



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 2222/2012

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

<i>Submitted by:</i>	Ahmet Hudaýbergenov (represented by counsel, Shane H. Brady)
<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 a document form)
<i>Date of adoption of Views:</i>	29 October 2015
<i>Subject matters:</i>	Conscientious objection to compulsory military service; inhuman and degrading treatment; deprivation of liberty
<i>Procedural issues:</i>	Admissibility – exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of conscience; inhuman and degrading treatment; deprivation of liberty
<i>Articles of the Covenant:</i>	7, 10 (1) and 18 (1)
<i>Articles of the Optional Protocol:</i>	5 (2) (b)

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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. 2222/2012\***

*Submitted by:* Ahmet Hudaybergenov (represented by counsel, Shane H. Brady)

*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. 2222/2012, submitted to it on behalf of Ahmet 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 Ahmet Hudaybergenov, a national of Turkmenistan, born in 1990. He claims that the State party has violated his rights under articles 7 and 18 (1) of the Covenant. Although the author does not invoke this provision specifically, the communication also appears to raise issues under article 10 of the Covenant. The Optional Protocol entered into force for Turkmenistan on 1 August 1997. The author is represented by counsel, Shane H. Brady.

1.2 In his initial submission, the author requested that the Committee seek assurances from the State party as an interim measure that it would not subject him to a second round of criminal prosecution until the Committee had dealt with the communication. On

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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, 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.

7 December 2012, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to accede to this request.

### **The facts as submitted by the author**

2.1 The author submits that he is a Jehovah's Witness. He has never been charged with a criminal or administrative offence other than his criminal conviction as a conscientious objector.

2.2 On 1 October 2008, he was called by the Military Commissariat to perform his compulsory military service. In compliance with the summons, he met with representatives of the Military Commissariat and explained that as a Jehovah's Witness, his religious beliefs did not permit him to perform military service.

2.3 On 4 September 2010, the author was arrested by the police, without any explanation, in a market in Turkmenabat. The police officers, who did not show their identification documents, slammed the author's head against a wall before taking him to police station No. 2 in Turkmenabat. He was then taken to the narcotics division, where he was detained, without a court order, for nine days.

2.4 On 20 September 2010, the author was tried before the Turkmenabat City Court. The author explained that his religious beliefs as a Jehovah's Witness did not permit him to "take up weapons or learn war" but that he was willing to perform alternative service. The court convicted him under article 219 (1) of the Criminal Code and sentenced him to 18 months' imprisonment for refusing military service, to be served in a general regime prison. The author considers that the 20 September 2010 decision of the Turkmenabat City Court satisfies his obligation to exhaust all reasonable domestic remedies before filing a complaint. The author did not appeal his conviction to the higher courts in Turkmenistan.

2.5 Following his conviction, the author was placed in a detention facility in Turkmenabat and held there for 18 days. On four occasions he was beaten by guards because of his religious beliefs. On 8 October 2010, the author was transferred to the LBK-12 prison in Seydi. He was confined in a bare concrete cell for nine days. The guards refused to allow him to use the toilet. Two guards beat him with their batons. After being transferred to a cell in the general prison regime, the author was again repeatedly beaten.

2.6 The author was released from prison on 20 March 2012.<sup>1</sup> Owing to the conditions of his imprisonment, he had to undergo an operation to remove varicose veins caused by severe exertion. According to the author, he faces the prospect of being called up again for military service and being imprisoned again as a conscientious objector.<sup>2</sup>

2.7 In relation to the alleged violation of his rights under article 18 (1) of the Covenant, the author submits that the national courts have never ruled in favour of a conscientious objector to military service. He thus maintains that he has exhausted the available domestic remedies concerning the alleged violation of article 18 (1) of the Covenant. Since the justice system is perceived as ineffective and lacks independence, the author believes that filing an appellate complaint would be futile and totally ineffective in his case.<sup>3</sup>

2.8 As to the alleged violation of article 7 of the Covenant, the author maintains that there was no effective domestic remedy available to him. He refers to the concluding

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<sup>1</sup> The author submits that as a convict, he is required to report to the police twice a week for a period of three years.

<sup>2</sup> The author refers to communication No. 2218/2012, *Abdullayev v. Turkmenistan*, Views adopted on 25 March 2015.

<sup>3</sup> See CAT/C/TKM/CO/1, para. 10.

observations of the Committee against Torture concerning Turkmenistan,<sup>4</sup> in which the Committee noted the lack of an independent and effective complaint mechanism in the State party for receiving and conducting impartial and comprehensive investigations into allegations of torture, in particular those made by prisoners and pretrial detainees.

2.9 The author has not submitted his complaint to any other procedure of international investigation or settlement.

### **The complaint**

3.1 The author claims that his imprisonment because of his religious beliefs in itself constituted 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 because of his ill-treatment while in detention and of the conditions of imprisonment at the LBK-12 prison. In this regard, he refers, inter alia, to the report of February 2010 of the Turkmenistan Independent Lawyers Association, which notes that the LBK-12 prison is located in a desert where winter temperatures 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. 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>5</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 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.

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

4. In a note verbale dated 17 March 2014, the State party reported, inter alia, that the author's case had been carefully considered by the relevant law enforcement bodies of Turkmenistan and no reason had been found to appeal the court decision. According to the State party, the criminal offence committed by the author had been determined accurately according to the Criminal Code of Turkmenistan, and that according to article 41 of the Constitution, protection of Turkmenistan was the sacred duty of every citizen and general conscription was compulsory for male citizens of Turkmenistan. In addition, the author had not met the criteria of persons eligible for exemption 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 on admissibility and the merits**

5.1 On 14 May 2014, the author noted that in its submission on the admissibility and merits the State party did not disagree with any of the facts set out in the communication.

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<sup>4</sup> Ibid., para. 11.

<sup>5</sup> See, for example, communication No. 1853/2008 and 1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012, paras. 10.4 and 10.5.

The only attempted justification raised by the State party was its assertion that the author had been 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 showed 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 did not contest the author's allegations that he had 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 requests the Committee to conclude that his prosecution, conviction and imprisonment violated his rights under articles 7 and article 18 (1) of the Covenant. He also reiterates his request for remedies to be provided by the State party (see para. 3.4).

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

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

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

6.3 The Committee 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>6</sup> The Committee notes the author's assertion that there are no effective remedies available to him in the State party with 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 no reason had been found to appeal the court decision and that it has not contested the author's argumentation in this regard. 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 of 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, when he was arrested on 4 September 2010, the police slammed his head against a wall and that, after his conviction, during the first 18 days of his detention he was beaten on four occasions. The author also claims that upon arrival at the LBK-12 prison on 8 October 2010, he was again beaten and that beatings continued regularly throughout his imprisonment. The State party has not

<sup>6</sup> See, for example, communication No. 2097/2011, *Timmer v. the Netherlands*, Views adopted on 24 July 2014, para. 6.3.

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 the placement in confinement in a bare concrete cell for nine days, without being allowed by the guards to use the toilets. The Committee further notes the claims that, after being transferred from the confinement cell to a cell in the general prison regime, the author endured harsh climatic conditions by being exposed to extreme heat in summer and extreme cold in winter. The Committee notes that the State party did not contest the allegations, which are consistent with the findings of the Committee against Torture in its most recent concluding observations with regard to the State party.<sup>7</sup> The Human Rights 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>8</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>9</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 belief 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 and 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>10</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

<sup>7</sup> See CAT/C/TKM/CO/1, para. 19.

<sup>8</sup> See, for example, communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010, para. 6.4 and *Abdullayev v. Turkmenistan*, para. 7.3.

<sup>9</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>10</sup> See communications No. 1321/2004 and 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; *Atasoy and Sarkut v. Turkey*, paras. 10.4 and 10.5; No. 2179/2012, *Young-kwan Kim et al. v. the Republic of Korea*, Views adopted on 15 October 2014, para. 7.4; and *Abdullayev v. Turkmenistan*, para. 7.7.

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>11</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 service, exercised against persons whose conscience or religion prohibits the use of arms, is incompatible with article 18 (1) of the Covenant.<sup>12</sup> It also recalls that during the consideration of the State party's initial report under article 40 of the Covenant, it 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>13</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 obligated, inter alia, to expunge the author's criminal record and to provide him with adequate compensation. The State party is also 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>11</sup> See communication Nos. 1642-1741/2007, *Min-Kyu Jeong et al. v. the Republic of Korea*, Views adopted on 24 March 2011, para. 7.3; *Jong-nam Kim et al. v. the Republic of Korea*, para. 7.4; and *Abdullayev v. Turkmenistan*, para. 7.7.

<sup>12</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; *Atasoy and Sarkut v. Turkey*, paras. 10.4 and 10.5; *Young-kwan Kim et al. v. the Republic of Korea*, para. 7.4; and *Abdullayev v. Turkmenistan*, para. 7.8.

<sup>13</sup> See CCPR/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 communications 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); with reference to communication No. 1853/2008 and 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).