

## Submission of the UN Working Group on Arbitrary Detention

1. The present submission is made by the UN Working Group on Arbitrary Detention in response to [the call for inputs- OHCHR report on conscientious objections to military service](#).
2. Over the past 30 years, the Working Group has developed a considerable body of legal analysis relating to the freedom of conscience as well as conscientious objections to military service in particular<sup>1</sup>. The Working Group continues to receive communications that raise issues relating to the freedom of conscience, particularly the right to conscientious objection to military service.
3. In its opinion [40/2018](#)<sup>2</sup> and [2018 Annual Report](#)<sup>3</sup> the Working Group set out the key principles that it applies in its consideration of cases involving conscientious objection to military service as follows:

(i) While the International Covenant on Civil and Political Rights does not explicitly refer to a right to conscientious objection, such a right derives from the freedom of thought, conscience and religion protected under article 18, and under article 18 of the Universal Declaration of Human Rights.<sup>4</sup> The obligation of an individual to use lethal force within a military institution may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.<sup>5</sup> While not explicitly raised in opinion No. 40/2018, the Working Group considers that persons performing military service who may not have had conscientious objections may develop such objections as they proceed with the service,<sup>6</sup>

(ii) In its earlier jurisprudence, the Working Group considered conscientious objection to military service to be a manifestation of one's conscience, which could be subject to limitations under article 18 (3) of the Covenant that are prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>7</sup> However, a more progressive approach that ensures more comprehensive protection of human rights, and reflects a growing consensus regarding the harm to society involved in obliging individuals to take up arms and to take part in a military process involving training in the use of force despite their convictions, is now warranted. The Working Group takes the view that detention of a conscientious objector is a

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<sup>1</sup> See e.g. Opinion Nos. 8/2020, 69/2018, 40/2018, 43/2017, 16/2008, 8/2008, 24/2003.

<sup>2</sup> See the Government's follow-up information, available at: [www.ohchr.org/Documents/Issues/Detention/Opinions/ROK-Reply\\_to\\_letter\\_WGAD\\_2019-02-25\\_10-50-23.pdf](http://www.ohchr.org/Documents/Issues/Detention/Opinions/ROK-Reply_to_letter_WGAD_2019-02-25_10-50-23.pdf).

<sup>3</sup> A/HRC/42/39 paras 59-64.

<sup>4</sup> See opinions No. 43/2017, No. 16/2008, No. 8/2008 and No. 24/2003; A/HRC/16/47/Add.3, para. 68; and A/HRC/10/21/Add.3, para. 66. See also Human Rights Council resolutions 20/2, 24/17 and 36/18 and Commission on Human Rights resolutions 1989/59, 1991/65, 1993/84, 1995/83, 1998/77, 2000/34, 2002/45 and 2004/35.

<sup>5</sup> Human Rights Committee, general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, para. 11.

<sup>6</sup> Human Rights Council resolution 24/17 and Commission on Human Rights resolutions 1993/84, 1995/83 and 1998/77.

<sup>7</sup> Opinion No. 16/2008, para. 36.

violation per se of article 18 (1) of the Covenant.<sup>8</sup> That is, the right to conscientious objection to military service is part of the absolutely protected right to hold a belief under article 18 (1) of the Covenant, which cannot be restricted by States;

(iii) The right to conscientious objection entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs.<sup>9</sup> States should refrain from imprisoning individuals solely on the basis of their conscientious objection to military service, and should release those that have been so imprisoned.<sup>10</sup> However, a State may compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. Alternative service must not be punitive; it must be a real service to the community and compatible with respect for human rights;<sup>11</sup>

(iv) All States should adopt appropriate legislative or other measures to ensure that conscientious objector status is recognized and attributed. Repeated prosecution and incarceration of conscientious objectors should not be used to force individuals to change their beliefs.<sup>12</sup>

4. In applying these principles to the deprivation of liberty of individuals who refuse to enlist in military service as the direct result of their genuinely held religious and conscientious beliefs, the Working Group has found violations of categories I (detention which lacks legal basis), II (detention due to peaceful exercise of rights) and V (detention based on discrimination) of its methods of work.<sup>13</sup> While each case depends on its own facts, the Working Group considers that the detention of conscientious objectors is a per se violation of article 18 (1) of the Covenant and such a detention will therefore usually lack a legal basis according to category I. Moreover, given that the detention of conscientious objectors results from the exercise of the right to freedom of thought, conscience and religion under article 18 of the Covenant, it will also often fall within category II. Finally, when the detention of conscientious objectors to military service involves discrimination on the basis of religion or belief, it will amount to a category V violation.
5. When the Working Group determines that the deprivation of liberty of conscientious objectors to military service is arbitrary, it will require the relevant State to immediately release the individuals involved (if they are not already at liberty, for example, on bail), to accord them an enforceable right to compensation and other reparations and to expunge their criminal records.<sup>14</sup> The Working Group will also request the State to bring its laws, particularly the provisions found to have resulted in the arbitrary

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<sup>8</sup> See opinions No. 69/2018, paras. 19–20; No. 40/2018, para. 44; and No. 43/2017, para. 34. See also Human Rights Committee, *Young-kwan Kim et al. v. Republic of Korea* (CCPR/C/112/D/2179/2012).

<sup>9</sup> Human Rights Committee, *Min-Kyu Jeong et al. v. Republic of Korea* (CCPR/C/101/D/1642-1741/2007), paras. 7.2–7.4. See also AL KOR 2/2018 and the State's response.

<sup>10</sup> Human Rights Council resolution 24/17, paras. 10–11.

<sup>11</sup> Human Rights Committee, *Min-Kyu Jeong et al. v. Republic of Korea*, para. 7.3.

<sup>12</sup> E/CN.4/2001/14, paras. 91–94.

<sup>13</sup> See opinions No. 43/2017, No. 40/2018 and No. 69/2018. In addition, category III violations of the right to fair trial may also be found in any individual case.

<sup>14</sup> CCPR/C/KOR/CO/4, paras. 44–45.

deprivation of liberty of conscientious objectors, into conformity with the State's commitments under international human rights law.

6. The Working Group also reminds States to respect, protect and fulfil the right to personal liberty of conscientious objectors to military service by exercising due diligence to prevent their expulsion, return (refoulement) or extradition to another State where there are substantial grounds for believing that they would be in danger of being subjected to arbitrary deprivation of liberty.
7. The Working Group notes developments in the Republic of Korea on this specific issue. In June 2018, the Constitutional Court issued an opinion that the mandatory military service without an alternative for a conscientious objector does not align with the Constitution. The Working Group anticipates that this jurisprudential development will benefit all those in the country who had been subjected to the previous legal regime, while it should serve as an example to other countries.
8. The Working Group welcomed<sup>15</sup> the raising of its opinion by defence counsel during legal argument in domestic proceedings during a public hearing before the Supreme Court of the Republic of Korea on conscientious objection to military service and its status under international human rights law.<sup>16</sup> In this case, the Government informed the Working Group that in November 2018, the Supreme Court reversed its jurisprudence, which had previously considered the punishment of conscientious objectors as necessary to public safety, and that this could result in detained objectors being eligible to file a claim for compensation.<sup>17</sup>

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<sup>15</sup> A/HRC/42/39 at para 72.

<sup>16</sup> Transcript of closing statements made in a public hearing held by the Supreme Court of the Republic of Korea on 30 August 2018 (citing opinion No. 40/2018).

<sup>17</sup> See opinion No. 69/2018, para. 15. See also the Government's follow-up information, available at [www.ohchr.org/Documents/Issues/Detention/Opinions/ROK-Reply\\_to\\_letter\\_WGAD\\_2019-02-25\\_10-50-23.pdf](http://www.ohchr.org/Documents/Issues/Detention/Opinions/ROK-Reply_to_letter_WGAD_2019-02-25_10-50-23.pdf).