



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2195/2012\*, \*\*

<i>Communication submitted by:</i>	Ch.H.O. (represented by counsels, Gib van Ert and Lesley Stalker)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	16 September 2012 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 92 and rule 97 of the Committee's rules of procedure, transmitted to the State party on 21 September 2012 (not issued in document form)
<i>Date of adoption of decision:</i>	3 November 2016
<i>Subject matter:</i>	Deportation from Canada to the Republic of Korea of a conscientious objector
<i>Procedural issues:</i>	Incompatibility of claims with the Covenant; level of substantiation of claims
<i>Substantive issues:</i>	Risk of prosecution and imprisonment of a conscientious objector for refusing to undertake military service upon forcible removal from Canada to the Republic of Korea
<i>Articles of the Covenant:</i>	2 (1) and (3) and 18 (2)
<i>Articles of the Optional Protocol:</i>	2 and 3

\* Adopted by the Committee at its 118th session (17 October-4 November 2016).

\*\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmad 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.



1.1 The author of the communication is Ch.H.O., a national of the Republic of Korea, born in 1982, who arrived in Canada in July 2008. He claimed refugee status in Canada as a conscientious objector to the mandatory military service in his home country, his application was denied and he faces deportation. He claims that his removal by Canada to the Republic of Korea, scheduled for 9 October 2012, would constitute a violation of articles 2 (1) and 18 (2) of the International Covenant on Civil and Political Rights.<sup>1</sup> The Optional Protocol entered into force for Canada on 19 May 1976. The author is represented by counsels, Gib van Ert and Lesley Stalker.

1.2 The communication was registered on 21 September 2012. Pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to request that Canada refrain from removing the author by way of interim measures.<sup>2</sup> The author was deported to the Republic of Korea on 9 October 2012. He was subsequently convicted and sentenced to 18 months' imprisonment, and commenced his prison term on 27 December 2012.

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

2.1 The author is a 29-year-old citizen of the Republic of Korea and a lifelong devoted adherent to the Jehovah's Witness faith. The Immigration and Refugee Board of Canada found the author to be "generally credible in relating his personal religious beliefs".

2.2 A sacred tenet of the Jehovah's Witness faith is that adherents remain neutral in political and military matters. They must not participate in any form of fighting or military service, including handling weapons or participating in military training. The commitment to remain neutral is sacrosanct.

2.3 In 2002, the author became eligible for military service and was instructed to complete a medical examination. At the time, the Government of the Republic of Korea was considering the possibility of alternate, non-military service for conscientious objectors. The author decided to pursue his studies overseas, thereby obtaining a temporary deferral of his military service. He hoped that by the time his studies were completed, the law would have changed and he would be permitted to complete an alternate, non-military form of service.

2.4 In early 2008, a newly elected Government announced it would not amend the Military Service Act. In the light of the failure of the Republic of Korea to bring its military service laws into compliance with the Covenant, the author decided to focus on finding a long-term solution outside the country. In May 2008, he discontinued his graduate studies in economics and arrived in Canada in July 2008. In October 2008, he filed an asylum application in Canada.

2.5 In 2010, the Republic of Korea indicted the author for having violated the Military Service Act. The indictment was suspended, because the author's whereabouts were unknown to the authorities. That same year, the author's brother, Y.H.O, was sentenced to 18 months in prison for his conscientious objection to military service.<sup>3</sup>

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<sup>1</sup> Although the State party was of the view that the communication also appeared to raise allegations of violations of article 7 of the Covenant without expressly stating so, the author then clarified that he did not intend to make any allegations under article 7.

<sup>2</sup> The author requested that the Committee order the State party to suspend his deportation to the Republic of Korea for the duration of the proceedings before the Committee, in order to avoid irreparable harm, as his deportation by Canada would predictably result in his imprisonment for 18 months.

<sup>3</sup> The author's brother Y.H.O. has completed the sentence, but has been unable to find employment since his release and appears psychologically fragile.

2.6 The author's claim for asylum was heard by the Refugee Protection Division of the Immigration and Refugee Board of Canada on 19 January 2011 in Vancouver. In his written submissions, the author relied on article 18 of the Covenant, and the Views of the Human Rights Committee in *Yoon and Choi v. Republic of Korea* (2006)<sup>4</sup> and *Jung and others v. Republic of Korea* (2010),<sup>5</sup> arguing that he was a person in need of protection.

2.7 On 15 December 2011, the Immigration and Refugee Board denied the author's claim for asylum. The Board found that the author was a conscientious objector who would likely be prosecuted and imprisoned upon his return to the Republic of Korea and would experience discrimination as a result; however, it denied his claim for asylum on the basis that the prosecution and imprisonment of conscientious objectors for refusing to perform military service did not constitute persecution within the meaning of the Convention relating to the Status of Refugees. In reaching that conclusion, the Board relied on a decision of the Federal Court of Appeal of Canada in *Ates v. Canada* (MCI) 2005 FCA 322.

2.8 On 3 January 2012, the author filed an application for leave and judicial review by the Federal Court of Canada of the decision denying his claim for asylum. In his leave application, the author argued, inter alia, that the Board had erred in applying the *Ates* decision, despite the subsequent Views of the Human Rights Committee in *Yoon and Choi* (2006), *Jung and others* (2010) and *Min-Kyu Jeong and others v. Republic of Korea* (2011),<sup>6</sup> and despite a subsequent decision of the Federal Court of Appeal of Canada in *De Guzman v. Canada* (MCI) 2005 FCA 436, in which the Court affirmed that the Immigration and Refugee Protection Act must be interpreted in conformity with the State party's international human rights obligations.

2.9 On 17 April 2012, the Federal Court of Canada dismissed the author's leave application without reasons.<sup>7</sup> On 12 September 2012, the author submitted a request to Citizenship and Immigration Canada that it expedite the review of his application for permanent residence on humanitarian and compassionate grounds, in view of the imminent removal order. On 13 September 2012, Citizenship and Immigration Canada denied the author's request to expedite the review of his application,<sup>8</sup> and the author was informed that he would be removed to the Republic of Korea on 9 October 2012. He also sought to have the removal deferred until his application had been considered and to expedite the processing of that application, but was unsuccessful. The author further sought an administrative deferral of removal and when that was unsuccessful, he sought a judicial review of the decision by the Canada Border Services Agency not to defer his removal until Citizenship and Immigration Canada had considered his application. The author also sought a judicial stay of removal from the Federal Court, pending its consideration of the leave application against the decision of the Canada Border Services Agency.<sup>9</sup> The author contends that he has exhausted all available and effective domestic remedies.

### **The complaint**

3.1 The author alleges that Canada has violated its obligation under article 2 (1) of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant by (a) failing to grant the author refugee status in Canada, despite the evidence that he would face imprisonment in the Republic of Korea on account of his religious beliefs if forcibly returned; and by (b) forcibly returning the author to the

<sup>4</sup> Communications No. 1321/2004 and No. 1322/2004, Views adopted on 3 November 2006.

<sup>5</sup> Communications Nos. 1593 to 1603/2007, Views adopted on 23 March 2010.

<sup>6</sup> Communications Nos. 1642-1741/2007, Views adopted on 24 March 2011.

<sup>7</sup> No further appeal of the decision has been available under the State party's law.

<sup>8</sup> The application remained pending at the time of submission of the present communication.

<sup>9</sup> No details have been provided on the outcome of the request for a judicial stay of removal.

Republic of Korea where he would be imprisoned as a conscientious objector in violation of his right to freedom of religion, as guaranteed in article 18 of the Covenant.

3.2 He points to the Committee's jurisprudence, and in particular to its interpretation of article 2 (1), that if a State party takes a decision concerning a person within its jurisdiction, and the necessary and foreseeable consequence is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.<sup>10</sup>

3.3 The author further alleges that Canada has violated its obligations under article 18 (2) of the Covenant, as it has subjected him to coercion which would impair his freedom to have or adopt a religion or belief of his choice (the Jehovah's Witness faith) by (a) failing to grant the author refugee status or alternate protection in Canada on the ground of the religious persecution he would face if forcibly returned to the Republic of Korea; and by (b) forcibly returning the author to the Republic of Korea, where he would be imprisoned in violation of his right to freedom of religion, as guaranteed in article 18 of the Covenant.

3.4 The author refers to a decision by the House of Lords (then the Supreme Court of the United Kingdom of Great Britain and Northern Ireland)<sup>11</sup> in order to demonstrate that the responsibility of a State in the context of removals is not solely limited to circumstances involving risk to life or risk of torture. Similarly, the author refers to the jurisprudence of the European Court of Human Rights, finding a violation of article 9 of the European Convention,<sup>12</sup> although not in the context of removals, to make a claim that the European Convention permits resisting extradition or expulsion also in other contexts than the risk of death or torture,<sup>13</sup> in particular where there is a risk of a very serious or "flagrant" violation of the Convention.

3.5 The author claims that Canada is internationally responsible for deporting the author to a State in which he will suffer a clear and significant violation of his right to freedom of religion, as the State party had actual knowledge of the impending violation.

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

4.1 On 28 March 2013, the State party submitted its observations on the admissibility and merits of the communication. It asserts that the author's claim of refugee status on the basis that he is a conscientious objector to the mandatory military service in the Republic of Korea was denied by the Immigration and Refugee Board, as it did not consider the author as a refugee or a person in need of protection within the terms of the 1951 Convention relating to the Status of Refugees.

4.2 The State party submits that the author's claims regarding articles 2 and 18 of the Covenant are inadmissible, as they are incompatible with the Covenant, pursuant to article 3 of the Optional Protocol. It contends that article 18 cannot be applied extraterritorially and thus does not prohibit a State from deporting foreign nationals to a country where they allege that their right to freedom of religion may not be respected. According to the Committee's jurisprudence, the Covenant can be applied extraterritorially only when there is a real risk of irreparable harm. The State party, however, asserts that such a risk is not present in this case. It also claims that article 2 of the Covenant sets out general obligations for States parties and cannot give rise to an independent right and be subject to a separate claim in a communication under the Optional Protocol.

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<sup>10</sup> See communication No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993, para. 6.2.

<sup>11</sup> *EM (Lebanon) v. Secretary of State for the Home Department* [2008] UKHL 64.

<sup>12</sup> *Bayatyan v. Armenia* (application No. 23459/01, judgment of 7 July 2011) and *Ercep v. Turkey* (application No. 43965/04, judgment of 22 November 2011).

<sup>13</sup> See articles 2 and 3 of the European Convention.

4.3 The State party contends that the author's allegations, including his implicit allegations regarding a risk of torture or cruel, inhuman or degrading treatment or punishment, are inadmissible owing to a lack of substantiation, pursuant to article 2 of the Optional Protocol. It maintains that the author has failed to establish his case on even a prima facie basis. The State party further asserts that the author has not demonstrated how the reported incidents of human rights violations in prisons in the Republic of Korea relate to his personal situation. Nor has he explained how the ill-treatment of his brother relates in any way to the allegations that the author would personally face serious harm upon removal.

4.4 In addition, the State party claims that there is no evidence to suggest that the author is at personal risk of torture or other similarly irreparable harm in the Republic of Korea. The most recent country reports on the Republic of Korea indicate that the country's law prohibits torture and other ill-treatment, and that there were no reported cases of such practices being used by government officials. The reports also indicate that conscientious objectors who are sentenced to more than 1 year and 6 months in prison are exempt from further military service and reserve duty obligations and are not subject to further fines or other punishment.

4.5 The State party adds that the author's communication does not present any new information or evidence, other than what has already been presented and considered by the national authorities. It submits that since the State party's authorities have already dealt with the claims and evidence presented in the communication, the Committee should not re-evaluate the facts and evidence, unless the evaluation by the domestic tribunals was arbitrary or amounted to a denial of justice. The information submitted by the author cannot support a finding that the decisions of the State party's authorities suffered from any such defects. The author has not identified any irregularity in the decision-making process, or any risk factor that the State party's authorities failed to take properly into account. The State party observes that in the present case, all due process guarantees were applied to the author. It considers that the author merely disagrees with the assessment of his specific circumstances and the background information that was made by the Immigration and Refugee Board in his case and that he is trying to use the Committee as an appellate body to have the factual circumstances of the case reassessed by the Committee. The State party maintains that the Committee must give considerable weight to the findings of the national authorities, which are better placed to assess the factual circumstances of the author's case.

4.6 The State party submits that the Federal Court of Canada heard and dismissed the author's application for a stay of removal. The Court concluded that the author had not raised a serious issue regarding the refusal of the officer of the Immigration and Refugee Board to exercise his discretion in his favour and that the risks of irreparable harm upon removal alleged by the author had already been carefully assessed and rejected by the Immigration and Refugee Board and the Federal Court itself in its earlier assessment of the leave application to seek a review of the decision of the Board. According to the State party, the Court observed that Canadian law is clear that prosecution and imprisonment of conscientious objectors does not amount, in and of itself, to persecution even when the objection is based on religious grounds. The State party further submits that as long as the duration and conditions of imprisonment do not offend international standards, incarceration does not amount to cruel or degrading treatment or punishment.

4.7 In conclusion, the State party considers that the communication is wholly without merit.

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

5.1 In his comments dated 9 August 2013 on the State party's observations on the admissibility and merits of the communication, the author submits that, following his deportation by Canada on 9 October 2012, he was arrested in the Republic of Korea upon

arrival, and released on bail. He was subsequently convicted and sentenced to 18 months' imprisonment.<sup>14</sup>

5.2 The author claims that the harm he had foreseen, as reflected in his communication to the Committee and the request for interim measures, has now materialized. He also indicates that he alleges a violation by Canada of articles 2 (1) and 18 (2) of the Covenant, but not of article 7, as mistakenly interpreted by the State party. The author also disputes the State party's characterization of the Committee's jurisprudence as requiring a violation of articles 6 or 7 in a receiving State as a precondition of the responsibility of the removing State under the Covenant.

5.3 The author claims that he has exhausted all available domestic remedies and notes that this was not contested by the State party. The author opposes the State party's submission that his claim is inadmissible, either because it involves a breach of the obligations of the Republic of Korea under the Covenant, or because the author has not substantiated his claim that there was a reasonably foreseeable risk of the violation the author faced if deported by Canada. The author considers that those arguments do not relate to the admissibility of the author's claim, but to its merits.

5.4 The author further argues that, given his specific circumstances, the policy of the Republic of Korea against conscientious objectors and the Committee's jurisprudence, Canada could not lawfully deport him. Having done so, Canada has violated its obligations under the Covenant.

5.5 The author contends that article 2 (1) requires each State party to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. He submits that the Committee's jurisprudence is clear that the obligations of States parties under article 2 (1) extend to situations where a State party takes a decision concerning a person within its jurisdiction, the necessary and foreseeable consequence of which is a violation of the person's rights under the Covenant.<sup>15</sup> By removing the author to the Republic of Korea, rather than permitting him to remain in Canada, Canada failed to respect and ensure his Covenant rights in violation of article 2 (1).

5.6 The author also considers that his deportation constitutes a violation of article 18 (2), which provides that no one will be subjected to coercion that would impair his or her freedom to have a religion or belief of his choice. By deporting the author to certain conviction and imprisonment in the Republic of Korea, followed by a future of discrimination in the workforce upon his release, Canada has exposed the author to a dilemma to give in to the authorities in the Republic of Korea and undertake military service, contrary to the author's religion and conscience, or to serve a prison sentence. The threat of an extended term of imprisonment for abiding by the dictates of one's conscience is a clear instance of coercion. Since the Republic of Korea was going to imprison the author, Canada knowingly delivered the author and thereby participated in coercion due to religious persecution.

5.7 The author invites the Committee to conclude that Canada has violated articles 2 (1) and 18 (2) of the Covenant, read alone and in conjunction. The author asks the Committee to declare that he is entitled, pursuant to article 2 (3) of the Covenant, to an appropriate remedy, including requests by Canada to the Republic of Korea, for the author's criminal record to be expunged and for his immediate release from prison, and adequate

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<sup>14</sup> The author commenced his prison term on 27 December 2012. He provided copies of documents concerning his arraignment, conviction and sentence.

<sup>15</sup> See, for example, communications No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, paras. 4.1, 6.8 and 6.9, and *Kindler v. Canada*, para. 13.1.

compensation by Canada for the author's unlawful deportation. The author also asks the Committee to request Canada to prevent similar violations in the future.

#### **State party's additional observations**

6.1 In its additional observations of 21 January 2014, the State party refers to its observations of 27 March 2013 on the admissibility and merits of the author's communication. The State party reiterates that the author's allegations under articles 2 (1) and 18 (2) are inadmissible for being incompatible with the Covenant. In the alternative, the State party holds that the author has failed to substantiate a violation of article 18 (2) of the Covenant by Canada. Should the Committee consider the communication to be admissible, partly or fully, the communication should be considered to be wholly without merit, as the author has not substantiated his claims and no new facts or evidence have been presented.

6.2 As regards the author's information that he has been convicted in the Republic of Korea for having failed to perform military service and sentenced to 18 months in prison, the State party claims that the author bases his submission on the same facts and evidence as was presented to Canadian decision makers. The expert panel of the Refugee Protection Division of the Immigration and Refugee Board and the Federal Court of Canada have determined that there are no substantial grounds for believing that the author would face a risk of persecution, death, torture or cruel or inhuman treatment or punishment in the Republic of Korea.

6.3 The author has not alleged that the proceedings in Canada, such as the determinations of the Immigration and Refugee Board and the Federal Court, or his application for permanent residence based on humanitarian and compassionate considerations, directly violated his rights under article 18 of the Covenant. Rather, the author's claims that his conviction and imprisonment by the Republic of Korea for a failure to complete compulsory military service could amount to a violation of his rights under article 18 of the Covenant are based on the treatment that he alleges he could face upon his return to the Republic of Korea, which he perceives as a necessary and foreseeable consequence of the State party's decision to remove him.

6.4 It is the State party's position that even if the author could establish that he would be subject to discrimination or ill-treatment in the Republic of Korea for his religious belief, that would not engage its obligations under the Covenant. When a State party removes a foreign national, it does not have an obligation under the Covenant to ensure that the person's rights under article 18 will be respected in the State to which the person is being removed.

6.5 As regards the author's contention that the extraterritorial application of the Covenant is not restricted, as the State party has claimed, to articles 6 and 7, relying primarily on the Committee's views in four communications, in which the Committee allegedly found that States parties have obligations under article 18 of the Covenant, the State party asserts that the Committee never found such obligations in the context of cases of removal.<sup>16</sup> Importantly, the Committee concluded only exceptionally that rights guaranteed by the Covenant have an extraterritorial application, thereby recognizing the territorial scope of application of the rights under the Covenant. The State party holds that the cases of conscientious objectors referred to by the author do not support a further extension of the application of the Covenant in the removals context beyond articles 6 and 7 of the Covenant. Indeed, the author himself recognizes that the cases reviewed in his observations raised claims under articles 6 and 7 of the Covenant, arguing for an expansion of the obligations which the Committee has not yet recognized. The State party also

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<sup>16</sup> See communications No. 1321/2004 and 1322/2004, No. 1593-1603/2007, No. 1642-1741/2007 and *Atasoy and Sarkut v. Turkey*, Nos. 1853/2008 and 1854/2008, Views adopted on 29 March 2012.

submits that the alleged harm does not amount to death, torture or other similarly serious violations of human rights and that it is not aware of any communication in which the Committee has concluded that the removal of a foreign national to a country where the person would face a potential violation of his or her right as guaranteed under the Covenant, other than one under articles 6 and 7, would amount to a violation of the obligations under the Covenant by the removing State.<sup>17</sup> The State party is firmly of the view that States parties to the Covenant have no obligation to ensure, prior to removing foreign nationals from their territory, that the conditions in the receiving State are in full and effective accord with each of the substantive rights guaranteed in the Covenant.

6.6 As regards the author's reliance on a decision by the House of Lords,<sup>18</sup> by which the author attempts to demonstrate that the responsibility of a State in the context of removals is not solely limited to circumstances involving risks to life or risks of torture, the State party asserts that such expansion is limited, in the jurisprudence of the House, to flagrant violations in exceptional cases of extreme violations of Covenant rights amounting to a complete denial of rights other than articles 6 and 7. However, the Committee has not followed such an approach. Moreover, the State party submits that the author's situation does not disclose any compelling circumstances that would give rise to a finding of a flagrant violation of article 18 of the Covenant, or a violation of article 18 that would give rise to the level of seriousness of death or torture in violation of articles 6 or 7 of the Covenant. The State party claims that exceptions to State authority must be limited to cases of irreparable and grave prejudice to the individual being removed.

6.7 As concerns the two judgments by the European Court of Human Rights, finding a violation of article 9 of the European Convention, the State party submits that neither of those findings were made in the context of removals, recalling that while the European Convention does not preclude reliance on articles other than articles 2 and 3 as a ground for resisting extradition or expulsion, successful reliance demands presentation of a very serious or "flagrant" violation.<sup>19</sup> It considers that the present case does not fulfil that requirement, as the treatment the author risks facing does not reach the level of seriousness of death or torture. Moreover, the author confirms that he does not allege any violation of article 7 of the Covenant. The State party finally recalls that the jurisprudence of the European Court is not binding on Canada and is of no value in terms of precedence.

6.8 The State party also refers to information from country reports on international religious freedom in the Republic of Korea indicating that there were "no reports of societal abuses or discrimination based on religious affiliation, belief or practice".<sup>20</sup> The reports further indicate that prisoners and detainees have reasonable access to visitors and are permitted religious observance. As indicated in the United States of America, Department of State reports on religious freedom for 2011 and 2012, the conscientious objectors who are sentenced to more than 18 months in prison are exempt from further military service and reserve duty obligations and are not subject to further fines or other punishment.<sup>21</sup> The

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<sup>17</sup> This interpretative approach is consistent with the Committee's views expressed in its general comments No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant and No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial. It is also consistent with other relevant general comments of the Committee, which do not mention State obligations of the nature claimed by the author. See, for example, general comments No. 22 (1993) on the right to freedom of thought, conscience and religion and No. 15 (1986) on the position of aliens under the Covenant.

<sup>18</sup> *EM (Lebanon) v. Secretary of State for the Home Department*.

<sup>19</sup> *Bayatyan v. Armenia* and *Ercep v. Turkey*.

<sup>20</sup> See United States of America, Department of State, Bureau of Democracy, Human Rights and Labor, "International religious freedom report for 2011: Republic of Korea".

<sup>21</sup> *Ibid.*



State party submits that there is no reason to believe that the author was specifically targeted for arrest and detention on the basis of his religion and that a law of general application requiring compulsory military service, or imposing sanctions for failure to perform such service, cannot alone be grounds for a claim for refugee status, nor constitute substantial grounds for believing that the author faces a foreseeable, real and personal risk of death or torture. Furthermore, the specific form of military service objected to in this case is not fundamentally illegitimate, that is it does not violate basic human rights or general principles of international law. If the Committee considers that the treatment of the author in the Republic of Korea amounts to a violation of the author's rights under article 18 of the Covenant, Canada reiterates that the Republic of Korea should be held responsible for the violation, not Canada.

6.9 Regarding the author's claims under article 2 (1), the State party recalls the Committee's views indicating that the provisions of article 2, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication under the Optional Protocol, as they do not guarantee a separate or independent right to individuals. Since the author has failed to establish a violation of article 18, the State party submits that the author's allegations of a violation of article 2 (1) are inadmissible for reasons of incompatibility with the provisions of the Covenant.

#### **Author's further observations**

7.1 On 10 June 2015, the author responded to the State party's additional observations.<sup>22</sup> In his view, the supplemental submissions did not provide any elements relating to the issue of the duty of States parties not to expel a person to a country where his or her Covenant rights would be violated.

7.2 He submits that following his criminal conviction for conscientious objection to undertake military service in the Republic of Korea, he was released from prison.<sup>23</sup> Despite his qualifications, he has been unable to obtain employment because of his criminal record and the stigma associated with a refusal to do military service.<sup>24</sup> In that regard, he refers to a report published in 2015 by Amnesty International entitled "Sentenced to life: conscientious objectors in South Korea".<sup>25</sup> The barriers faced by the author in obtaining employment in his native country are a direct result of his conscientious objection to carrying arms, thereby constituting irreparable harm for which the Committee should hold Canada accountable.

7.3 As regards the author's claims of a violation of article 2, the author submits that the State party appears to recognize that the author had exhausted all available remedies before his deportation from Canada. He claims that the Committee had held the view over more than 20 years that conscientious objection to military service is inherent in the right to freedom of thought, conscience and religion.<sup>26</sup> He reiterates that the Committee has found that the practice of imprisoning and convicting conscientious objectors in the Republic of

<sup>22</sup> On 26 June 2014, the author advised the Committee that he did not intend to respond to the supplemental observations of the State party; however, new facts had emerged in the case which the author was bringing to the attention of the Committee.

<sup>23</sup> The author was paroled in February 2014, after serving 14 months in prison. He served the final 4 months of his sentence on supervised parole.

<sup>24</sup> The author claims that whenever prospective employers learned of his criminal record and his failure to complete military service, they said they would need to discuss the matter internally, but never offered a job to the author.

<sup>25</sup> Amnesty International states that conscientious objectors in the Republic of Korea face lifelong repercussions for their refusal to serve in the military. The most serious consequence is the difficulty of finding work.

<sup>26</sup> See the Committee's general comment No. 22.

Korea violates article 18 of the Covenant. The author claims to have substantiated the risk he faced by establishing the sincerity of his religious faith and documenting the treatment meted out to conscientious objectors. Prior to deporting him, Canadian officials expressly acknowledged that he faced that harm. The question is whether Canada should be held accountable for having delivered the author to the authorities in the Republic of Korea, knowing that there was a real risk that his right to freedom of religion under the Covenant would be violated. He maintains that the State party failed to consider that risk prior to removing him.

7.4 The author considers that the State party's argument that the Covenant would be engaged only if the author could establish a risk to life or a risk of torture in the Republic of Korea is inconsistent with the spirit and jurisprudence of the Covenant. He argues that the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant refers to a real risk of irreparable harm, such as that contemplated in articles 6 and 7 of the Covenant, thereby not limiting the prohibition of deportation to cases engaging a risk of death or torture. He invokes such an interpretation also from the Committee's jurisprudence in *Kindler v. Canada*, stating that if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State where treatment contrary to the Covenant is certain.<sup>27</sup> The author submits that the Committee has shown openness to allegations of irreparable harm emanating from article 18 of the Covenant in its jurisprudence in *X v. Denmark*.<sup>28</sup> In the author's view, the issue is whether the State party had an obligation not to expel the author to a country where he clearly faced prosecution and imprisonment because of his religious faith, recalling that article 18 rights are so fundamental that they are non-derogable, pursuant to article 4 of the Covenant.

7.5 The author concludes that by removing him to the Republic of Korea rather than permitting him to remain in Canada, the State party failed to respect and ensure his Covenant rights, in violation of article 2 (1). He further submits that the deportation of the author by Canada is also a violation of the provision of article 18 (2) of the Covenant not to subject anyone to coercion that would impair his freedom to have a religion or belief of his choice. By deporting the author to certain conviction and imprisonment in the Republic of Korea, followed by discrimination in the workforce upon his release, Canada knowingly took part in coercion.

7.6 The author requests the Committee to conclude that Canada has violated articles 2 (1) and 18 (2) of the Covenant, read alone or in conjunction.

#### **State party's further observations**

8.1 On 21 September 2015, the State party reiterated that even though the risks the author alleges were foreseeable at the time of his return, that does not engage the responsibility of Canada as the removing State, because they do not rise to the level of a real risk of irreparable harm, such as that contemplated in articles 6 and 7 of the Covenant, as described by the Committee in its general comment No. 31. Therefore, even if the author had been able to substantiate his claim that a violation of article 18 was foreseeable, which

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<sup>27</sup> See *Kindler v. Canada*, para. 13.1. See also *A.R.J. v. Australia*, paras. 4.1, 6.8 and 6.9.

<sup>28</sup> Communication No. 2007/2010, *X v. Denmark*, Views adopted on 26 March 2014, para. 9.4. The Committee, agreeing that deportation would violate article 7, concluded that it was not necessary to examine the allegations under article 18, in view of its findings on article 7.

Canada denies, the risk of that violation occurring in the receiving State would not engage the State party's responsibility.

8.2 The author claims that the Committee has never considered a complaint on the merits regarding deportation of a person who feared a "lesser human rights violation in the receiving State".<sup>29</sup> The State party claims that in this communication, the Committee should not take the approach to considering article 18 that it took in *X v. Denmark*. It would be more appropriate for the Committee to first consider the substantive allegation under article 18 to be inadmissible. The Committee could then consider the facts surrounding the alleged risk at the merits stage, when considering the author's substantive allegations under article 7.

8.3 As regards the actual risks alleged by the author, the State party submits that the kinds of foreseeable violations that have been alleged by the author clearly do not reach the level of irreparable harm — death, torture or other similarly serious violations — such as that contemplated in articles 6 and 7 of the Covenant. The State party notes that the author ultimately received a more lenient punishment than what he claimed was foreseeable in his initial submission, and that his experiences in finding employment, even if foreseeable, were not of sufficient seriousness to engage the State party's obligations under the Covenant.

8.4 The State party also submits that the author's allegations with respect to article 2 (3) of the Covenant, due to an alleged lack of remedy, are inadmissible as incompatible with the Covenant. The State party submits that article 2 (3) does not set out a free-standing substantive right. Even if the author had been able to substantiate his claim that he faced foreseeable violations of the Covenant rights at the time of his removal from Canada — which is denied — those violations would not engage the State party's responsibility under the Covenant as the removing State and any obligation under article 2 (3) to provide an effective remedy would not apply to Canada. Moreover, the State party reiterates that the author's allegations are manifestly unfounded as the author had failed to substantiate them, even on a prima facie basis.

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

### *Consideration of admissibility*

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

9.2 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.

9.3 The Committee notes that the State party has not objected to the admissibility of the communication under article 5 (2) (b) of the Optional Protocol. It also observes that the author filed an application for asylum, which was rejected by the Immigration and Refugee Board of Canada on 15 December 2011 and subsequently a leave application, which was dismissed on 17 April 2012. He also sought to have his removal deferred until his application for permanent residence on humanitarian and compassionate grounds was considered and to expedite the processing of that application, but was unsuccessful. He further sought an administrative deferral of removal to no avail, and a judicial review of

<sup>29</sup> Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd ed. (New York, Oxford University Press, 2013), p. 110.

that negative decision. Accordingly, the Committee considers that the author has exhausted all available domestic remedies.

9.4 The Committee notes the author's allegations that the State party violated article 2 (1) by failing to grant him refugee status or alternate protection and by forcibly returning him to the Republic of Korea, where he would be at risk of irreparable harm owing to prosecution and imprisonment. The Committee also notes the State party's argument that the author's claim should be held inadmissible insofar as articles 2 (1) and 2 (3) of the Covenant are accessory in nature and cannot give rise to an independent right and be subject to a separate claim in a communication under the Optional Protocol. The Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant lay down general obligations for States parties and they cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.<sup>30</sup> The Committee thus considers that the author's claims under article 2 of the Covenant are inadmissible under article 3 of the Optional Protocol.

9.5 The Committee notes the author's claim that Canada violated article 18 (2), read in conjunction with article 2 (1) of the Covenant, by failing to grant him refugee status or alternate protection and by forcibly returning him to the Republic of Korea, where he would be imprisoned as a conscientious objector in violation of his right to freedom of religion. The Committee further notes the author's claim that a State should refrain from removing a person not only where that person would face a risk to life or torture, but also in case of a risk of a very serious or "flagrant" violation of his rights under article 18 of the Covenant. The Committee notes the author's claim that Canada should be held responsible for deporting the author to the Republic of Korea where he would suffer a violation of his right to freedom of religion, in violation of article 18, as Canada had actual knowledge of the impending prosecution and conviction that he would suffer as a conscientious objector upon his return. In that connection, the Committee notes the State party's argument that the author's claims under articles 18 (2) read in conjunction with article 2 (1), are inadmissible *ratione loci* and *ratione materiae*. The Committee recalls that article 2 of the Covenant entails an obligation for States parties not to deport a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated in articles 6 and 7 of the Covenant, in the country to which removal is to be effected.<sup>31</sup> In that connection, the Committee notes that the author does not raise any allegations under article 7 of the Covenant and that he does not provide any arguments that would enable the Committee to conclude that the prosecution and conviction to which he has been subjected as a conscientious objector would amount to an irreparable harm, such as that contemplated in articles 6 and 7. Accordingly, the Committee considers that the author's communication falls short of substantiating his allegations that the State party violated article 18, read in conjunction with article 2 (1), by removing the author to the Republic of Korea where he risked prosecution and conviction, which would have led to an irreparable harm, such as that contemplated in articles 6 and 7 of the Covenant. The Committee therefore finds that the communication is inadmissible under article 2 of the Optional Protocol.

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<sup>30</sup> See, for example, communications No. 2202/2012, *Castañeda v. Mexico*, Views adopted on 18 July 2013, para. 6.8; No. 1834/2008, *A.P. v. Ukraine*, decision of inadmissibility adopted on 23 July 2012, para. 8.5; No. 1887/2009, *Peirano Basso v. Uruguay*, Views adopted on 19 October 2010, para. 9.4; and No. 2343/2014, *H.E.A.K. v. Denmark*, Views adopted on 23 July 2015, para. 7.4.

<sup>31</sup> See the Committee's general comment No. 31, para. 12.

10. The Committee therefore decides:
- (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;
  - (b) That the decision be transmitted to the State party and to the author.
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