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HUMAN RIGHTS COMMITTEE  
Eighty-eighth session  
16 October – 3 November 2006

**VIEWS**

**Communications Nos. 1321/2004 and 1322/2004**

<u>Submitted by:</u>	Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi (represented by counsel, Mr. Suk-Tae Lee)
<u>Alleged victims:</u>	The authors
<u>State Party:</u>	Republic of Korea
<u>Date of communications:</u>	18 October 2004 (initial submissions)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 25 October 2004 (not issued in document form)
<u>Date of adoption of Views:</u>	3 November 2006

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\* Made public by decision of the Human Rights Committee.

*Subject matter:* Conscientious objection on the basis of genuinely-held religious beliefs to enlistment in compulsory military service

*Procedural issues:* Joinder of communications

*Substantive issues:* Freedom to manifest religion or belief – permissible limitations on manifestation

*Articles of the Optional Protocol:* None

*Articles of the Covenant:* 18, paragraphs 1 and 3

On 3 November 2006, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communications Nos. 1321/2004 and 1322/2004.

[ANNEX]

**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

Eighty-eighth session

concerning

**Communications Nos. 1321/2004 and 1322/2004\***

<u>Submitted by:</u>	Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi (represented by counsel, Mr. Suk-Tae Lee)
<u>Alleged victims:</u>	The authors
<u>State Party:</u>	Republic of Korea
<u>Date of communications:</u>	18 October 2004 (initial submissions)

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

Meeting on 3 November 2006,

Having concluded its consideration of communications Nos. 1321/2004 and 1322/2004, submitted to the Human Rights Committee on behalf of Yeo-Bum Yoon and Myung-Jin Choi 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 communications, both initially dated 18 October 2004, are Mr. Myung-Jin Choi and Mr. Yeo-Bum Yoon, nationals of the Republic of Korea, born on 27 May 1981 and 3 May 1980, respectively. The authors claim to be victims of a breach by the Republic of Korea

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The texts of two individual opinions signed by Committee members Mr. Hipólito Solari-Yrigoyen and Ms. Ruth Wedgwood are appended to the present document.

of article 18, paragraph 1, of the Covenant. The authors are represented by counsel, Mr. Suk-Tae Lee.

1.2 Pursuant to Rule 94, paragraph 2, of the Committee's Rules of Procedure, the two communications are joined for decision in view of the substantial factual and legal similarity of the communications.

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

#### *Mr. Yoon's case*

2.1 Mr. Yoon is a Jehovah's Witness. On 11 February 2001, the State party's Military Power Administration sent Mr. Yoon a notice of draft for military service. On account of his religious belief and conscience, Mr. Yoon refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act.<sup>1</sup> In February 2002, Mr. Yoon was bailed.

2.2 On 13 February 2004, the Eastern Seoul District Court convicted Mr. Yoon as charged and sentenced him to one and a half years of imprisonment. On 28 April 2004, the First Criminal Division of the Eastern Seoul District Court upheld the conviction and sentence, reasoning *inter alia*:

*"...it cannot be said that an internal duty of acting according to one's conscience motivated by an individual belief is greater in value than the duty of national defence, which is essential to protect the nation's political independence and its territories, the people's life, body, freedom and property. Furthermore, since whether there is an expectancy for compliance or not must be determined based on specific actors but on the average person in society, so-called "conscientious decisions", where one objects to the duty of military service set by the law on grounds of religious doctrine, cannot justify acts of objection to military service in violation of established law."*

2.3 On 22 July 2004, a majority of the Supreme Court in turn upheld both the conviction and sentence, reasoning, *inter alia*:

*"if [Mr. Yoon's] freedom of conscience is restricted when necessary for national security, the maintenance of law and order or for public welfare, it would be a constitutionally permitted restriction .... Article 18 of the [Covenant] appears to provide essentially the same laws and protection as Article 19 (freedom of conscience) and Article 20 (freedom of religion) of the Korean Constitution. Thus, a*

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<sup>1</sup> Article 88 of the Military Service Act provides as follows:

#### **"Evasion of Enlistment**

(1) Persons who have received a notice of enlistment or a notice of call (including a notice of enlistment through recruitment) in the active service, and who fails to enlist in the army or to comply with the call, even after the expiration of the following report period from the date of enlistment or call, without any justifiable reason, shall be punished by imprisonment for not more than three years: 1. Five days in cases of enlistment in active service [...]"

*right to receive an exemption from the concerned clause of the Military Service Act does not arise from Article 18 of the [Covenant].”*

2.4 The dissenting opinion, basing itself on resolutions of the (then) UN Commission on Human Rights calling for institution of alternative measures to military service as well as on broader State practice, would have held that genuinely-held conscientious objection amounted to “justifiable reasons”, within the meaning of Article 88(1) of the Military Services Act, allowing for exemption from military service.

*Mr. Choi’s case*

2.5 Mr. Choi is also a Jehovah’s Witness. On 15 November 2001, the State party’s Military Power Administration sent Mr. Choi a notice of draft. On account of his religious belief and conscience, Mr. Choi refused to be drafted within the prescribed period of time, whereupon he was arrested and charged under article 88 (section 1) of the Military Service Act.<sup>2</sup>

2.6 On 13 February 2002, the Eastern Seoul District Court convicted Mr. Choi as charged and sentenced him to one and a half years of imprisonment. On 28 February 2002, Mr. Yoon was bailed. On 28 April 2004 and on 15 July 2004, the First Criminal Division of the Eastern Seoul District Court and the Supreme Court, respectively, upheld the conviction and sentence, on the basis of the same reasoning described above with respect to Mr. Yoon.

*Subsequent events*

2.7 On 26 August 2004, in a case unrelated to Messrs. Yoon or Choi, the Constitutional Court rejected, by a majority, a constitutional challenge to article 88 of the Military Service Act on the grounds of incompatibility with the protection of freedom of conscience protected under the Korean Constitution. The Court reasoned, *inter alia*:

*“the freedom of conscience as expressed in Article 19 of the Constitution does not grant an individual the right to refuse military service. Freedom of conscience is merely a right to make a request to the State to consider and protect, if possible, an individual’s conscience, and therefore is not a right that allows for the refusal of one’s military service duties for reasons of conscience nor does it allow one to demand an alternative service arrangement to replace the performance of a legal duty. Therefore the right to request alternative service arrangement cannot be deduced from the freedom of conscience. The Constitution makes no normative expression that grants freedom of expression a position of absolute superiority in relation to military service duty. Conscientious objection to the performance of military service can be recognised as a valid right if and only if the Constitution itself expressly provides for such a right”.*

2.8 While accordingly upholding the constitutionality of the contested provisions, the majority directed the legislature to study means by which the conflict between freedom of conscience and the public interest of national security could be eased. The dissent, basing itself on the Committee’s General Comment No. 22, the absence of a reservation by the State party to article

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<sup>2</sup> Ibid.

18 of the Covenant, resolutions of the (then) UN Commission on Human Rights and State practice, would have found the relevant provisions of the Military Services Act unconstitutional, in the absence of legislative effort to properly accommodate conscientious objection.

2.9 Following the decision, the authors state that some 300 conscientious objectors whose trials had been stayed were being rapidly processed. Accordingly, it was anticipated that by the end of 2004, over 1,100 conscientious objectors would be imprisoned.

### **The complaint**

3. The authors complain that the absence in the State party of an alternative to compulsory military service, under pain of criminal prosecution and imprisonment, breaches their rights under article 18, paragraph 1, of the Covenant.

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

4.1 By submission of 2 April 2005, the State party submits that neither communication has any merit. It notes that article 18 provides for specified limitations, where necessary, on the right to manifest conscience. Although article 19 of the State party's Constitution protects freedom of conscience, article 37(2) provides that: "The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare .... Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated." Accordingly, the Constitutional Court ruled that "the freedom of conscience prescribed in Article 19 of the Constitution does not grant one the right to object to fulfilling one's military service duty" based on limitations of principle that all basic rights must be exercised within the boundary of enabling pursuit of civic engagement and keeping the nation's 'law order' intact. Hence, the freedom to manifest one's conscience may be restricted by law when it is harmful to public safety and order in pursuing civic engagement or when it threatens a nation's 'law order'.

4.2 The State party argues that in view of its specific circumstances, conscientious objection to military service needs to be restricted as it may incur harm to national security. Unlike the freedom to form or determine inner conscience, the freedom to object to fulfilling military service duty for reasons of religion may be restricted, as recognised in article 18 of the Covenant, for public causes in that it manifests or realizes one's conscience through passive non-performance.

4.3 Under the specific security circumstances facing a hostile Democratic People's Republic of Korea (DPRK), the State party, as the world's sole divided nation, adopted the Universal Conscription System, which recognises all citizens' obligation to military service. Thus, the equality principle of military service duty and responsibility carries more meaning in the State party than in any other country. Considering the strong social demand and anticipation for the equality of the performance of military service duty, allowing exceptions to military service duty may prevent social unification, greatly harming national security by eroding the basis of the national military service system – the Universal Conscription System – especially considering the social tendency of attempting to evade military service duty by using any and every means.

4.4 The State party argues that a nation's military service system is directly linked to issues of national security, and is a matter of legislative discretion vested in the lawmakers for the creation of the national army with the maximum capabilities for national defence, after considering a nation's geopolitical stance, internal and external security conditions, economic and social state and national sentiment, along with several other factors.

4.5 The State party contends that given its security conditions, the demand for equality in military service and various concomitant restricting elements in adopting an alternative service system, it is difficult to argue that it has reached the stage of improved security conditions that would allow for limitations to military service, as well as the formation of national consensus.

4.6 The State party concludes that the prohibition of conscientious objection to military service is justified by its specific security and social conditions, which makes it difficult to conclude that the decision violates the essential meaning of the freedom of conscience set out in paragraph 3 of article 18 of the Covenant. Considering the State party's security conditions, the demand for equality in military service duty, and the absence of any national consensus, along with various other factors, the introduction of any system of alternative service is unlikely.

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

5.1 By letter of 8 August 2005, the authors responded to the State party's submissions. They note that the State party does not identify which of the permissible restrictions in section 3 of article 18 is invoked, though accept that the general import of argument is on "public safety or order". Here, however, the State party has not identified why conscientious objectors can be considered to harm public safety or order. Strictly speaking, as conscientious objection has never been allowed, the State party cannot determine whether or not any such danger in fact exists.

5.2 The authors note a vague fear on the State party's part that allowing conscientious objection would threaten universal conscription. But such a fear cannot justify the severe punishments meted out under the Military Service Act to thousands of objectors and the discrimination faced by objectors after their release from prison. In any event, the authors question the real value of conscience, if it must be kept internal to oneself and not expressed outwardly. The authors note the long history, dating from the Roman Republic, of conscientious objection and the pacifist rejection of violence of objectors. Referring to the Committee's General Comment No. 22, the authors argue that conscientious objectors, far from threatening public safety or order or others' rights, in fact strengthens the same, being a noble value based on deep and moral reflection.

5.3 On the aspect of the threat posed by the DPRK, the authors note that the State party's population is almost twice as large, its economy thirty times as large and its annual military spending over the last decade nearly ten times as large as that of its northern neighbour. That country is under constant satellite surveillance, and is suffering a humanitarian crisis. By contrast, the State party fields almost 700,000 soldiers, and 350,000 young people perform military service each year. The number of 1,053 imprisoned objectors, as of 11 July 2005, is a very small number incapable of adversely affecting such military power. Against this background, it is unreasonable to argue that the threat posed by the DPRK is sufficient justification for the punishment of conscientious objectors.

5.4 On the issue of equitability, the authors argue that the institution of alternative service arrangements would preserve this, if necessary by extending the term of the latter kind of service. The authors note the positive experience gained from the recent institution of alternative service in Taiwan, facing at least equivalent external threat to its existence as the State party, and in Germany. Such an institution would contribute to social integration and development and respect for human rights in society. The social tendency to avoid military service, for its part, is unrelated to the objection issue and stems from the poor conditions faced by soldiers. Were these improved, the tendency to avoid service would lessen.

5.5 The authors reject the argument that the introduction of alternative service is at the discretion of the legislative branch, noting that such discretion cannot excuse a breach of the Covenant and in any event little if any work in this direction has been done. Moreover, the State party has not observed its duty as a member of the UN Commission on Human Rights, and, whether deliberately or not, has failed to report to the Committee in its periodic reports on the situation of conscientious objectors.

### **Supplementary submissions of the State party**

6.1 By submission of 6 September 2006, the State party responded to the authors' submissions with supplementary observations on the merits of the communications. The State party notes that under article 5 of its Constitution, the National Armed Forces are charged with the sacred mission of national security and defence of the land, while article 39 acknowledges that the obligation of military service is an important, indeed one of the key, means of guaranteeing national security, itself a benefit and protection of law. The State party notes that national security is an indispensable precondition for national existence, maintaining territorial integrity and protecting the lives and safety of citizens, while constituting a basic requirement for citizen's exercise of freedom.

6.2 The State party notes the freedom to object to compulsory military service is subject to express permission of limitations set out in article 18, paragraph 3, of the Covenant. Allowing exceptions to compulsory service, one of the basic obligations imposed on all citizens at the expense of a number of basic rights to protect life and public property, may damage the basis of the national military service which serves as the main force of national defence, escalate social conflict, threaten public safety and national security and, in turn, infringe on the basic rights and freedoms of citizens. Hence, a restriction on the basis of harm to public safety and order or threat to a nation's legal order when undertaken in a communal setting is permissible.

6.3 The State party argues that while it is true that the situation on the Korean peninsula has changed since the appearance of a new concept of national defence and modern warfare, as well as a military power gap due to the disparities in economic power between North and South, military manpower remains the main form of defence. The prospect of manpower shortages caused by falling birth rates must also be taken into account. Punishing conscientious objectors, despite their small overall number, discourages evasion of military service. The current system may easily crumble if alternative service systems were adopted. In light of past experiences of irregularities and social tendencies to evade military service, it is difficult to assume alternatives would prevent attempts to evade military service. Further, accepting conscientious objection while military manpower remains the main force of national defence may lead to the misuse of



conscientious objection as a legal device to evade military service, greatly harming national security by demolishing the conscription basis of the system.

6.4 On the authors' arguments on equality, the State party argues that exempting conscientious objectors or imposing less stringent obligations on them risks violating the principle of equality enshrined in article 11 of the Constitution, breach the general duty of national defence imposed by article 39 of the Constitution and amount to an impermissible awarding of decorations or distinctions to a particular group. Considering the strong social demand and anticipation of equality in performance of military service, allowing exceptions may hinder social unification and greatly harm national capabilities by raising inequalities. If an alternative system is adopted, all must be given a choice between military service and alternative service as a matter of equity, inevitably threatening public safety and order and the protection of basic rights and freedoms. The State party accepts that human rights problems are a major reason for evasion of service and substantially improved barracks conditions. That notwithstanding, the two year length of service – significantly longer than that in other countries – continues to be a reason for evasion unlikely to fade even with improved conditions and the adoption of alternative service.

6.5 On the authors' arguments as to international practice, the State party notes that Germany, Switzerland and Taiwan accept conscientious objection and provide alternative forms of service. It had contacted system administrators in each country and gathered information on the respective practices through research and seminars, keeping itself updated on an ongoing basis on progress made and reviewing the possibility of its own adoption. The State party notes however that the introduction of alternative arrangements in these countries was adopted under their own particular circumstances. In Europe, for example, alternative service was introduced in a general shift from compulsory to volunteer military service post-Cold War, given a drastic reduction in the direct and grave security threat. Taiwan also approved conscientious objection in 2000 when over-conscription became a problem with the implementation in 1997 of a manpower reduction policy. The State party also points out that in January 2006, its National Human Rights Commission devised a national action plan for conscientious objection, and the Government intends to act on the issue.

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

### **Consideration of admissibility**

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 In the absence of objection by the State party to the admissibility to the communication, as well as any reasons suggesting that the Committee should *proprio motu*, declare the communication inadmissible in whole or in part, the Committee declares the claim under article 18 of the Covenant admissible.

### Consideration of the merits

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

8.2 The Committee notes the authors' claim that article 18 of the Covenant guaranteeing the right to freedom of conscience and the right to manifest one's religion or belief requires recognition of their religious belief, genuinely held, that submission to compulsory military service is morally and ethically impermissible for them as individuals. It also notes that article 8, paragraph 3, of the Covenant excludes from the scope of "forced or compulsory labour", which is proscribed, "any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors". It follows that the article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, 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.

8.3 The Committee recalls its previous jurisprudence on the assessment of a claim of conscientious objection to military service as a protected form of manifestation of religious belief under article 18, paragraph 1.<sup>3</sup> It observes that while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious belief. The Committee also recalls its general view expressed in General Comment 22<sup>4</sup> that to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18. The Committee notes, in the instant case, that the authors' refusal to be drafted for compulsory service was a direct expression of their religious beliefs, which it is uncontested were genuinely held. The authors' conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief. Such restriction must be justified by the permissible limits described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public safety, order, health or morals or the

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<sup>3</sup> In Muhonen v Finland (Case No. 89/1981), for example, the Committee declined to decide whether article 18 guaranteed a right of conscientious objection. In L.T.K. v Finland (Case No. 185/1984), the Committee declined to address the issue fully on the merits, deciding as a preliminary matter of admissibility on the basis of the argument before it that the question fell outside the scope of article 18. Brinkhof v The Netherlands (Case No. 402/1990) addressed differentiation between total objectors and Jehovah's Witnesses, while Westerman v The Netherlands (Case No. 682/1996) involved a procedure for recognition of conscientious objection under domestic law itself, rather than the existence of underlying rights as such. Although the statement was not necessary for its final decision, in J.P. v Canada (Case No. 446/1991) the Committee noted, without further explanation, that article 18 "certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures".

<sup>4</sup> General Comment No. 22 (1993), para. 11.

fundamental rights and freedoms of others. However, such restriction must not impair the very essence of the right in question.

8.4 The Committee notes that under the laws of the State party there is no procedure for recognition of conscientious objections against military service. The State party argues that this restriction is necessary for public safety, in order to maintain its national defensive capacities and to preserve social cohesion. The Committee takes note of the State party's argument on the particular context of its national security, as well as of its intention to act on the national action plan for conscientious objection devised by the National Human Rights Commission (see paragraph 6.5, *supra*). The Committee also notes, in relation to relevant State practice, that an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service, and considers that the State party has failed to show what special disadvantage would be involved for it if the rights of the authors' under article 18 would be fully respected. As to the issue of social cohesion and equitability, the Committee considers that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. It likewise observes that it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service. The Committee, therefore, considers that the State party has not demonstrated that in the present case the restriction in question is necessary, within the meaning of article 18, paragraph 3, of the Covenant.

9. 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 as found by the Committee reveal, in respect of each author violations by the Republic of Korea of article 18, paragraph 1, of the Covenant.

10. 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 compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future.

11. 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 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[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.]

## APPENDIX

### **Dissenting opinion by Committee member Mr. Hipólito Solari-Yrigoyen**

While I agree with the majority's conclusion in paragraph 9 that the facts before the Committee reveal a violation of article 18, paragraph 1, I disagree with the reasoning of the majority, as will be apparent from the following observations:

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

8.2 The Committee notes the authors' claim that the State party breached article 18, paragraph 1, of the Covenant by prosecuting and sentencing the authors for their refusal to perform compulsory military service on account of their religious beliefs as Jehovah's Witnesses.

The Committee also notes the comment by the State party that article 19 of its Constitution does not grant one the right to object to fulfilling one's military service duty. The State party also argues that conscientious objection may be "restricted" as it may harm national security. The State party concludes that the prohibition of conscientious objection to military service is justified and that, given the wording of article 18, paragraph 3, it does not violate the Covenant. The Constitutional Court (see paragraph 2.7, *supra*) would limit the right to freedom of conscience to a mere right to request the State to consider and protect the objector's right "if possible".

The fundamental human 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. The right must not be impaired by coercion. Given that the State party does not recognize this right, the present communication should be considered under paragraph 1 of article 18, not paragraph 3.

8.3 The right to conscientious objection to military service derives from the right to freedom of thought, conscience and religion. As stated in article 4, paragraph 2, of the Covenant, this right cannot be derogated from even in exceptional circumstances which threaten the life of the nation and justify the declaration of a public emergency. When a right to conscientious objection is recognized, 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.

In General Comment No. 22, the Committee recognized this right "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". The same General Comment states that the right to freedom of thought, conscience and religion "is far-reaching and profound", and that "the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief".

Because of their religious beliefs, the authors invoked this right, established in article 18, paragraph 1, to avoid compulsory military service. The prosecution, conviction and prison term imposed on the authors directly violated this right.

The mention of freedom to manifest one's religion or belief in article 18, paragraph 3, is a reference to the freedom to manifest that religion or belief in public, not to recognition of the right itself, which is protected by paragraph 1. Even if it were wrongly supposed that the present communication does not concern recognition of the objector's right, but merely its public manifestation, the statement that public manifestations may be subject only "to such limitations as are prescribed by law" in no way implies that the existence of the right itself is a matter for the discretion of States parties.

The State party's intention to act on the national plan for conscientious objection devised by the National Human Rights Commission (see paragraph 6.5, *supra*), which the Committee notes in paragraph 8.4, must be considered alongside the statement in paragraph 4.6 that the introduction of any system of alternative service is unlikely. Moreover, intentions must be acted upon, and the mere intention to "act on the issue" does not establish whether, at some point in the future, the right to conscientious objection will be recognized or denied.

9. 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 Republic of Korea has, in respect of each author, violated the authors' rights under article 18, paragraph 1, of the Covenant.

(*Signed*): Hipólito Solari-Yrigoyen

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

**Dissenting opinion by Committee member Ms. Ruth Wedgwood**

I concur with the Committee that a State party wishing to apply the principles of the International Covenant on Civil and Political Rights with a generous spirit should respect the claims of individuals who object to national military service on grounds of religious belief or other consistent and conscientious beliefs. The sanctity of religious belief, including teachings about a duty of non-violence, is something that a democratic and liberal state should wish to protect.

However, regrettably, I am unable to conclude that the right to refrain from mandatory military service is strictly required by the terms of the Covenant, as a matter of law. Article 18 paragraph 1, of the Covenant states that “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

Article 18 thus importantly protects the right to worship in public or private, to gather with others for worship, to organize religious schools, and to display outward symbols of religious belief. The proviso of article 18 paragraph 3 – that the “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” – cannot be used by a state party as a backdoor method of burdening religious practice. The Human Rights Committee has appropriately rejected any attempt to limit the protections of article 18 to “traditional” religions or to use forms of administrative regulation to impede or deny practical implementation of the right to worship.

But article 18 does not suggest that a person motivated by religious belief has a protected right to withdraw from the otherwise legitimate requirements of a shared society. For example, citizens cannot refrain from paying taxes, even where they have conscientious objections to state activities. In its present interpretation of article 18, seemingly differentiating military service from other state obligations, the Committee cites no evidence from the Covenant’s negotiating history to suggest that this was contemplated. The practice of States parties may also be relevant, whether at the time the Covenant was concluded or even now. But we do not have any record information before us, most particularly, in regard to the number of parties to the Covenant that still rely upon military conscription without providing *de jure* for a right to conscientious objection.

To be sure, in the “concluding observations” framed upon the examination of country reports, the Human Rights Committee has frequently encouraged states to recognize a right of conscientious objection to military practice. But these concluding observations permissibly may contain suggestions of “best practices” and do not, of themselves, change the terms of the Covenant. It is also true that in 1993, the Committee stated in “General Comment 22”, at paragraph 11, that a right to conscientious objection “can be derived” from article 18. But in the interval of more than a decade since, the Committee has never suggested in its jurisprudence

under the Optional Protocol that such a “derivation” is in fact required by the Covenant.<sup>5</sup> The language of article 8, paragraph 3(c)(ii), of the Covenant also presents an obstacle to the Committee’s conclusion.

This does not change the fact that the practice of the state party in this case has apparently tended to be harsh. The “stacking” of criminal sentences for conscientious objection, through repeated re-issuance of notices for military service, can lead to draconian results. The prohibition of employment by public organizations after a refusal to serve also is a severe result.

In a recent decision of the Constitutional Court of Korea, the national defence minister suggested that “present conditions for life as a serviceman within the military [are] poor” and therefore that “the number of objectors to military service will increase rapidly” if “alternative service is allowed in a country like ours.”<sup>6</sup> This may suggest the wisdom of seeking to ameliorate the living conditions of service personnel. In any event, many other countries have felt able to discern which applications for conscientious objection are based upon a bona fide moral or religious belief, without impairing the operation of a national service system. Thus, a state party’s democratic legislature would surely wish to examine whether the religious conscience of a minority of its citizens can be accommodated without a prohibitive burden on its ability to organize a national defence.

*(Signed):* Ruth Wedgwood

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

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<sup>5</sup> In the case of *J.P. v. Canada*, Communication No. 446/1991, 7 November 1991, the Committee rejected the claim of a petitioner that she had a right to withhold taxes to protest Canada’s military expenditures. The Committee stated 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.” In other words, an individual’s conscientious objection to taxes for military activities did not require the state to refrain from collecting those taxes.

<sup>6</sup> See 2002 *HeonGal*, *Alleging Unconstitutionality of Article 88, Section 1, Clause 1 of Military Service Act*, Constitutional Court of Korea, in the case of *Kyung-Soo Lee*.