that even though the authors were investigated, charged by the prosecutors and tried at the trial court, the appeal court and the Supreme Court of the State party, their detention as an outcome of criminal procedures was arbitrary in that the detentions violated the authors' right to conscientious objection to military service, which is inherent in article 18 of the Covenant. The authors argue that in cases involving the conviction of conscientious objectors, the courts of the Republic of Korea have totally ignored and refused to implement the Views of the Committee, which provide the correct interpretation of the Covenant for signatories of the Covenant. Moreover, according to its own Constitution, the State party is under an obligation to apply the Covenant and the interpretation thereof as expressed by the Committee in its Views and general comments. The authors reiterate that the notion of arbitrariness includes elements of inappropriateness and injustice, even though the State party followed criminal procedures in detaining the so-called perpetrators, thus if the detention was the direct outcome of a violation of fundamental rights, it will be construed as arbitrary.

5.6 The authors also note that, in 2015, the Committee, in its concluding observations on the fourth periodic report of the Republic of Korea, reiterated its concern about the continued punishment of conscientious objectors and again urged the State party to release immediately all conscientious objectors and ensure that their criminal records were expunged (CCPR/C/KOR/CO/4, paras. 44–45).

<sup>26</sup> The authors list the countries that recognize the right to conscientious objection during wartime, such as Armenia, Denmark, the Netherlands, Norway, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America, as well as Taiwan Province of China. Armenia in particular is constantly under threat of military confrontation with its neighbours.

<sup>27</sup> Regarding the public poll information provided by the State party, the authors argue that, while fundamental human rights should never be determined by the results of public opinion polls, despite the ongoing issue of national security, there have been favourable public poll results. According to a 2013 Gallup poll in which a total of 1,211 Koreans participated, 68 per cent preferred adopting alternative civilian service over imprisoning conscientious objectors. Another Gallup survey conducted at the request of Amnesty International Korea from 19 to 21 April 2016 showed that of 1,004 adults nationwide, 70 per cent were in favour of adopting alternative civilian services. See <https://amnesty.or.kr/12873> (in Korean).

## 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 97 of its rules of procedure, whether it 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 observes that article 5 (2) (b) of the Optional Protocol precludes it from considering a communication unless it has been ascertained that domestic remedies have been exhausted. Taking into account the authors' arguments that they have exhausted domestic remedies, and in the absence of any objection from the State party in this connection, the Committee considers that it is not precluded by the provisions of article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee considers that the authors have sufficiently substantiated their claims under articles 9 and 18 (1) of the Covenant for the purposes of admissibility. It therefore declares the communication admissible and proceeds with its consideration of the merits.

### *Consideration of the merits*

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the authors' claim that their rights under article 18 (1) of the Covenant have been violated, owing to the absence in the State party of an alternative to compulsory military service, as a result of which their failure to perform military service on account of their religious conscience led to their criminal prosecution and subsequent imprisonment. The Committee notes that, in the present case, the State party reiterates arguments that were advanced in response to the earlier communications before the Committee,<sup>28</sup> notably on the issues of national security, equality between military and alternative service, and lack of a national consensus on the matter.

7.3 The Committee recalls its general comment No. 22, in which it considers that the fundamental character of the freedoms enshrined in article 18 (1) of the Covenant is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4 (2) of the Covenant. The Committee recalls its jurisprudence that, although the Covenant does not explicitly refer to a right to conscientious objection, such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience.<sup>29</sup> 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

<sup>28</sup> *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, paras. 4.1–4.6; *Eu-min Jung et al. v. Republic of Korea*, paras. 4.3–4.10; *Min-kyu Jeong et al. v. Republic of Korea*, paras. 4.1–4.10; *Jong-nam Kim et al. v. Republic of Korea*, paras. 4.1–4.8; and *Young-kwan Kim et al. v. Republic of Korea*, paras. 4.1–4.6.

<sup>29</sup> *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, para. 8.3; *Min-kyu Jeong et al. v. Republic of Korea*, para. 7.3; *Jong-nam Kim et al. v. Republic of Korea*, para. 7.3; *Atasoy and Sarkut v. Turkey*, paras. 10.4–10.5; *Young-kwan Kim et al. v. Republic of Korea*, para. 7.3; *Abdullayev v. Turkmenistan* (CCPR/C/113/D/2218/2012), para. 7.7; *Mahmud Hudaybergenov v. Turkmenistan* (CCPR/C/115/D/2221/2012), para. 7.5; *Ahmet Hudaybergenov v. Turkmenistan* (CCPR/C/115/D/2222/2012), para. 7.5; *Japparow v. Turkmenistan* (CCPR/C/115/D/2223/2012), para. 7.6; *Matyakubov v. Turkmenistan* (CCPR/C/117/D/2224/2012), para. 7.7; *Nurjanov v. Turkmenistan* (CCPR/C/117/D/2225/2012 and Corr.1), para. 9.3; *Uchetov v. Turkmenistan* (CCPR/C/117/D/2226/2012), para. 7.6; and *Durdyev v. Turkmenistan* (CCPR/C/124/D/2268/2013), para. 7.3.

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.<sup>30</sup> In this regard, the Committee is not convinced by the State party's argument that 18 months' imprisonment would not be overly punitive given its similarity to performing to military service (A/HRC/35/4, para. 42). The Committee also notes that the State party opposes the recognition of conscientious objection to military service as a non-derogable right on the grounds that the claim of conscientious objection could be extended to justify acts such as refusal to pay taxes or refusal of mandatory education. However, the Committee considers that military service, unlike payment of taxes and schooling, implicates individuals in a significant level of complicity with an activity that risks depriving others of life.

7.4 In this context, the Committee also notes that in June 2018, the Constitutional Court of the Republic of Korea ruled that not providing alternatives for conscientious objectors was unconstitutional and ordered the Government to introduce civilian forms of service for conscientious objectors by revising the Military Service Act.<sup>31</sup> It also notes that in November 2018, the Supreme Court of the Republic of Korea ruled that conscientious objection to military service is justifiable under article 88 (1) of the Military Service Act, stating that it is not appropriate to penalize people who have refused to perform mandatory military service on the grounds of conscience or religion.<sup>32</sup> While acknowledging the efforts of the Government to introduce a new law following those judgments, the Committee has not received information on the conditions of the alternative service available for conscientious objectors under new legislation and its applicability to the authors in the present case.<sup>33</sup>

7.5 In the present case, the Committee considers that the authors' refusal to be drafted for compulsory military service derives from their religious beliefs, which, it is uncontested, were genuinely held. The Committee therefore considers that the authors' subsequent convictions and sentences amounted to an infringement of their freedom of conscience, 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 prohibits the use of arms, is incompatible with article 18 (1) of the Covenant.<sup>34</sup> It also recalls that in its concluding observations adopted in November 2015, the Committee expressed concern at the failure of the State party to implement the Committee's Views in numerous cases concerning conscientious objection, and called upon the State to immediately release all conscientious objectors condemned to a prison sentence for exercising their right to be exempted from military service (CCPR/C/KOR/CO/4, paras. 6 and 45). The Committee considers that it has already

<sup>30</sup> *Min-Kyu Jeong et al. v. Republic of Korea*, para. 7.3; *Jong-nam Kim et al. v. Republic of Korea*, para. 7.4; *Atasoy and Sarkut v. Turkey*, para. 10.4; *Young-kwan Kim et al. v. Republic of Korea*, para. 7.3; *Abdullayev v. Turkmenistan*, para. 7.7; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.5; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.5; *Japparow v. Turkmenistan*, para. 7.6; *Matyakubov v. Turkmenistan*, para. 7.7; *Nurjanov v. Turkmenistan*, para. 9.3; *Uchetov v. Turkmenistan*, para. 7.6; and *Durdyev v. Turkmenistan*, para. 7.3.

<sup>31</sup> Constitutional Court, case No. 2011Hun-Ba379 (28 June 2018).

<sup>32</sup> See [www.loc.gov/law/foreign-news/article/south-korea-supreme-court-finds-conscientious-objection-to-military-service-justifiable/](http://www.loc.gov/law/foreign-news/article/south-korea-supreme-court-finds-conscientious-objection-to-military-service-justifiable/).

<sup>33</sup> It is reported that individuals who refuse to perform military service on religious or other grounds will be required to work in a jail or other correctional facility for three years under the alternative service law. See [www.amnesty.org/en/latest/news/2019/12/south-korea-alternative-to-military-service-is-new-punishment-for-conscientious-objectors/](http://www.amnesty.org/en/latest/news/2019/12/south-korea-alternative-to-military-service-is-new-punishment-for-conscientious-objectors/).

<sup>34</sup> *Min-Kyu Jeong et al. v. Republic of Korea*, para. 7.4; *Jong-nam Kim et al. v. Republic of Korea*, para. 7.5; *Atasoy and Sarkut v. Turkey*, para. 10.5; *Young-kwan Kim et al. v. Republic of Korea*, para. 7.4; *Abdullayev v. Turkmenistan*, para. 7.8; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.6; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.6; *Japparow v. Turkmenistan*, para. 7.7; *Matyakubov v. Turkmenistan*, para. 7.8; *Nurjanov v. Turkmenistan*, para. 9.4; *Uchetov v. Turkmenistan*, para. 7.7; and *Durdyev v. Turkmenistan*, para. 7.4.

examined the general arguments raised by the State party in its earlier Views<sup>35</sup> and finds no reason in the present communication to depart from its position.<sup>36</sup> Accordingly, the Committee finds that, by prosecuting and convicting the authors for refusal to perform compulsory military service owing to their religious beliefs and conscientious objection, the State party has violated their rights under article 18 (1) of the Covenant.

7.6 The Committee notes the authors' claim that imprisoning them as punishment for refusing to perform military service amounts to arbitrary detention under article 9 of the Covenant.<sup>37</sup> The Committee observes that article 9 (1) of the Covenant provides that no one may be subjected to arbitrary arrest or detention. The Committee recalls that the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.<sup>38</sup> The Committee considers that deprivation of liberty as punishment for the legitimate exercise of a right protected under the Covenant, including freedom of religion and conscience as guaranteed by article 18 of the Covenant, is ipso facto arbitrary in nature.<sup>39</sup> Consequently, the Committee also finds that article 9 (1) of the Covenant has been violated with respect to each of the authors.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose violations by the State party of articles 9 (1) and 18 (1) of the Covenant with respect to each of the 31 authors.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to expunge the authors' criminal records and to provide adequate compensation to them. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future. This includes an obligation to ensure that any legislative measures adopted in connection with the duty to conduct military service guarantee the right to conscientious objection, as was also provided in the recent jurisprudence of the State party's Constitutional Court and Supreme Court.

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 guarantee 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 where it has been determined that a violation has occurred, the Committee requests the State party to provide, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and ensure that they are widely disseminated in the official language of the State party.

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<sup>35</sup> *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, para. 8.4.

<sup>36</sup> *Min-kyu Jeong et al. v. Republic of Korea*, para. 7.2.

<sup>37</sup> See Working Group on Arbitrary Detention, opinion No. 16/2008.

<sup>38</sup> For example, *Gorji-Dinka v. Cameroon*, para. 5.1; and Human Rights Committee, *Van Alphen v. Netherlands*, communication No. 305/1988, para. 5.8.

<sup>39</sup> *Zelaya Blanco v. Nicaragua*, para. 10.3. See also Working Group on Arbitrary Detention, opinions No. 40/2018, paras. 44–45 and 51; No. 69/2018, paras. 20–21 and 27; No. 84/2019, paras. 43–44 and 60, in which the Working Group found that deprivation of liberty for genuinely held religious and conscientious beliefs in refusing to enlist in military service was in contravention of articles 18 (1) and 9 of the Covenant.