



## International Covenant on Civil and Political Rights

Distr.: General  
22 December 2015

Original: English

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### Human Rights Committee

#### Communication No. 2221/2012

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

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

GE.15-22124(E)



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## Annex

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

concerning

#### **Communication No. 2221/2012\***

*Submitted by:* Mahmud Hudaybergenov (represented by counsel)

*Alleged victim:* The author

*State Party:* Turkmenistan

*Date of communication:* 3 September 2012 (initial submission)

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

*Meeting on 29 October 2015,*

*Having concluded* its consideration of communication No. 2221/2012, submitted to it on behalf of Mahmud Hudaybergenov under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

*Adopts* the following:

#### **Views under article 5 (4) of the Optional Protocol**

1.1 The author of the communication is Mahmud Hudaybergenov, a Turkmen national born on 29 January 1990 in Dashoguz, Turkmenistan. He claims to be victim of a violation of his rights under articles 7 and 18 (1) of the Covenant. Although the author did not invoke article 10 of the Covenant specifically, the communication also appears to raise issues under this provision. The Covenant and the Optional Protocol entered into force for the State party on 1 May 1997. The author is represented by counsel, Shane H. Brady.

1.2 In his initial submission, the author requested that the Committee request the State party as an “interim measure” to release him immediately pending the examination of his complaint by the Committee. On 7 December 2012, the Committee, acting through its

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\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval. The text of a joint opinion of Committee members Yuji Iwasawa, Anja Seibert-Fohr, Yuval Shany and Konstantine Vardzelashvili (concurring) is appended to the present Views.

Special Rapporteur on new communications and interim measures, decided not to accede to this request.

### **Factual background**

2.1 The author states that he has been a Jehovah's Witness since 2003. In the fall of 2008, shortly after he turned 18, he was called up by the State party's Military Commissariat to perform military service. He states that he has explained to the Military Commissariat in writing and orally that he was not able to perform military service as his faith did not allow him to take part in any kind of military activity, including using weapons, wearing military uniforms and taking oaths. According to information provided by the author, the Military Commissariat gave him a six-month deferral because of his health.<sup>1</sup> He was subsequently given several deferrals<sup>2</sup> until early 2011, when he was again called up for military service. The author claims that he once again explained to the Military Commissariat, orally and in writing, that he could not perform military service because he was a Jehovah's Witness and serving in the military was against his faith. He indicated to the Military Commissariat that he would be willing to perform alternative service. The author further claims that he has never been charged with any criminal or administrative offence other than the present one related to his convictions as a conscientious objector.

2.2. The author was charged under article 219 (1) of the Criminal Code<sup>3</sup> for refusing to perform military service. His case was transferred to the Dashoguz City Court. On 9 August 2011, the court convicted the author of evading military service and sentenced him to 24 months' imprisonment, on the basis of article 219 (1) of the Criminal Code. The court indicated that the author had partially admitted his guilt as he had agreed to be a Jehovah's Witness and because of this, he believed that it was wrong to "bear arms or learn war". The court further stated that according to a medical report, the author was fit for military service and concluded that the author's refusal to serve in the army was without any legal basis. The author was arrested in the courtroom.

2.3 On 28 September 2011, the Dashgouz Regional Court refused to accept an appeal presented by the author's mother on behalf of her son. The court indicated that she did not have any legal authority to present an appeal on his behalf, as article 436 (2) of the Code of Criminal Procedure states that the only persons entitled to appeal are the convicted or acquitted person, his/her lawyer or his/her legal representatives and the victims or their legal representatives. In the view of the court, the author's mother was only a witness.<sup>4</sup>

2.4 The author alleges that immediately after his arrest he was detained for 18 days in the temporary holding facility DZ-D/7 in Dashoguz and that on 28 August 2011, he was transferred to the LBK-12 prison located near the town of Seydi. Immediately after his

<sup>1</sup> Information contained in a statement of an official of the Military Commissariat included in the decision of the Dashoguz City Court of 9 August 2011 (an unofficial English translation of the ruling has been provided by the author).

<sup>2</sup> According to the statement of the Military Commissariat official contained in the ruling of the Dashoguz City Court of 9 August 2011, in 2008, 2009 and 2010 the author wrote indicating that he could not perform military service because of his religion. The reasons why the author was given the deferrals during this period (2008-2010) are not specified in the official's statement or in the ruling.

<sup>3</sup> The author provided an unofficial translation of article 219 (1) of the Criminal Code. Article 219: Evasion of the draft for military service: (1) Evasion of the draft for military service without legal grounds for exemption from such service, shall be punished by up to two years of corrective labour or up to two years of deprivation of freedom and shall be punished by three to ten years of deprivation of liberty.

<sup>4</sup> The author provided an unofficial translation of the ruling of the Dashoguz Regional Court.

transfer to the LBK-12 prison he was put in quarantine for 10 days. The author states that he was subjected to torture and ill-treatment while detained.

2.5 The author alleges that he has exhausted all available domestic remedies concerning his claim under article 18 (1) of the Covenant, as the State party's judicial authorities, including trial courts, appeal courts and the Supreme Court, have never ruled in favour of conscientious objectors to military service. Since the justice system is perceived to be ineffective and lacks independence, the author believes that filing an appellate complaint would be futile and totally ineffective in his case.<sup>5</sup>

2.6 Regarding the claims under article 7 of the Covenant, the author states that there were no effective domestic remedies available to him. He quotes the concluding observations of the Committee against Torture concerning the State party, in which the Committee noted the lack of an independent and effective complaint mechanism for receiving and conducting impartial and comprehensive investigations regarding allegations of torture and ill treatment, in particular those made by prisoners and pre-trial detainees.<sup>6</sup>

### **The complaint**

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

3.2 The author further claims a violation of article 7 of the Covenant on account of the treatment he received while in detention, which amounted to torture and ill-treatment,<sup>7</sup> and of the conditions of imprisonment at the LBK-12 prison. He refers to the concluding observations of the Committee against Torture cited above, in which the Committee expressed concern regarding ongoing physical abuse and psychological pressures by prison staff in Turkmenistan, including collective punishment, ill-treatment as a "preventive" measure, the use of solitary confinement, and sexual violence and rape by prison officers or inmates.<sup>8</sup> The author further refers to the report of the Turkmenistan Independent Lawyers Association of February 2010, which notes that the LBK-12 prison is located in a desert where temperatures can reach -20° Celsius in winter and 50° in summer. The prison is overcrowded and prisoners infected with tuberculosis and skin diseases are kept together with healthy inmates.<sup>9</sup> Although the author does not invoke it specifically, the communication also appears to raise issues under article 10 of the Covenant.

3.3 The author also claims that his prosecution, conviction and imprisonment for refusing to perform compulsory military service because of his religious beliefs and conscientious objection have violated his rights under article 18 (1) of the Covenant.<sup>10</sup> He notes that he repeatedly informed the Turkmen authorities that he was willing to fulfil his civic duties by performing genuine alternative service; however, the State party's legislation does not provide for the possibility of performing any alternative service.

3.4 The author requests the Committee to direct the State party (a) to acquit him of the charges under article 219 (1) of the Criminal Code and to expunge his criminal record; (b) to provide him with appropriate compensation for the non-pecuniary damages suffered as a result of his conviction and imprisonment; and (c) to provide him with appropriate monetary compensation for his legal expenses.

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<sup>5</sup> See CAT/C/TKM/CO/1, para. 10.

<sup>6</sup> Ibid., para. 11.

<sup>7</sup> See paras. 2.4 and 5.3.

<sup>8</sup> CAT/C/TKM/CO/1, para. 18.

<sup>9</sup> The author provided a detailed description of the ill-treatment he was subjected to while in detention when he was released in August 2013. See para. 5.3.

<sup>10</sup> See, for example, communications Nos. 1853-1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012, paras. 10.4 and 10.5.

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

4. On 17 March 2014, the State party submitted a note verbale containing its observations on the admissibility and merits of the communication. The State party reports that, among other things, the author's case was carefully considered by the relevant law enforcement bodies of Turkmenistan and no reason had been found to appeal the court's decision. According to the State party, the criminal offence committed by the author was "determined accurately according to the Criminal Code of Turkmenistan". It further notes that according to article 41 of the Constitution, "protection of Turkmenistan is the sacred duty of every citizen" and that general conscription is compulsory for male citizens of Turkmenistan. In addition, the author "did not meet the criteria of persons to be exempted from military service as provided for under article 18 of the Law on Military Duty and Military Service".

### Author's comments on the State party's observations

5.1 On 14 May 2014, the author submitted his comments on the State party's observations. The author notes that the State party in its submission on the admissibility and merits does not disagree with any facts set out in the communication. The only attempted justification provided by the State party is its assertion that the author was convicted and imprisoned as a conscientious objector to military service because he "did not qualify" for an exemption from military service under article 18 of the Law on Military Duty and Military Service. According to the author, the State party's submission shows total disregard for its commitments under article 18 of the Covenant and the Committee's jurisprudence, which upholds the right to conscientious objection to military service. Furthermore, the State party does not contest the author's allegations that he has suffered inhuman and degrading treatment at the hands of law enforcement officers and prison officers, contrary to article 7 of the Covenant.

5.2 The author concludes that his prosecution, conviction and imprisonment violated his rights under articles 7 and 18 (1) of the Covenant. He reiterates his request for remedies to be provided by the State party (see para. 3.4).

5.3 On 22 October 2014,<sup>11</sup> the author added that he was released on 9 August 2013 after serving his prison term. He provided the Committee with a signed statement reiterating the facts of his case and adding that on 28 August 2011, he was transferred to LBK-12 prison in Seydi from the temporary holding facility DZ-D/7 in Dashoguz, where he spent 18 days. He stated that he was placed in an isolation cell for 10 days upon arrival at the LBK-12 prison. In September 2011, the director of the prisons' working facilities for detainees, Major R.B.,<sup>12</sup> kicked him in the chest, slapped him several times and used his palms to hit him in the area around his ears. The author stated that his left ear hurt for a month afterwards. The author further claimed that Major R.B. used to hit him with a wire on his back and that on a different occasion, he hit him from morning until lunchtime.<sup>13</sup> The author further claimed that the conditions of detention were very bad as there was no glass in the windows; it was therefore very cold during the winter and very hot during the summer. Furthermore, he was not allowed to use the indoor showers during the winter, so he had to use those located outdoors, where it was freezing. Finally, he stated that he has been suffering from kidney pain since his imprisonment.

<sup>11</sup> The author's submission was transmitted to the State party on 9 December 2014.

<sup>12</sup> The author does not specify the date of this event.

<sup>13</sup> The author does not provide further information regarding this claim.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 Before considering any claims contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

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

6.3 The Committee further recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.<sup>14</sup> The Committee notes the author's submission that there are no effective remedies available to him in the State party in regard to his claims under articles 7, 10 and 18 of the Covenant. The Committee further notes the State party's assertion of 17 March 2014 that the author's case had been "carefully considered by the relevant law enforcement bodies of Turkmenistan and [that] no reason had been found to appeal the court decision" and that it has not contested the author's argument concerning the issue of exhaustion of domestic remedies. In these circumstances, the Committee considers that in the present case, it is not precluded by article 5 (2) (b), of the Optional Protocol from examining the communication.

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

### *Consideration on the merits*

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

7.2 The Committee takes note of the author's claim that he was ill-treated by the prison staff while in the LBK-12 prison in violation of article 7 of the Covenant. It notes that the author has provided a detailed description of the manner in which he was ill-treated and that he has provided the identity of the perpetrator. The Committee also notes that the author stated that he was beaten on different parts of his body on at least in two occasions, including his face and his head; that he was once kicked in the chest; and that he was often beaten with a wire on his back. The Committee further notes the author's allegation regarding the lack of adequate mechanisms for investigating torture and ill-treatment in the State party. The State party has not refuted these allegations, nor provided any information in this respect. In the circumstances, due weight must be given to the author's allegations. Accordingly, the Committee concludes that the facts as presented reveal a violation of the author's rights under article 7 of the Covenant.

7.3 The Committee further notes the author's claims concerning the deplorable prison conditions at the LBK-12 prison, including his placement upon arrival in quarantine for 10 days, the harsh climatic conditions the author was exposed to during an extremely hot summer and an extremely cold winter, and the fact that he was obliged to use the outdoor showers during winter, when it was very cold.<sup>15</sup> The Committee notes that these allegations were not contested by the State party and that they are consistent with the findings of the

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<sup>14</sup> See, for example, communication No. 2097/2011, *Timmer v. the Netherlands*, Views adopted on 24 July 2014, para. 6.3.

<sup>15</sup> See para. 3.2.

Committee against Torture in its most recent concluding observations with regard to the State party.<sup>16</sup> The Committee recalls that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners.<sup>17</sup> In the absence of any other pertinent information on file, the Committee decides that due weight must be given to the author's allegations. Accordingly, the Committee finds that confining the author in such conditions constitutes a violation of his right to be treated with humanity and with respect for the inherent dignity of the human person under article 10 (1) of the Covenant.<sup>18</sup>

7.4 The Committee further notes the author's claim that his rights under article 18 (1) of the Covenant have been violated due to the absence in the State party of an alternative to compulsory military service, as a result of which his refusal to perform military service on account of his religious beliefs led to his criminal prosecution and subsequent imprisonment. The Committee takes note of the State party's submission that the criminal offence committed by the author was "determined accurately according to the Criminal Code of Turkmenistan", that pursuant to article 41 of the Constitution, "protection of Turkmenistan is the sacred duty of every citizen" and that general conscription is compulsory for male citizens.

7.5 The Committee recalls its general comment No. 22 (1993) on freedom of thought, conscience or religion, in which it considers that the fundamental character of the freedoms enshrined in article 18 (1) is reflected in the fact that this provision cannot be derogated from even in time of public emergency, as stated in article 4 (2) of the Covenant. The Committee recalls its prior jurisprudence, according to which although the Covenant does not explicitly refer to a right of conscientious objection, such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of thought, conscience and religion.<sup>19</sup> The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if such service cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion. A State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights.<sup>20</sup>

7.6 In the present case, the Committee considers that the author's refusal to be drafted for compulsory military service derives from his religious beliefs and that the author's subsequent conviction and sentence amounted to an infringement of his freedom of thought, conscience and religion, in breach of article 18 (1) of the Covenant. In this context, the Committee recalls that repression of the refusal to be drafted for compulsory military

<sup>16</sup> CAT/C/TKM/CO/1, para. 19.

<sup>17</sup> See, for example, communications No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010, para. 6.4 and No. 2218/2012, *Abdullayev v. Turkmenistan*, Views adopted on 25 March 2015, para. 7.3.

<sup>18</sup> See, for example, communication No. 1530/2006, *Bozbey v. Turkmenistan*, Views adopted on 27 October 2010, para. 7.3 and *Abdullayev v. Turkmenistan*, para. 7.3.

<sup>19</sup> See communications Nos. 1321-1322/2004, *Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea*, Views adopted on 3 November 2006, para. 8.3; No. 1786/2008, *Jong-nam Kim et al. v. the Republic of Korea*, Views adopted on 25 October 2012, para. 7.3; *Abdullayev v. Turkmenistan*, para. 7.7; and Nos. 1853-1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012, paras. 10.4 and 10.5.

<sup>20</sup> See communications Nos. 1642-1741/2007, *Min-Kyu Jeong et al. v. the Republic of Korea*, Views adopted on 24 March 2011, para. 7.3; *Atasoy and Sarkut v. Turkey*, paras. 10.4 and 10.5; *Jong-nam Kim et al. v. the Republic of Korea*, para. 7.4; and *Abdullayev v. Turkmenistan*, para. 7.7.

service, exercised against persons whose conscience or religion prohibit the use of arms, is incompatible with article 18 (1) of the Covenant.<sup>21</sup> It also recalls that during the consideration of the State party's initial report under article 40 of the Covenant, it had expressed its concern that the Law on Military Duty and Military Service, as amended on 25 September 2010, does not recognize a person's right to exercise conscientious objection to military service and does not provide for any alternative military service, and recommended that the State party, inter alia, take all necessary measures to review its legislation with a view to providing for alternative service.<sup>22</sup>

8. The Committee, acting under article 5 (4), of the Optional Protocol, is of the view that the facts before it disclose a violation of the author's rights under articles 7, 10 (1) and 18 (1) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is also obligated, inter alia, to expunge the author's criminal record and to provide him with adequate compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future, which includes the adoption of legislative measures guaranteeing the right to conscientious objection.

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

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<sup>21</sup> See *Min-Kyu Jeong et al. v. the Republic of Korea*, para. 7.4; *Jong-nam Kim et al. v. the Republic of Korea*, para. 7.5; *Young-kwan Kim et al. v. the Republic of Korea*, para. 7.4; *Atasoy and Sarkut v. Turkey*, para. 10.4; *Abdullayev v. Turkmenistan*, para. 7.8.

<sup>22</sup> See CPR/C/TKM/CO/1, para. 16.



## Appendix

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

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

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