



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communications Nos. 1853/2008 and 1854/2008

##### Views adopted by the Committee at its 104th session, 12 to 30 March 2012

<i>Submitted by:</i>	Cenk Atasoy (1853/2008) and Arda Sarkut (1854/2008) (represented by counsel, James E. Andrik, United States of America)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Turkey
<i>Date of communication:</i>	8 December 2008 (1853/2008) and 15 December 2008 (1854/2008) (initial submissions)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 December 2008 (not issued in document form) CCPR/C/99/D/1853-1854/2008–Admissibility decision, adopted on 5 July 2010
<i>Date of adoption of Views:</i>	29 March 2012
<i>Subject matter:</i>	Conscientious objection
<i>Procedural issue:</i>	Admissibility - non-exhaustion
<i>Substantive issues:</i>	Right to freedom of thought, conscience and religion
<i>Articles of the Covenant:</i>	18, paragraph 1
<i>Articles of the Optional Protocol:</i>	2 and 5, paragraph 2 (b)

## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (104th session)**

concerning

#### **Communications Nos. 1853/2008 and 1854/2008\***

*Submitted by:* Cenk Atasoy (1853/2008), and Arda Sarkut (1854/2008) (represented by counsel, James E. Andrik, United States of America)

*Alleged victims:* The authors

*State party:* Turkey

*Date of communication:* 8 December 2008 (1853/2008) and 15 December 2008 (1854/2008) (initial submissions)

*Date of Admissibility decision:* 5 July 2010

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

*Meeting on 29 March 2012,*

*Having concluded* its consideration of communications No. 1853/2008 and No. 1854/2008, submitted to the Human Rights Committee by Cenk Atasoy and Arda Sarkut, respectively, 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 authors of the communication and the State party,

*Adopts* the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The authors of the communication are Cenk Atasoy (No. 1853/2008) and Arda Sarkut (No. 1854/2008), both Turkish nationals. They claim to be victims of a violation by the Republic of Turkey of article 18, paragraph 1, of the International Covenant on Civil

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\* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval. The texts of three individual opinions by Committee members, Mr. Gerald L. Neuman, jointly with Mr. Michael O'Flaherty, Mr. Yuji Iwasawa, Mr. Walter Kaelin; Sir Nigel Rodley, jointly with Mr. Cornelis Flinterman, Mr. Krister Thelin; and Mr. Fabian Omar Salvioli are appended to the text of the present Views.

and Political Rights. The authors are represented by counsel James E. Andrik of the United States of America. The Optional Protocol entered into force for the State party on 24 February 2007.

1.2 On 14 April 2009, at the request of the State party, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communications would be considered separately from the merits.

1.3 On 5 July 2010, pursuant to rule 94, paragraph 2, of the Committee's Rules of Procedure, the Committee decided to join the two communications for decision in view of their substantial factual and legal similarity.

### **The facts as presented by the authors**

#### *Cenk Atasoy's case*

2.1 Mr. Atasoy is a Jehovah's Witness. On 7 August 2007, he submitted a petition to the Military Recruitment Office, explaining that he was a Jehovah's Witness and could not perform military service because of his religious beliefs. In a letter dated 31 August 2007, he was informed that further to articles 10 and 72 of the Constitution and article 1 of the Military Law, he could not be exempted from military service. On 29 January 2008, he received through his university, a letter from the Ministry of National Defence, Recruitment Affairs, informing him that he should carry out military dispatch procedures between 1 and 31 March 2008 and take part in the April 2008 call-up.

2.2 On 21 March 2008, the author went to the Military Recruitment Office and submitted another petition reiterating the reasons why he could not perform military service. He also explained that for the same reason he could not sit for the reserve officer exams to be held between 1 and 3 April. The author was given an Evasion of Enlistment Status Certificate and requested to carry out military dispatch procedures between 1 and 31 July 2008 and present himself to the August 2008 call-up. On 9 April 2008, he received an official response to his petition of 21 March 2008, in which it was reiterated that further to article 10 and 72 of the Constitution and article 1 of the Military Law he could "not be exempted from national service."

2.3 On 25 July 2008, he went to the Military Recruitment Office and submitted a petition relating to the August 2008 call-up, reiterating why he could not perform military service. He was again given an Evasion of Enlistment Status Certificate stating that he should carry out military service procedures between 1 and 30 November 2008 and come to the December 2008 call-up. He submitted another petition stating why he could not take part in the December 2008 call-up and received a letter on 18 August 2008, indicating again that he could not be exempted from military service. The author states that this situation will continue: that he will continue to be invited to call-ups and eventually imprisoned. On 4 November 2008, he was brought before the Penal Court with respect to his failure to take part in the April 2008 call-up. This case remains outstanding. He also fears that the company for which he works may receive letters from the Government advising it to terminate his employment.

2.4 In all of his petitions, the author indicated that he could perform "civil" service which would not conflict with his religious principles. He explains that the responses he has received from the Ministry of National Defence state that he cannot be exempted from national service. However, he argues that he has not asked to be so exempt; he has merely stated that he cannot perform such service in the way requested by the State.

*Arda Sarkut's case*

2.5 Mr. Sarkut is also a Jehovah's Witness. On 27 October 2006, he started work as an assistant lecturer at the Faculty of Jewellery and Accessories Technology and Design, Mersin University. In February 2007, he went to the Military Recruitment Office in Mersin to submit a petition stating that he would not be able to perform military service because of his religious beliefs. Since then, he has gone to the Military Recruitment Office every four months to submit a similar petition concerning the national service call-up, stating why he cannot perform such service. The Military Recruitment Office always refuses to accept his petitions, subsequent to which the author sends copies, by registered mail, to the Ministry of National Defense, Recruitment Department, in Ankara.

2.6 On 6 April 2007, the Military Recruitment Office in Beşiktaş sent a letter to Mersin University, requesting that it to dismiss the author as from 31 July 2007, so that he could take part in the August 2007 call-up. The university was also advised not to re-employ the author unless he provided a document from the Military Recruitment Office. In the event that the university did re-employ him, it would be accused of having committed a crime under, inter alia, articles 91, 92 and 93 of Military Law No. 1111. As a result, the author was forced to accept leave without pay as from 15 July 2007.

2.7 In July 2008, the author received a letter from Mersin University stating that it had initiated an investigation into his failure to perform military service, despite the fact that he had obtained time off to do so. On 12 August 2008, he sent a letter stating the reasons why he had not performed such service, and requesting to have his job back. In October 2008, he received a letter from the university stating that he was dismissed for having provided a "false statement". After sending a letter to the university objecting to the decision to dismiss him, on 20 November 2008, he received a letter from the university which stated that his objection "was not accepted". According to the author, the university will no longer employ him as a teacher due to his conscientious objection to serving in the military; the Ministry of National Defence has prevented him from being employed at a place that "pays social security" and he remains unemployed and under pressure due to the lawsuits that have been launched against him.

2.8 In all of his petitions (approximately 20, at the time of his submission), the author has indicated that he could perform civil service, which would not conflict with his religious principles. He explains that the responses he has received from the Ministry of National Defence states that he cannot be exempted from national service on the basis of, inter alia, article 10 of the Constitution.

2.9 Both of the authors refer to and provide copies of decisions of the Military Supreme Court on conscientious objection which state that, "the defence of the accused that he cannot serve in the military because of his religious belief, and that mandatory military service imposed on the accused under articles 35 and 47 of the Military Service Law and article 45 of the Military Criminal Law contradicts the freedom of religion and conscience regulated under article 24 of the Constitution of the Republic of Turkey, is not considered to be legal, proper and righteous."<sup>1</sup> Given these decisions of the Military Supreme Court, the authors are of the opinion that exhausting domestic remedies would be ineffective.

**The complaint**

3.1 The authors complain that the absence in the State party of an alternative to compulsory military service, subject to criminal prosecution and imprisonment, breaches

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<sup>1</sup> See Military Supreme Court of Appeals, Ankara, principle No. 2004/400 and decree No. 2004/396, 9 April 2004.

their rights under article 18, paragraph 1, of the International Covenant on Civil and Political Rights.

3.2 The authors refer to the Committee's communications Nos. 1321/2004 and 1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006, in which the Committee found a violation by the State party of article 18, paragraph 1, of the Covenant, on the basis of similar facts as in the present communications, and in which the State party was obliged to provide the authors with an effective remedy.

#### **The State party's submission on admissibility and merits**

4.1 By submissions of 20 February 2009, the State party contests the admissibility of both communications on grounds of non-exhaustion of domestic remedies. As to the authors' view that domestic remedies would be ineffective, it argues that, according to article 5, paragraph 2 (b) of the Optional Protocol, the only exception to exhaustion of domestic remedies is proof that remedies would be "unreasonably prolonged" and that proof of ineffectiveness is not stipulated as an exception to the rule. However, it also argues that exhaustion of remedies would in any event be effective.

4.2 Concerning the authors' argument that, in light of a decision of the Military Supreme Court on conscientious objection involving four Jehovah's Witnesses, they are not required to exhaust domestic remedies in their cases, the State party submits that in 2006, the Act No. 353 on the Establishment and Trial Procedure of Military Courts was amended, according to which the offence of evading military service (*bakaya*) set out in article 63 of the Military Penal Code, when committed by civilians in peace time, shall be tried by civil courts instead of military courts.<sup>2</sup> The decisions of civil courts are subject to appeal before the Court of Cassation.

4.3 According to the State party, the authors' trials relating to the evasion of military service are ongoing. Both authors have cases pending before the Beyoğlu 1st Criminal Court (first instance court), and the second named author also has a case pending before the 2nd Criminal Court. During the first named author's hearing on 4 November 2008, he stated that as a Jehovah Witness he could not perform military service because of his conscience and based on his beliefs. He also argued that charges of evasion of military service violated article 9 of the European Convention on Human Rights. The second named author provided similar arguments.

4.4 The State party submits that international treaties have direct effect in the State and become part of domestic legislation upon ratification. In case of contradiction between human rights treaties, to which Turkey is a party, and domestic laws on the same matter, provisions of the international treaty shall prevail. Thus, the Beyoğlu 1st Criminal Court will consider the authors' arguments during the proceedings with due regard to the European Convention on Human Rights and the International Covenant on Civil and Political Rights, as well as the Constitution and other relevant legislation.

4.5 In addition, in the event that the authors are unsuccessful before the first instance court, they may appeal the decision before the Court of Cassation, which is the highest court for both civil and criminal matters. Neither the first instance court nor the Court of

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<sup>2</sup> See art. 13 of Law No. 353, amended as Law No. 5530, promulgated in the Official Gazette on 5 July 2006, and entered into effect on 5 October 2006: "Trial court for civilians who commit offences subject to Military Criminal Court in peace time, article 13 - Offences provided for in articles 55, 56, 57, 58, 59, 61, 63, 64, 75, 79, 80, 81, 93, 94, 95, 114 and 131 of the Military Criminal Court, when committed in peace time by civilians who are not subject to military courts: the trial of such persons shall be conducted by ordinary courts of law".

Cassation is legally bound by the jurisprudence of military courts, even though the cases may be similar. Indeed, according to the State party, there is divergence of views between the Court of Cassation and the Military Supreme Court on similar cases. Furthermore, civil courts do not have established jurisprudence on conscientious objection.

#### **The authors' comments on the State party's submission**

5.1 On 26 June 2009, the authors disputed the State party's arguments on the admissibility of their respective communications. They both provided an update on their trials. On 2 April 2009, the Beyoğlu 1st Criminal Court found both authors guilty of violating article 63/1-A of the Military Penal Code – not a civil law.<sup>3</sup> The first named author was sentenced to one month's imprisonment which was converted to a 600-YTL fine. Three decisions were rendered against the second named author: he was given two sentences of one month's imprisonment, which was converted, at 20 YTL a day, into a fine of 600 YTL; and a third sentence of four months' imprisonment, converted to a fine of 2000 YTL, calculated at 20 YTL per day for 100 days, instead of 120 days. According to the authors, the civil court may have made their situation even more difficult than if they had been tried in a military court, as the fact that their sentences were converted to fines (below the 2000 YTL threshold) meant that they could not be appealed before the Court of Cassation. Although the court based itself on military law to try the authors, the penalties were based on penal civil law.

Article 305 of the Penal Judging Procedures Law No. 1412 states, in the applicable part, that "the judgments of the penal courts can be appealed. However, ... judgments of fines up to 2 billion Turkish Lira (i.e., 2000 YTL, after the recent revaluing of the money)... and decisions stated as "certain" cannot be appealed."<sup>4</sup>

5.2 All of the authors' penalties were below the threshold. Indeed, the second named author alleges that the conversion of his four-month prison sentence was deliberately calculated in such a way as to ensure that it did not reach the threshold, thus circumventing his right to appeal. In addition, the authors claim that all of the decisions clearly stated that they were "certain", which is also a criterion of decisions precluded from the possibility of appeal before the Court of Cassation. The authors' only options now are to pay the fine or go to prison. However, the matter is not expected to end there, as the authors will invariably be called up for military service again and face the same charges, convictions and penalties. For these reasons, the authors submit that domestic remedies have been exhausted and that their communications should be considered on the merits.

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<sup>3</sup> See Military Penal Code, art. 63/1-A – Individuals without an acceptable excuse who are, during peacetime, absentee conscripts, draft evaders or unregistered [for military service] and of whom the first contingent of peers or friends with whom they have been processed have been sent off; Reserve recruits who have been called up and [are absent] without excuse, and [in all the preceding cases] starting from the date of their peers being sent off: arrive within seven days, shall be imprisoned for a term of up to one month; are arrested [within seven days], shall be imprisoned for a term of up to three months; arrive between seven days to three months, shall be imprisoned for a term ranging from three months to one year; are arrested between seven days to three months, shall be imprisoned for a term ranging from four months to one-and-a-half years; arrive after three months, shall be imprisoned for a term ranging from four months to two years; are arrested after three months, shall be punished with a term of heavy imprisonment ranging from six months to three years."

<sup>4</sup> Informal translation as provided by the authors.

## **Issues and proceedings before the Committee**

### **Consideration of admissibility**

6.1 The Committee examined the admissibility of the communications on 5 July 2010. As required by article 5, paragraph 2 (a), of the Optional Protocol, it ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

6.2 The Committee noted the State party's arguments that both communications were inadmissible for failure to exhaust domestic remedies as, at the time of its submission to the Committee, the authors' cases were still pending before the civil courts. In addition, the State party has argued that any court decisions against the authors could be appealed in the Court of Cassation. The Committee further noted that since that submission, the authors had provided information to the effect that the first instance court had by then considered their cases and handed down decisions against them in each case. The Committee considered that the authors had also provided detailed information as to why they could not appeal any of the decisions before the Court of Cassation. The Committee observed that none of the authors' arguments had been challenged by the State party. For these reasons, the Committee considered that it was not precluded from examining the communications under article 5, paragraph 2 (b), of the Optional Protocol, and found both of them admissible.

### **State party's observations on the Committee's admissibility decision and on the merits**

7.1 In a note verbale of 4 February 2011, the State party commented on the Committee's admissibility decision. It explained that Mr. Atasoy had failed to take part in a number of drafting call-ups in 2008 and 2010 and for this reason, he was brought before the Penal Court where a number of criminal cases against him were pending. Furthermore, while Beyoğlu 2nd and 3rd Criminal Courts of Peace had ruled to release the author in the majority of the cases, according to the information provided by the Ministry of Justice, the cases in which the author has been found guilty were still pending before the Court of Cassation.

7.2 With regard to Mr. Sarkut, the State party explained that he had failed to take part in the drafting call-ups from 2007 to 2010 and on those grounds, he was brought before the Penal Court; a number of criminal cases against him were open. According to information available at the time, the Criminal Court had ordered the release of the author in two cases, while three other cases were still pending before the Court of Cassation.

7.3 The State party further reiterates its observations on the admissibility of the communications and contends that in decisions taken in 2006 and 2009, the Constitutional Court had found that article 305, paragraph 2 (1), of the Criminal Procedure Code was in contradiction with the Constitution, and thus made possible appeals by individuals against fines below 2000 YTL.

7.4 With regard to the merits, the State party reiterates that according to article 72 of the Constitution, military service is compulsory: "National service is the right and duty of every Turk. The manner in which this service shall be performed, or considered as performed, either in the Armed Forces or in public service shall be regulated by law." Furthermore, article 10 of the Constitution states that all individuals are equal, without discrimination, before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion, sect or any such considerations; and men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality

before the law in all their proceedings. Article 18 of the Constitution guarantees the freedom of conscience, religious beliefs and conviction.

7.5 Under the State party's constitutional system, all articles of the Constitution carry equal weight, without any hierarchy among them. The articles are in conformity with each other and are mutually reinforcing; every article should be read in conjunction with the others. Thus, articles 72, 10 and 24 of the Constitution, read together, means that the exercise of freedom of conscience, religious belief and conviction cannot be valued above the duty of military service, as these provisions cannot be interpreted as contradicting or violating one another. Article 10, in parallel, guarantees equality among individuals without discrimination, and thus prevents the exemption of individuals or groups from performing military service on the ground that this would contradict their religious beliefs.

7.6 The legislation governing military service provides for male citizens to perform military service at a certain age. Even individuals who perform military service under a temporary scheme have to fulfil basic military training. Therefore, exemption from military service on the ground of conscience is not possible under the law, and this issue, according to the State party, falls under the margin of appreciation of the domestic authorities.

7.7 According to the State party, article 18 of the Covenant does not apply to the present case as it does not provide any tacit or express guarantee for conscientious objection. Referring to article 31 of the Vienna Convention on the Law of Treaties, the State party notes that a treaty should be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The State party believes that when an ordinary meaning is given to article 18 of the Covenant, in light of the object and purpose thereof, nothing therein can be construed as suggesting that any "right to a conscientious objection" is explicit in its provisions or may be derived from it. Even if, in arguendo, one should assume that the article, read in its letter and spirit, is ambiguous or obscure, recourse to the preparatory papers (*travaux préparatoires*) of the Covenant would confirm the fact that it had never been the intention of the drafters to create a separate and absolute "right to a conscientious objection" within the ambit of the right to freedom of thought, conscience and religion, at a time when compulsory military service was indeed the reality in many of the drafting States.

7.8 According to the State party, article 18, read in conjunction with article 8, paragraph 3 (c) (ii), of the Covenant, leaves no room for ambiguity as the latter provision explicitly refers to "those countries where conscientious objection is recognized". The State party contends that if the drafters intended to create a distinct and absolute "right to conscientious objection" under article 18 so that based on this understanding, compulsory military service would be regarded as "a violation of this right," then one would not expect such a contradictory reference in article 8 of the Covenant that clearly accepts the practice in countries where conscientious objection is not recognized. It would be inconsistent to interpret that in one article, the intention of the drafters was to prohibit compulsory military service, whereas in another article the intention was to give legitimacy to or at least to provide a general recognition of such a practice without expressing the need to reconcile articles 18 and 8. If it is to be assumed that the intention of the drafters was to declare compulsory military service a violation of the "right to conscientious objection," then one would legitimately challenge the rationale behind providing in another article for recognition of this "violation" in some States as an exception to forced or compulsory labour.

7.9 The State party goes on to explain that any inconsistencies among articles of a treaty are resolved by making necessary linkages between their provisions, so as to allow States parties to have a clear understanding of their obligations. In this case, however, article 8 makes it clear that some States may not recognize conscientious objection and that this practice would in no way be considered as violating any other provisions of the Covenant.



Articles 8 and 18 are consistent with each other, since the latter does not envisage a “right to conscientious objection.” Any other interpretation would, according to the State party go beyond what is permitted by the existing rules of the law of the treaties.

7.10 For the sake of argument, the State party explains that it may be considered that article 8 does not exclude conscientious objection as a State practice, however, it certainly does not recognize it as a “right” and it unequivocally does not delegitimize a State’s practice of compulsory military service as a “violation” of such “rights”. According to the State party, if the intention of the drafters was to forbid compulsory military service in article 18, one would expect them to have introduced a clear prohibition on this, such as “No one shall be compelled to perform military service against their thought, conscience or religion”.

7.11 According to the State party, the object and purpose of articles 8 and 18 are clear when their terms are given their ordinary meaning. In no way can they be construed as considering compulsory military service a “violation” of an inexplicit “right to conscientious objection”. In the State party’s view, arguing the contrary would not be consistent with the customary rule of interpretation reflected in article 31 of the Vienna Convention on the Law of Treaties. It considers that asserting a violation of such “an implied right” under the Covenant, given that military service is recognized under its other provision, would amount to an “abuse of right” under international law. Furthermore, it would be in contradiction with the fundamental principles of human rights law for a core treaty like the Covenant to establish a right (in article 18) on the one hand, and anticipate its recognition by *some* States, while, on the other hand, making it possible for other States *not to recognize* it (as in article 8). According to the State party, such an inconsistent approach would infringe upon the paramount principle of universality of human rights.

7.12 The State party adds that the present communication should not only be assessed in the light of article 18 of the Covenant, given the reference to “conscientious objection” in article 8 thereof. Further to the Vienna Convention, when interpreting the terms of a treaty, due regard should also be given to the context for the purpose of the interpretation which shall comprise “the text, including its preamble and annexes”.

7.13 The State party admits that it may be acceptable that the understanding of treaty provisions may “evolve” over time, but such “evolving interpretation” has limits, and a contemporary interpretation of a provision cannot ignore what is written therein already. The interpretation cannot go beyond the letter and spirit of the treaty or what the States parties initially and explicitly so intended. In this case, it is clear that the drafters of the Covenant acknowledge in article 8 that in some States where military service is compulsory, conscientious objection may not be recognized. If, in the future, States parties to the Covenant want to reconcile articles 8 and 18 thereof in view of changing circumstances, they should amend the Covenant accordingly; until then, any interpretation of the text should be faithful to its letter and spirit.

7.14 In the light of the above observations, the State party considers that the Covenant does not afford, even implicitly, a “right to conscientious objection” per se, and States parties have no obligation to recognize such a right. Therefore, as acknowledged by the Covenant, military service cannot be regarded as a “violation” of the “right to conscientious objection”.

7.15 According to the State party, even if one assumed in this case that the manifestation of the authors’ beliefs has been restricted, it should be noted that the authors were sentenced only because of their insistent disobedience of the military service rules. This did not prevent them from continuously objecting to perform military duties of any kind. In addition, according to article 18, paragraph 3, of the Covenant, some restrictions may be necessary in a democratic society for the protection of public safety and public order. Thus,

States parties have the right and responsibility to appreciate limits of the right of conscientious objection in such a way that exemption from military service does not perturb public safety and order.

#### **Authors' comments on the State party's observations**

8.1 The authors submitted their comments on the State party's observations on 23 March 2011. First of all, they inform the Committee that their situation remains unchanged and that they continue to be indicted because of their refusal to perform military service. As at that time, Mr. Atasoy had been indicted for three military call-ups, and he had to defend himself in court for six more call-ups periods, for a total of nine. Mr. Sarkut had been indicted for six military call-ups and had to defend himself in court for his refusal to join the army in six more call-ups, for a total of 12. Due to an order sent by military officials to his employer in November 2008, Mr. Sarkut has lost his employment as a teacher; the order will remain in effect until he performs military service. According to the authors, there is no realistic possibility that the authorities and courts will make a decision in their favour that would permanently release them from the obligation to perform military service, even if they are prepared to perform any other civil service as an alternative.

8.2 On the issue of non-exhaustion of domestic remedies, the authors note that on 23 July 2009, the Constitutional Court decided that fines below 2000 YTL could be appealed. The decision was published in the Official Gazette on 7 October 2009 and entered into force on 7 October 2010. Furthermore, after 7 October 2010, such appeals were only possible against fines determined after this date. Even if an appeal concerning the fines of conscientious objectors are heard by the Court of Cassation, there can be no reasonable expectation that the authors would be exempted from military service or provided with an acceptable alternative civilian service. Accordingly, even if the Court of Cassation accepted some of the authors' appeals against their fines, exhaustion of such remedies would, in fine, remain ineffective.

8.3 As to the State party's contention that the Covenant does not provide for the right of conscientious objection, the authors recall that although the Committee had initially concluded that article 18 of the Covenant did not provide for such a right,<sup>5</sup> its interpretation of the Covenant has since evolved and, at present, its position is that unjustified limitations on the rights of conscientious objectors amount to a violation of article 18. The authors point out that this position has been confirmed in the Committee's decisions regarding several individual communications, as well as in its general comment No. 22 on the right to freedom of thought, conscience and religion (article 18), and reflects the position of other United Nations bodies.<sup>6</sup> The authors consider that the above-mentioned information provides a sufficient answer to the State party's contentions in this connection.

8.4 As to the State party's view that exemption from military service would be a threat to public safety and public order, the authors state that they cannot imagine how they could constitute such a threat. They add that states such as Denmark, Israel, the Netherlands, Norway, the Russian Federation or the United Kingdom of Great Britain and Northern

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<sup>5</sup> See communication No. 185/1984, *L.T.K. v. Finland*, Decision of inadmissibility adopted on 9 July 1985.

<sup>6</sup> The authors refer, inter alia, to communications Nos. 1321-1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006; Nos. 1593-1603/2007, *Jung et al v. the Republic of Korea*, Views adopted on 23 March 2010; No. 666/1995, *Foin v. France*, Views adopted on 3 November 1999; as well as the Committee's general comment No. 22 (1993), in particular para. 11; several resolutions adopted by the Commission on Human Rights between 1971 and 2004, on the issue of conscientious objectors; and the work of the General Assembly on the matter.

Ireland have laws recognizing conscientious objection even during war time. Thus, in their view, the State party's argument is non-substantiated, given that at present less than one per cent of those enlisted for military service is composed of conscientious objectors in the State party, and it is difficult to envisage how such a small percentage could constitute a threat.

#### **Consideration as to re-opening the issue of admissibility**

9.1 The Committee notes that the State party's submission that the authors' cases are still pending before the Court of Cassation and that domestic remedies have not been exhausted. This would imply that the issue of admissibility should be revisited.

9.2 In the circumstances of the present case, the Committee considers that it does not need to re-consider its admissibility decision of 5 July 2010, and it decides to proceed to examine the communication on the merits.

#### **Consideration of the merits**

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes the authors' claim that their rights under article 18, paragraph 1, of the Covenant have been violated, due to the absence in the State party of an alternative to compulsory military service, as a result of which, they have been criminally prosecuted due to their failure to perform military service, with Mr. Sarkut having lost his employment. It further notes that the State party has not addressed this issue directly, but has explained rather that article 18 per se does not establish a "right to conscientious objection". The State party also invokes paragraph 3 of article 18, claiming that some restrictions may be necessary in a democratic society for the protection of public safety and public order.

10.3 The Committee also notes the State party's argument concerning article 8 of the Covenant, which states that "in countries where conscientious objection is recognized", national service by conscientious objectors does not constitute forced or compulsory labour. The Committee recalls that in its decision of inadmissibility regarding communication No. 185/1984, *L.T.K. v. Finland*, it had indeed regarded this phrase as reinforcing a conclusion that article 18 did not specifically confer a right to conscientious objection. Since that time, however, the Committee has confirmed that the oblique use of this phrase in a different context "neither recognizes nor excludes a right of conscientious objection,"<sup>7</sup> and so does not contradict the necessary consequences of the Covenant's guarantee of the right to freedom of thought, conscience and religion.

10.4 The Committee thus recalls its general comment No. 22 (1993), in which it considers that the fundamental character of the freedoms enshrined in article 18, paragraph 1, of the Covenant is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4, paragraph 2, of the Covenant. Although the Covenant does not explicitly refer to a right of conscientious objection, the Committee

<sup>7</sup> See communications Nos. 1321-1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006, para. 8.2. The Committee notes that the European Court of Human Rights subsequently reached a similar conclusion regarding similar language in art. 4 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, subsequent to the Committee's interpretation: see *Bayatyan v. Armenia*, Application No. 23459/03, judgement of 7 July 2011, paras. 62-64; also *Erçep v. Turkey*, Application No. 43965/04, judgement of 22 November 2011.

reaffirms its view that 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>8</sup> The Committee reiterates that the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if the latter cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion. A State party may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside of the military sphere and not under military command. The alternative service must not be of a punitive nature, but must rather be a real service to the community and compatible with respect for human rights.<sup>9</sup>

10.5 In the present cases, the Committee considers that the authors' refusal to be drafted for compulsory military service derives from their religious beliefs, which have not been contested and which are genuinely held, and that the authors' subsequent prosecution and sentences amount to an infringement of their freedom of conscience, in breach of article 18, paragraph 1, of the Covenant. 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, paragraph 1, of the Covenant.<sup>10</sup>

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, concludes that the facts before the Committee reveal, in respect of each author, violations by the Republic of Turkey of article 18, paragraph 1, of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including expunging their criminal records and providing them with adequate compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future.

13. 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 or not 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 in case a violation has been established, 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 these Views and to have them translated in the official language of the State party and widely distributed.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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<sup>8</sup> See, for example, communications Nos. 1642-1741/2007, *Jeong et al v. the Republic of Korea*, Views adopted on 24 March 2011.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

## Appendix

### I. Individual opinion of Committee member Mr. Gerald L. Neuman, jointly with members Mr. Yuji Iwasawa, Mr. Michael O’Flaherty and Mr. Walter Kaelin (concurring)

I agree with the Committee’s conclusion that the State party has violated article 18 of the Covenant, but I would reach that conclusion by a somewhat different route. In *Yoon and Choi v. the Republic of Korea*,<sup>1</sup> the Committee explained that punishing conscientious objectors for their refusal to perform military service amounted to a restriction on their ability to manifest their religion or belief, and that the restriction would be compatible with article 18 of the International Covenant on Civil and Political Rights only if it were shown to be necessary for a valid purpose within the meaning of article 18, paragraph 3. I would apply the same analysis in the present case, bearing in mind the particular factual circumstances in Turkey – the State party has not identified any empirical reasons why its refusal to accommodate conscientious objection to military service would be necessary for one of the legitimate purposes listed in the Covenant.

The majority applies a different approach, first adopted by the Committee in *Jeong et al. v. the Republic of Korea*,<sup>2</sup> in March 2011. It attributes the right of conscientious objectors to decline military service directly to the right to freedom of conscience, and does not undertake any examination of its necessity. Indeed, the Committee’s general comment No. 22 (1993) on article 18 observes that freedom of conscience, in contrast with freedom to manifest religion or belief, is protected unconditionally by the Covenant and cannot be subjected to any limitations whatsoever.<sup>3</sup> I continue to believe that the majority’s new approach to conscientious objection to military service is mistaken.

Refusal to perform military service for reasons of conscience is among the “broad range of acts”<sup>4</sup> encompassed by the freedom to manifest religion or belief in worship, observance, practice and teaching. Such refusal involves not merely the right to hold a belief, but the right to manifest the belief by engaging in actions motivated by it. Article 18 of the Covenant does permit limitations on this freedom if the high standard of justification in paragraph 3 can be met. The majority’s Views in the present case do not provide any convincing reason for treating conscientious objection to military service as if it were an instance of the absolutely protected right to hold a belief. Nor does the majority clarify how conscientious objection to military service can be distinguished in this respect from other claims to exemption on religious grounds from legal obligations.

<sup>1</sup> Communication No. 1321-1322/2004, Views adopted on 3 November 2006. I observe that the same approach as in *Yoon and Choi* was subsequently adopted by the European Court of Human Rights in the cases cited by the majority: see *Bayatyan v. Armenia*, Application no. 23459/03, para. 112, and *Erçep v. Turkey*, Application no. 43965/04, para. 49.

<sup>2</sup> Communication No. 1642-1741/2007, Views adopted on 24 March 2011, in which I joined the individual opinion of Committee members Mr. Yuji Iwasawa et al.

<sup>3</sup> General comment No. 22 (1993) on the right to freedom of thought, conscience and religion, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40)*, annex VI, para. 3.

<sup>4</sup> *Ibid.*, para. 4; see also communication No. 1876/2009, *Singh v. France*, Views adopted on 22 July 2011, paras. 8.3-8.4, concerning exemption on religious grounds from the duty to appear bareheaded in an identity photograph.

I recognize that the majority writes narrowly, in a manner that does not invite a broad expansion of arguments for absolute protection of religiously motivated action and inaction. I also recognize that the majority's approach has not led it to an inappropriate result in the present case. Nonetheless, I think that the error in the analysis is important, and that the Committee has not yet provided an adequate justification for its new approach to this issue. I would return to the Committee's earlier approach, based on the freedom to manifest a religion or belief in practice.

[Done in English (original version). Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish, as part of the Committee's annual report to the General Assembly.]

## II. Individual opinion of Committee member Sir Nigel Rodley, jointly with members Mr. Krister Thelin and Mr. Cornelis Flinterman (concurring)

By way of explanation of its decision to treat this and earlier conscientious objection cases as violations of article 18 of the Covenant, without reference – as was its practice before *Jeong et al. v. the Republic of Korea*<sup>1</sup> – to the possible limitations applicable to a manifestation of religion or belief in article 18, paragraph 3, the Committee states at paragraph 10.4 of the above Views “that the right to conscientious objection to military service is inherent to the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if the latter cannot be reconciled with the individual’s religion or beliefs. The right must not be impaired by coercion.”

My understanding of the thinking behind this evolution is that freedom of thought, conscience and religion embraces the right not to manifest, as well as the right to manifest, one’s conscientiously held beliefs. Compulsory military service without possibility of alternative civilian service implies that a person may be put in a position in which he or she is deprived of the right to choose whether or not to manifest his or her conscientiously held beliefs by being under a legal obligation, either to break the law or to act against those beliefs *within a context in which it may be necessary to deprive another human being of life*.

Of course, there are other situations in which one may be compelled to manifest one’s conscientiously held beliefs. For example, a compulsory military service system that makes provision for conscientious objection may require someone wishing to avail him/herself of that alternative service to declare the belief that entitles the person to opt for it. The distinction here is that the person is having to do it for the purpose of staying within the law and ipso facto avoiding being put in a position of being at risk of having to deprive another person of life.

Claims for exemption from other legal obligations on grounds of religion or other conscientiously held belief may also arise and, as noted in the individual opinion of Mr Neuman and the colleagues joining him, conscientious objection needs to be distinguished from other such claims. For the purposes of the present case, the typical example would be conscientious objection to paying that part of one’s tax bill that is destined for a state party’s military capacity. In such a case, the Committee might answer that the distinction lies in the fact that the level of complicity in the involvement in the feared deprivation of life is one that is at least not self-evident. I would also suggest that the Committee’s earlier approach in *Yoon and Choi v. the Republic of Korea*<sup>2</sup> gave no better guidance than in the present case on how to distinguish conscientious objection to military service from similar objection to paying taxes or, for that matter, compliance with other legal obligations on conscientious grounds.

Furthermore, there is a certain lack of reality in basing the violation on an analysis of article 18, paragraph 3. The implication of relying on that provision is that circumstances could be envisaged in which the community interests contemplated by the provision could override the individual’s conscientious objection to military service. This goes against all our experience of the phenomenon of conscientious objection. It is precisely in time of armed conflict, when the community interests in question are most likely to be under greatest threat, that the right to conscientious objection is most in need of protection, most likely to

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<sup>1</sup> Communication No. 1642-1741/2007, Views adopted on 24 March 2011.

<sup>2</sup> Communication No. 1321-1322/2004, Views adopted on 3 November 2006.

be invoked and most likely to fail to be respected in practice. Indeed, I do not for a moment believe that the Committee would ever use an analysis of article 18, paragraph 3, to prevent a person from successfully invoking conscientious objection as a defence against legal liability.

In my view, the underlying issue concerns not article 18 alone, but article 18 in the penumbra of article 6, the right to life, the right that from its earliest days the Committee described as the “supreme right”.<sup>3</sup> Of course, not every deprivation of human life in armed conflict (or otherwise) is to be considered a violation of article 6, and deprivation of life (killing) is not the same as deprivation of the right to life. But the value underlying that right – the sanctity of human life – puts it on another plane than that of other deep human goods protected by the Covenant. Paragraphs 1 and 2 of article 18 acknowledge that completely; paragraph 3 cannot but acknowledge it incompletely. The right to refuse to kill must be accepted completely. That is why article 18, paragraph 3, is the less appropriate basis for the Committee’s decision.

[Done in English (original version). Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the Committee's annual report to the General Assembly.]

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<sup>3</sup> Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 1. *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V.



### III. Individual opinion by Committee member Mr. Fabían Omar Salvioli (concurring)

1. I concur with the decision of the Human Rights Committee on communications No. 1853/2008 and 1854/2008 (*Atasoy and Sarkut v. Turkey*) and all the arguments put forward in the Committee's Views, which consolidate its vitally important jurisprudence on conscientious objection to compulsory military service, as established in its decision on communications Nos. 1642–1741/2007 (*Jeong et al. v. the Republic of Korea*), taken on the historic day of 24 March 2011. The debate has continued within the Committee in the lead-up to the decision in the case of Atasoy and Sarkut that is the subject of this analysis, and this has prompted me to set out my position in more detail.

2. It is important to clarify that the decision in the aforementioned cases is limited to conscientious objection to compulsory military service in the light of the International Covenant on Civil and Political Rights. The Committee's Views do not address other conscientious objection scenarios and their compatibility or otherwise with the Covenant, as the Committee has not had an opportunity to set out its position on these in its jurisprudence,<sup>1</sup> and it would be inappropriate to speculate on them in the context of individual communications on different subjects.

3. What is clear is that — regardless of the other possible scenarios — the nature of compulsory military service and its relationship to the use of armed force justify the Committee's attention to the subject, as explained in masterly fashion, it seems to me, by Sir Nigel Rodley in the last two paragraphs of his individual opinion to the communication concerning *Atasoy and Sarkut v. Turkey*.

4. The concept of conscientious objection to compulsory military service has been developed over time within the framework of the international protection of human rights; this development is reflected in the jurisprudence and opinions of the Committee, which must apply and interpret the Covenant as a living instrument. The most perceptive theorists in the field of international human rights law agree that legal instruments are dynamic and evolve on the basis of their interpretation by implementing bodies, which themselves reflect progress in international human rights law and offer interpretations that are used by other bodies and institutions. The development of conscientious objection to compulsory military service as a human right is a clear example of the fruitful interaction between the Human Rights Committee and other United Nations organs and bodies.

5. In its resolution 1989/59, the former Commission on Human Rights recognized the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought, conscience and religion, as laid down in article 18 of the Universal Declaration of Human Rights and article 18 of the International Covenant on Civil and Political Rights.<sup>2</sup> The Commission subsequently maintained this

<sup>1</sup> It may be pointed out that the only such case which the Committee declared inadmissible concerned a complaint from a petitioner who refused to pay a certain percentage of his taxes, corresponding to the percentage of the federal budget allocated by Canada to military expenditure. The Committee noted that “although article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures, the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article” (communication No. 446/1991, *J.P. v. Canada*, Views adopted on 7 November 1991, para. 4.2).

<sup>2</sup> Commission on Human Rights resolution 1989/59, adopted on 8 March 1989, para. 1. The Commission had earlier adopted resolution 1987/46 on 10 March 1987, in which it appealed to States

position in various resolutions recognizing that conscientious objection to military service derived from principles and reasons of conscience, including profound convictions, arising from religious, ethical, humanitarian or similar motives.<sup>3</sup> In 1998, the Commission requested the Secretary-General of the United Nations to collect information from Governments, the specialized agencies and intergovernmental and non-governmental organizations on recent developments in this field and to submit a report,<sup>4</sup> which he did in 1999.<sup>5</sup>

6. The Special Rapporteur of the Commission on Human Rights on the elimination of all forms of religious intolerance addressed this issue on several occasions; the first holder of this mandate, Angelo Vidal d'Almeida Ribeiro, drew up a set of criteria relating to cases of conscientious objection to compulsory military service.<sup>6</sup> A subsequent mandate holder, Abdelfattah Amor, stressed in his report that the right of conscientious objection was closely related to freedom of religion, and expressed support for the views of the Commission on Human Rights.<sup>7</sup>

7. The Human Rights Council has continued to renew the mandate of the Special Rapporteur on this subject. Former Special Rapporteur Asma Jahangir noted in her 2007 report that many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that this right derives from their freedom of thought, conscience and religion.<sup>8</sup> All such reports are, of course, brought to the attention of the General Assembly of the United Nations. In his reports, the current mandate holder, Heiner Bielefeldt, also sets out his position on conscientious objection to compulsory military service, including in his reports on country missions, such as the one on his visit to Paraguay in 2012.<sup>9</sup>

8. All the instruments referred to expressly mention the International Covenant on Civil and Political Rights and the work of the Human Rights Committee. The link between conscientious objection to compulsory military service and human rights is undeniable, and so it should be no surprise that the Human Rights Council has followed the path of "progressive development" in this area, as this principle permeates the entire sphere of international protection.

9. Although in the case of *Muhonen v. Finland* the author of the communication alleged that article 18, paragraph 1, of the Covenant had been violated because of his conscientious objection to performing military service — which was based on ethical reasons — the Committee did not express an opinion on this, as it found that part of the communication inadmissible on the grounds that the author had obtained a remedy within

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to recognize that conscientious objection to military service should be considered a legitimate exercise of the right to freedom of thought, conscience and religion.

<sup>3</sup> Commission on Human Rights resolution 1995/83, adopted on 8 March 1995 (preamble, penultimate paragraph). See also Commission on Human Rights resolution 1998/77, adopted on 22 April 1998, para. 1.

<sup>4</sup> Commission on Human Rights resolution 1998/77, adopted on 22 April 1998, para. 10.

<sup>5</sup> Report of the Secretary-General submitted pursuant to Commission resolution 1998/77 (E/CN.4/2000/55).

<sup>6</sup> Report of the Special Rapporteur on the elimination of all forms of religious intolerance, (E/CN.4/1992/52), para. 185.

<sup>7</sup> Report of the Special Rapporteur on the elimination of all forms of religious intolerance, to the General Assembly (A/52/477), paras. 77–78.

<sup>8</sup> Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, (A/HRC/6/5), para. 22.

<sup>9</sup> Report of the Special Rapporteur on freedom of religion or belief: Mission to Paraguay (A/HRC/19/60/Add.1), para. 56.

the State party that recognized the right he was claiming.<sup>10</sup> Shortly afterwards, in 1985, the Committee adopted its decision in the case of *L.T.K. v. Finland*, in which it observed that: “The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as implying that right.”<sup>11</sup> In its general comment No. 22 (1993), however, the Committee considers developments in the area and stresses that “the Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief”.<sup>12</sup>

10. In 2006, the cases of Yeo-Bum Yoon and Myung-Jin Choi, two conscientious objectors to compulsory military service, were considered together by the Committee, which clearly stated that “the present claim is to be assessed solely in the light of article 18 of the Covenant, *the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose*” (emphasis added).<sup>13</sup> The Committee therefore considered that the State party had not demonstrated, in the case in point, that the restriction in question was “necessary” within the meaning of article 18, paragraph 3, of the Covenant. According to this line of reasoning, the Committee still accepted that a State party could justify the application of a law on compulsory military service, which was a limitation on the right to manifest one’s religion or belief, when it was necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>14</sup>

11. Finally, the Committee’s jurisprudence in the case of *Jeong et al. v. the Republic of Korea*<sup>15</sup> and in the present case of *Atasoy and Sarkut v. Turkey* marks the greatest development to date on the issue of conscientious objection to compulsory military service in relation to the International Covenant on Civil and Political Rights.

12. Indeed, there is no doubt that the Committee now considers that freedom of conscience and religion (art. 18 of the Covenant) includes the right to conscientious objection to compulsory military service; this is a substantial departure from past practice. No other conclusion can be drawn from an analysis of the decisions in the cases of *Jeong et al. v. the Republic of Korea* and *Atasoy and Sarkut v. Turkey*: “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 this cannot be reconciled with that individual’s religion or beliefs. The right must not be impaired by coercion.”<sup>16</sup>

13. It is precisely because freedom of thought, conscience and religion is inherent in conscientious objection to compulsory military service, as recognized by the Committee,

<sup>10</sup> Communication No. 89/1981, *Muhonen v. Finland*, Views adopted on 6 April 1984 (decision of admissibility).

<sup>11</sup> Communication No. 185/1984, *L.T.K. v. Finland*, Views adopted on 9 July 1985, para. 5.2.

<sup>12</sup> Human Rights Committee, general comment No. 22 (1993), para. 11. *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40)*, annex VI.

<sup>13</sup> Communications Nos. 1321-1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006, para. 8.2.

<sup>14</sup> This is clear from para. 8.4 of the Committee’s Views on communications Nos. 1321-1322/2004, *Yoon and Choi v. the Republic of Korea*. In his dissenting opinion, Mr. Solari-Yrigoyen said he found it inappropriate to deal with the issue under article 18, paragraph 3; the Committee ought to have considered it exclusively under article 18, paragraph 1.

<sup>15</sup> Communications Nos. 1642-1741/2007, *Jeong et al. v. the Republic of Korea*, Views adopted on 24 March 2011.

<sup>16</sup> *Ibid.*, para. 7.3 (taken up in para. 10.4 of the Committee’s Views on *Atasoy and Sarkut v. Turkey*).

that the matter cannot be dealt with under article 18, paragraph 3. There can now be no limitation or possible justification under the Covenant for forcing a person to perform military service.

14. The Committee has also clearly set out the requirements to be met by a State party under the International Covenant on Civil and Political Rights as regards civilian alternatives to military service: “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>17</sup> Consequently, any person may choose to perform alternative civilian service that meets these requirements.

15. Article 18, paragraph 1, of the International Covenant on Civil and Political Rights states that the right to freedom of thought, conscience and religion includes, for everyone, the *freedom to have or to adopt* beliefs of their choice and the freedom to *manifest* those beliefs. Requiring a person to perform military service against their will violates the two dimensions of the right to freedom of conscience and religion; this reasoning has led the Committee to categorize conscientious objection as *inherent* in freedom of conscience and religion (here I am referring to conscientious objection to compulsory military service, not to other possible forms of conscientious objection on which the Committee takes no position in the present case).

16. The discussion is not about whether, in the case in point, article 18, paragraph 1, of the Covenant has been violated: on this there is consensus. Rather, it is about whether or not the State party’s explanation should be subject to the requirements set out in article 18, paragraph 3. This is not possible, since compulsory military service *impedes conscientious objectors’ enjoyment of the right to have a certain religion or belief*, which is prohibited under article 4, paragraph 2, of the International Covenant on Civil and Political Rights, according to which the right to freedom of thought, conscience and religion is non-derogable in any circumstances.

17. Some members have taken the position that the Committee’s Views in the cases of *Atasoy and Sarkut v. Turkey* and *Jeong et al. v. the Republic of Korea* do not adequately explain its new approach.<sup>18</sup> With all due respect, I must strongly disagree with this position, for the reasons set out above in this reasoned individual opinion. In fact, what needs to be explained is how it can be reasonable to maintain the previous approach in this, the second decade of the twenty-first century. Under the old approach, a State party could find reasons to force a person to use arms, to be involved in an armed conflict, to run the risk of being killed and, worse still, to kill, without this being a violation of the Covenant. How can this be compatible with the freedom of conscience and religion of someone whose philosophical or religious beliefs lead that person to be a conscientious objector (regardless of their freedom to manifest those beliefs or not)?

18. The Committee stated in the case of *Yoon and Choi v. the Republic of Korea* — in connection with article 18, paragraph 3, of the Covenant — that “such restriction must not

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<sup>17</sup> Ibid.

<sup>18</sup> See the individual opinion of Committee members Mr. Yuji Iwasawa, Mr. Gerald Neuman and Mr. Michael O’Flaherty (concurring) in the case of *Jeong et al. v. Republic of Korea* (communications Nos. 1642-1741/2007), in which the authors merely state that the Committee should follow the same reasoning that it used before; and, especially, the individual opinion of Mr. Gerald Neuman (jointly with Mr. Yuji Iwasawa, Mr. Michael O’Flaherty and Mr. Walter Kaelin) in the present case of *Atasoy and Sarkut v. Turkey*.

impair the very essence of the right in question”.<sup>19</sup> Conscientious objection to compulsory military service *also involves* a manifestation of philosophical or religious beliefs. One further argument I would like to make — and this in no way contradicts what is said in the two preceding paragraphs — is that the performance of compulsory military service can never be considered a limitation that is permissible under article 18, paragraph 3, of the Covenant, *because such a so-called “limitation” is no such thing: it is intended to abolish the right altogether*. The Committee’s assessment of possible limitations to the freedom to manifest one’s beliefs or religion will apply to other potential cases of conscientious objection, but never to cases of conscientious objection to performing compulsory military service.

19. It would be impossible to produce figures on how many people in the course of history have had their beliefs flouted by being forced to do military service against their will, or have been persecuted or imprisoned for refusing to take up arms; many others were made to kill or died in armed conflicts in which they did not choose to take part. The recent jurisprudence of the Human Rights Committee on the subject of conscientious objection to military service is not only based on solid legal grounds; it also pays a belated but well deserved homage to those victims.

[Done in Spanish, subsequently to be issued also in Arabic, Chinese, English, French and Russian as part of the Committee’s annual report to the General Assembly.]

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<sup>19</sup> Communications Nos. 1321-1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006, para. 8.3.