



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2225/2012*,**

<i>Communication submitted by:</i>	Akmurad Nurjanov (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>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 7 December 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	15 July 2016
<i>Subject matter:</i>	Conscientious objection to compulsory military service
<i>Procedural issues:</i>	Exhaustion of domestic remedies; lack of substantiation
<i>Substantive issues:</i>	Freedom of conscience; <i>ne bis in idem</i> ; inhuman or degrading treatment
<i>Articles of the Covenant:</i>	7, 14 (7) and 18 (1)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

* Adopted by the Committee at its 117th session (20 June-15 July 2016).

** The following members of the Committee participated in the examination of the communication:
Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville,
Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel
Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Yuval Shany and Margo Waterval.
Two individual opinions by two Committee members are annexed to the present Views.



1.1 The author of the communication is Akmurad Nurjanov, a national of Turkmenistan, born in 1993. He claims that the State party has violated his rights under articles 7, 14 (7) and 18 (1) 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 that as an interim measure it would not subject him to a second criminal prosecution¹ while his communication was pending before the Committee. On 7 December 2012, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to accede to that request.

The facts as submitted by the author

2.1 The author 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 13 April 2011, he was called by Azatlyk District Military Commissariat in the city of Ashgabat to perform his compulsory military service. In compliance with the summons, he met with representatives of the Military Commissariat and explained orally and in writing that as a Jehovah's Witness, his religious beliefs did not permit him to perform military service. The author's case was transmitted to the prosecutor's office. On an unspecified date, he was charged under article 219 (1) of the Criminal Code² for refusing to perform military service.

2.3 On 13 February 2012, the author was tried before Azatlyk District Court in the city of Ashgabat. He explained that his religious beliefs as a Jehovah's Witness did not permit him to directly or indirectly take up arms or learn warfare, but that he was willing to fulfil his civil obligations by performing alternative civilian service.³ Azatlyk District Court convicted the author under article 219 (1) of the Criminal Code and handed down a conditional sentence with one year of probation and weekly monitoring by the police.⁴

2.4 The author did not appeal his conviction to a higher court. He submits that the courts in Turkmenistan have never ruled in favour of a conscientious objector to military service. Furthermore, the justice system in Turkmenistan is ineffective and lacks independence,

¹ Article 18 (4) of the Military Service and Military Duty Act permits repeated call-up for military service and stipulates that a person refusing military service is exempt from further call-up only after he has received and served two criminal sentences. See communication No. 2218/2012, *Abdullayev v. Turkmenistan*, Views adopted on 25 March 2015.

² Article 219 (1) of the Criminal Code provides that evasion of the draft for military service in the absence of legal grounds for exemption from such service shall be punished with correctional labour for up to two years or imprisonment for up to two years.

³ The Military Service and Military Duty Act does not recognize a person's right to exercise conscientious objection to military service and does not provide for any alternative military service. For recommendations received by Turkmenistan in the context of the Act, see, inter alia, the report of the Special Rapporteur on freedom of religion or belief on her mission to Turkmenistan (A/HRC/10/8/Add.4, para. 68) and the concluding observations of the Human Rights Committee on the initial report of Turkmenistan (CCPR/C/TKM/CO/1, para. 16).

⁴ The relevant excerpt from the Azatlyk District Court decision of 13 February 2012 indicates that the Court found Akmurad Nurjanov guilty of committing the crime specified in article 219 (1) of the Criminal Code, and on that basis deprived him of freedom for two years; it applied article 68 of the Criminal Code, making that punishment a conditional sentence, and gave him one year of probation; and it required that during that time, Nurjanov not change his place of residence without permission from the authorities.

therefore appealing his conviction would be futile and totally ineffective.⁵ He thus maintains that he had exhausted “all reasonable domestic remedies” concerning the alleged violation of articles 7 and 18 (1) of the Covenant prior to filing his communication to the Committee.

2.5 In his additional submission of 27 May 2016, the author informed the Committee that he had again been prosecuted and convicted under article 219 (1) of the Criminal Code by Berkararlyk District Court in the city of Ashgabat, which had sentenced him to two years of “correctional labour” on 3 March 2015 (see paras. 6.1 and 6.2 below).

The complaint

3.1 The author claims that his prosecution and conviction on the ground of his genuinely held religious beliefs expressed in his conscientious objection to military service in itself constitutes inhuman or degrading treatment within the meaning of article 7 of the Covenant.

3.2 The author also claims that his prosecution and conviction for refusing to perform compulsory military service owing to his religious beliefs and conscientious objection have violated his rights under article 18 (1) of the Covenant.⁶ He notes that he repeatedly informed the Turkmen authorities that he was willing to fulfil his civic duty by performing genuine alternative service; however, the State party’s legislation does not provide for the possibility of performing alternative service.

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

3.4 In his additional submission of 27 May 2016, the author claimed that his second prosecution and conviction under article 219 (1) of the Criminal Code by Berkararlyk District Court on 3 March 2015 had violated his right under article 14 (7) of the Covenant not to be tried and punished twice for his conscientious objection to compulsory military service.

State party’s observations on admissibility and the merits

4. On 17 March 2014, the State party submitted its observations on admissibility and the merits. The State party informs the Committee that the author’s case was carefully considered by the relevant law enforcement bodies of Turkmenistan and no reason was found to appeal the court’s decision. The criminal offence committed by the author was determined accurately according to the Criminal Code of Turkmenistan. Under article 41 of the Constitution, protecting Turkmenistan is the sacred duty of every citizen and general conscription is compulsory for male citizens. The author did not meet the criteria of persons eligible to be exempted from military service, as provided for under article 18 of the Military Service and Military Duty Act.⁷

⁵ The author refers to the European Court of Human Rights, *Kolesnik v. Russia* (application No. 26876/08), judgment of 17 June 2010, paras. 54-58, 68, 69 and 73, and the Committee against Torture, concluding observations on the initial report of Turkmenistan (CAT/C/TKM/CO/1), para. 10.

⁶ See, for example, communications Nos. 1853/2008 and 1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012, paras. 10.4 and 10.5.

⁷ Article 18 of the Military Service and Military Duty Act, as amended on 25 September 2010, stipulates that the following citizens shall be exempted from military service: (1) those who have been declared unfit for military service for health reasons; (2) those who have performed military service; (3) those who have performed military or another form of service in the armed forces of another State

Author's comments on the State party's observations

5.1 On 14 May 2014, the author noted that in its submission on admissibility and the merits, the State party did not disagree with any of the facts set out in the communication. The only attempted justification raised by the State party was its assertion that the author had been convicted as a conscientious objector to military service because he did not qualify for an exemption from military service under article 18 of the Military Service and Military Duty Act. 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 did not contest the author's allegations that he had suffered inhuman and degrading treatment, contrary to article 7 of the Covenant.

5.2 The author requests that the Committee conclude that his prosecution and conviction violated his rights under articles 7 and 18 (1) of the Covenant.

Author's additional submissions

6.1 On 27 May 2016, the author informed the Committee that he had again been prosecuted and convicted under article 219 (1) of the Criminal Code by Berkararlyk District Court in the city of Ashgabat, which had sentenced him to two years of "correctional labour" on 3 March 2015. He had not been imprisoned and had instead been ordered to pay 20 per cent of his salary to the State budget for the term of his imprisonment, which amounted to 107 manats (approximately US\$ 30.50) a month. The author had not appealed that decision because the Turkmen courts have rejected all appeals filed by conscientious objectors to military service. Furthermore, he did not want to risk filing an appeal in which the appeal court might substitute his sentence of "correctional labour" with imprisonment.

6.2 The author requests that the Committee find that his second criminal prosecution and conviction violated his right under article 14 (7) of the Covenant not to be tried and punished twice for refusing to perform military service.

State party's additional submissions

7.1 On 1 July 2016, the State party submitted that the author's additional submission of 27 May 2016 had been examined by the Supreme Court in the exercise of supervisory powers. On the facts, it recalls that the author's conviction by Berkararlyk District Court in the city of Ashgabat on 3 March 2015 was not reviewed in cassation proceedings. With reference to the judgment, the State party submits that the author was called up by Berkararlyk District Military Commissariat to perform his compulsory military service in the autumn of 2014. On 22 December 2014, he was declared fit for non-combatant military service. He evaded military service in violation of article 41 of the Constitution, without any of the legal grounds for exemption from military service listed in article 8 (2) of the Military Service and Military Duty Act. In addition to the author's own admission of guilt during the court hearing, his guilt under article 219 (1) of the Criminal Code was also established on the basis of witness statements, the author's written refusal to perform

in accordance with international agreements entered into by Turkmenistan; (4) those who have been convicted twice of committing a minor crime or convicted of a crime of medium gravity, a grave crime or an especially grave crime; (5) citizens with an academic degree, approved in accordance with the legislation of Turkmenistan; (6) sons or brothers of those who died as a result of carrying out military duties during military service or military training; and (7) sons or brothers of those who, as a result of a disease contracted as a consequence of a wound or as a result of injury or contusion, have died within one year from the day of discharge from military service (after completion of military training) or of those who, as a result of performing military service, have become disabled during military service or military training.

military service submitted by him to Berkararlyk District Military Commissariat on 22 December 2014 and other evidence examined during the court hearing.

7.2 The State party argues that the author's claim of having been convicted twice for the same offence is unfounded. According to article 3 (8) of the Criminal Code, no one can be held criminally liable twice for the same offence. Pursuant to articles 17 (1) and 18 (4) of the Military Service and Military Duty Act, the author's conviction in 2012 under article 219 (1) of the Criminal Code is not a ground for absolving him from military service until he turns 27. Furthermore, he cannot be absolved from criminal liability for having committed an analogous offence in 2014, because those criminal offences were committed at different points in time and comprise separate *corpus delicti*. Therefore, the author can be held criminally liable for each of those offences.

7.3 In light of the above, the State party argues that there are no grounds to initiate the setting aside or amendment of the judgments handed down in relation to the author.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 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.

8.3 The Committee 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 authors.⁸ 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, 14 (7) and 18 (1) of the Covenant.⁹ The Committee also notes the State party's assertion 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's decision and that the State party has not contested the author's argumentation concerning the exhaustion of domestic remedies. In these circumstances, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the communication.

8.4 With regard to the author's claim that his prosecution and conviction on the ground of his genuinely held religious beliefs expressed in his conscientious objection to military service in itself constitutes inhuman or degrading treatment within the meaning of article 7 of the Covenant, the Committee notes that he has failed to provide any substantiation in support of his claim and, consequently, considers this part of the communication inadmissible under article 2 of the Optional Protocol.

⁸ See, for example, communication No. 2097/2011, *Timmer v. the Netherlands*, Views adopted on 24 July 2014, para. 6.3.

⁹ See communications No. 2221/2012, *Mahmud Hudaybergenov v. Turkmenistan*, Views adopted on 29 October 2015, para. 6.3; No. 2222/2012, *Ahmet Hudaybergenov v. Turkmenistan*, Views adopted on 29 October 2015, para. 6.3; and No. 2223/2012, *Japparow v. Turkmenistan*, Views adopted on 29 October 2015, para. 6.3.

8.5 The Committee considers that the author's claims under articles 14 (7) and 18 (1) of the Covenant are sufficiently substantiated for the purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

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

9.2 The Committee 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 because of his religious beliefs led to his criminal prosecution and subsequent conviction. 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, the protection of Turkmenistan is the sacred duty of every citizen and that general conscription is compulsory for male citizens.

9.3 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 stating that 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.¹⁰ 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.¹¹

9.4 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

¹⁰ See communications Nos. 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; *Abdullayev v. Turkmenistan*, para. 7.7; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.5; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.5; and *Japparow v. Turkmenistan*, para. 7.6.

¹¹ 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; *Jong-nam Kim et al. v. the Republic of Korea*, para. 7.4; *Abdullayev v. Turkmenistan*, para. 7.7; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.5; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.5; and *Japparow v. Turkmenistan*, para. 7.6.

incompatible with article 18 (1) of the Covenant.¹² It also recalls that during the consideration of the State party's initial report under article 40 of the Covenant, the Committee expressed its concern that the Military Service and Military Duty Act, 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.¹³ Accordingly, the Committee finds that, by prosecuting and convicting the author for his refusal to perform compulsory military service due to his religious beliefs and conscientious objection, the State party has violated his rights under article 18 (1) of the Covenant.

9.5 The Committee notes the author's claim under article 14 (7) of the Covenant that he has been convicted and punished twice for his objection to perform compulsory military service. The Committee also notes that, on 13 February 2012, Azatlyk District Court convicted the author under article 219 (1) of the Criminal Code for his refusal to perform compulsory military service, handing down a conditional sentence with one year of probation, and that he was again convicted by Berkararlyk District Court in the city of Ashgabat under article 219 (1) of the Criminal Code on 3 March 2015 and sentenced to two years of "correctional labour". The Committee further notes the author's submission that article 18 (4) of the Military Service and Military Duty Act permits repeated call-up for military service and stipulates that a person refusing military service is exempt from further call-up only after he has received and served two criminal sentences.

9.6 The Committee notes the State party's assertion that the author's claim that he was convicted twice for the same offence is unfounded, because, inter alia, the two criminal offences were committed at different points in time and comprise separate *corpus delicti*. Therefore, the author can be held criminally liable for each of the offences.

9.7 The Committee recalls its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in which it states that article 14 (7) of the Covenant provides that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted in accordance with the law and penal procedure of each country. Furthermore, repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience (paras. 54-55). The Committee notes that, in the present case, the author has been tried and convicted twice under the same provision of the Turkmen Criminal Code on account of the fact that, as a Jehovah's Witness, he objected to and refused to perform his compulsory military service. Accordingly, in the circumstances of the present communication, the Committee concludes that the author's rights under article 14 (7) of the Covenant have been violated.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of articles 14 (7) and 18 (1) of the Covenant.

11. 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

¹² 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; *Abdullayev v. Turkmenistan*, para. 7.8; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.6; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.6; and *Japparow v. Turkmenistan*, para. 7.7.

¹³ See CCPR/C/TKM/CO/1, para. 16.

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. In this connection, the Committee reiterates that the State party should revise its legislation in accordance with its obligation under article 2 (2) of the Covenant, in particular the Military Service and Military Duty Act, as amended on 25 September 2010, with a view to ensuring the effective guarantee of the right to conscientious objection under article 18 (1) of the Covenant.¹⁴

12. 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 present Views and to have them widely disseminated in the official language of the State party.

¹⁴ See communications No. 2019/2010, *Poplavny v. Belarus*, Views adopted on 5 November 2015, para. 10; and No. 1992/2010, *Sudalenko v. Belarus*, Views adopted on 27 March 2015, para. 10.

Annex I

Individual opinion of Committee member Yuji Iwasawa (concurring)

I 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 the majority of the Committee.^a I will retain my reasoning even though I may not find it compelling to repeat it in future communications.

^a For details, see *Abdullayev v. Turkmenistan*, appendix I (joint opinion of Committee members Yuji Iwasawa, Anja Seibert-Fohr, Yuval Shany and Konstantine Vardzelashvili).

Annex II

Individual opinion of Committee member Yuval Shany (partly dissenting)

1. I associate myself with the individual opinion authored by Mr. Iwasawa with respect to the reasoning espoused by the majority on the Committee, underlying the finding of a violation of article 18 of the Covenant by the State party. For the reasons articulated in my individual opinion in *Abdullayev v. Turkmenistan*, I wish also to express doubts about the findings reached by the Committee with respect to the violation of article 14 (7) by the State party.

2. The author was tried in 2012 for refusing military service, but received only a light sentence — a conditional two-year sentence with one-year probation. It was only following his second trial in 2015, in which a new act of refusal to serve in the military was adjudicated, that he actually started serving a two-year prison sentence. Under these circumstances, it appears to me that, unlike the second conviction that resulted in a severe penalty, the author's first conviction did not clearly reveal an intention by the State authorities to try and punish him for his refusal in principle to serve in the military (that is, for the "constant resolve" not to serve), as opposed to trial and punishment for one specific act of refusal. It is, in fact, unlikely that the conditional sentence imposed by the State party could have had the intended consequence of precluding it from trying the author for subsequent acts of refusal to serve (which might have activated the conditional sentence). Moreover, the result of adopting the approach taken by the majority, without considering the possibility that the first-in-time trial was not designed to punish the author for his "constant resolve" not to serve, might be to induce States parties to treat the first-in-time offence much more severely — not as a distinct "small" offence (a specific act of refusal), but as a serious offence of refusal in principle to military service, entailing a harsh sentence. I fail to see how pursuing this course of action would serve to advance the due process rights of individuals protected under the Covenant.

3. As a result, I do not consider it sufficiently well established that the author's rights under article 14 (7) were violated in the circumstances of the present case.

4. Of course, one should be also mindful of the problem of repetitive trials for multiple acts of refusal to serve, as such a practice may lead to serious harassment and mistreatment of the affected individuals and to cumulative sentences of a disproportionate nature, and may raise issues under articles 7 and 9 of the Covenant. Such legal claims were not made, however, in the present case.



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Corrigendum

1. Paragraph 6.1, second sentence

For the term of his imprisonment *read* the term of his sentence

2. Annex II, paragraph 2, second sentence

For serving a two-year prison sentence *read* serving a sentence (a two-year period of correctional labour without incarceration)

3. Annex II, paragraph 2, third sentence

For a severe penalty *read* a rather severe penalty

