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ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND REPORTS OF THE OFFICE OF THE HIGH COMMISSIONER AND THE SECRETARY-GENERAL

Report of the Office of the High Commissioner for Human Rights on conscientious objection to military service*

1. The Human Rights Council, by its decision 2/102, requested the United Nations High Commissioner for Human Rights to continue with the fulfilment of her activities, in accordance with all previous decisions adopted by the Commission on Human Rights and to update the relevant reports and studies. A comprehensive analytical report on best practices in relation to conscientious objection to military service (E/CN.4/2006/51) was submitted to the Commission on Human Rights at its sixty-second session, pursuant to Commission resolution 2004/35. The information in that report remains relevant. The Office of the United Nations High Commissioner for Human Rights (OHCHR) understands decision 2/102 as preserving the previous biannual reporting cycle in respect of this issue until otherwise decided by the Council. The present report to the Council accordingly addresses recent developments in respect of conscientious objection to military service and is updating in character.

2. An important development since the previous comprehensive report in February 2006 on conscientious objection to military service concerns a decision on the merits by the Human Rights Committee, taken in 2006 in communications nos. 1321/2004 and 1322/2004 at the Committee's eighty-eighth session, held from 16 October to 3 November 2006. In those communications, the two authors, Mr. Myung-Jin Choi and Mr. Yeo-Bum Yoon, nationals of the Republic of Korea, were Jehovah's Witnesses who refused to be drafted on account of their religious beliefs and conscience. They were both arrested and charged in separate proceedings

* The present report was submitted late in order to include the most recent information.

under article 88 (section 1) of the Military Service Act. In both cases, the authors were convicted as charged and sentenced in separate proceedings to one-and-a-half years of imprisonment. In both cases, the authors made appeals in separate proceedings from their convictions and sentences, which were upheld by both the First Criminal Division of the Eastern Seoul District Court, and then by the Supreme Court. In its decision on the merits, the Human Rights Committee noted:

article 8, paragraph 3, of the Covenant excludes from the scope of “forced or compulsory labour”, which is proscribed, “any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors”. It follows that article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purposes.

3. The Committee then went on to observe that:

... while the right to manifest one’s religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious belief. The Committee also recalls its general view expressed in general comment No. 22 that to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18. The Committee notes, in the instant case, that the authors’ refusal to be drafted for compulsory service was a direct expression of their religious beliefs, which it is uncontested were genuinely held.

4. The Committee also responded to one of the arguments of the State party by stating:

As to the issue of social cohesion and equitability, the Committee considers that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. It likewise observes that it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but tender equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service.

5. A dissenting opinion by Committee member Mrs. Ruth Wedgwood expressed the view that:

article 18 does not suggest that a person motivated by religious belief has a protected right to withdraw from the otherwise legitimate requirements of a shared society. For example, citizens cannot refrain from paying taxes, even when they have conscientious objections to State activities. In its present interpretation of article 18, seemingly differentiating military service from other state obligations, the Committee cites no evidence from the Covenant’s negotiating history to suggest that this was contemplated. The practice of States parties may also be relevant, whether at the time the Covenant was concluded or even now. But

we do not have any record information before us, most particularly in regard to the number of parties to the Covenant that still rely upon military conscription without providing *de jure* for a right to conscientious objection.

To be sure, in the “concluding observations” framed upon the examination of country reports, the Human Rights Committee has frequently encouraged states to recognize a right of conscientious objection to military practice. But these concluding observations permissibly may contain suggestions of “best practices” and do not, of themselves, change the terms of the Covenant. It is also true that in 1993, the Committee stated in “General Comment 22”, at paragraph 11, that a right to conscientious objection “can be derived” from article 18. But in the interval of more than a decade since, the Committee has never suggested in its jurisprudence under the Optional Protocol that such a “derivation” is in fact required by the Covenant. The language of article 8, paragraph 38 (c) (ii), of the covenant also presents an obstacle to the Committee’s conclusion.

6. The Human Rights Committee also addressed the issue of conscientious objection in its new revised general comment on article 14 of the Covenant. In general comment No. 32, adopted in August 2007, under the rubric “*Ne bis in idem*”, the Committee, in paragraph 55, stated:

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.

7. The position of the Committee regarding repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military was also the subject of a case before the European Court of Human Rights. On 24 January 2006, the Court ruled in the case of conscientious objector Osman Murat Ülke, and stated, *inter alia*, the following:

The Court noted that, despite the large number of times the applicant had been prosecuted and convicted, the punishment had not exempted him from the obligation to do his military service. He had already been sentenced eight times to terms of imprisonment for refusing to wear uniform. On each occasion, on his release from prison after serving his sentence, he had been escorted back to his regiment, where, upon his refusal to perform military service or put on uniform, he was once again convicted and transferred to prison. Moreover, he had to live the rest of his life with the risk of being sent to prison if he persisted in refusing to perform compulsory military service.

....

The numerous criminal prosecutions against the applicant, the cumulative effects of the criminal convictions which resulted from them and the constant alternation between prosecutions and terms of imprisonment, together with the possibility that he would be liable to prosecution for the rest of his life, had been disproportionate to the aim of ensuring that he did his military service. They were more calculated to repressing the applicant’s intellectual personality, inspiring in him feelings of fear, anguish and

vulnerability capable of humiliating and debasing him and breaking his resistance and will. The clandestine life amounting almost to “civil death” which the applicant had been compelled to adopt was incompatible with the punishment regime of a democratic society.

8. The European Court of Human Rights ruled that, “taken as a whole and regard being had to its gravity and repetitive nature, the treatment inflicted on the applicant had caused him severe pain and suffering which went beyond the normal element of humiliation inherent in any criminal sentence or detention. In the aggregate, the acts concerned constituted degrading treatment within the meaning of Article 3”.¹

9. In other developments, the European Committee on Social Rights, which has as its function to judge the conformity of national law and practice with the European Social Charter, in a series of decisions condemned what it regarded as excessively long periods of alternative service provisions in Estonia, Finland, Greece and Moldova. The Committee took the position that, under article 1, section 2, of the revised European Social Charter, alternative service should not exceed one and half times the length of military service.² Article 1, section 2, of the revised European Social Charter³ provides, “With a view to ensuring the effective exercise of the right to work, the Parties undertake ...[section] 2 to protect effectively the right of the worker to earn his living in an occupation freely entered upon.”

10. There have also been developments with regard to the Inter-American Commission on Human Rights. A case of conscientious objection involving Ecuador has been found admissible by the Commission. According to the petition, Xavier Leon “made a declaration of conscientious objection on September 2, 1999, and from October 16, 1999, until October 15, 2000, carried out civic service in the community as a human rights extension worker in the Ecuadorian Peace and Justice Service”. The petition further alleges that:

he has not been issued with the card which defines his status as conscientious objector or similar, that would have the same legal effects as the military card given to those who complete obligatory military service. ... [T]his omission has directly affected his freedom of conscience, the continuation of his education, his freedom to leave and enter Ecuador freely, as well as his right to work and engage in free enterprise.

11. In its admissibility decision, the Commission wrote:

“The question that has been lodged with the Commission and which must be resolved at the merits stage is whether the procedure used in Ecuador to regulate the condition of

¹ *Case of Ülke v. Turkey*, Application No. 39437/98, Judgement, European Court of Human Rights, Strasbourg, 24 January 2006.

² See the Human Rights and Legal Affairs page on the website of the Council of Europe at www.coe.int.

³ European Social Charter (Revised), European Treaty Series, No. 163, Strasbourg, 3.v.1996, Council of Europe.

conscientious objector, and the different forms of substitute service permitted, are compatible with the provisions of the conventions quoted above. Therefore, the Commission must examine the allegations of the petitioner in relation to the alleged affection of other rights such as the right to education and the right to freedom of movement caused by the lack of a military identity card.”⁴

12. In other developments, the Ibero-American Convention on Young People’s Rights, which entered into force on 1 March 2008, recognizes the right to conscientious objection. The Convention sets out specific rights for young people between 15 to 24 years of age and recognizes them as strategic actors in development. Article 12 of the Convention reads, “Young people have the right to form a conscientious objection against compulsory military service.” The Convention also includes a commitment of States to create legal instruments to safeguard this right, and to progressively end compulsory service.⁵

13. In developments at the national level, there have been a number of judicial decisions concerning conscientious objection to military service. On 27 June 2007, the Constitutional Court of Ecuador decided that articles 88 and 108 of the military service law violated the Constitution. Article 88 provides that all male Ecuadorians who do not present themselves in order to fulfil their military obligations are considered draft evaders and are subject to sanctions until they legalize their situation, which frequently is by payment of a “compensation quota” to obtain military documents. Article 108 requires conscientious objectors to apply to the director of recruitment of the Ecuadorian armed forces, and, if recognized as conscientious objectors, to serve in the development units of the armed forces. The Court found that service in the development units of the armed forces was incompatible with conscientious objection, and also decided that the director of recruitment could not be an independent and impartial judge to decide whether someone is a conscientious objector.⁶

14. On 15 August 2007, the Constitutional Court of Colombia made a decision concerning the *libreta militar*. The issue concerned not the legality of the card itself, but about payment for it. In this regard, article 22 of Law 48/1993 on military service, requires that Colombians who do not serve in the military pay a “compensation quota” to the Treasury, the value of which is to be determined by the Government. In its judgement C-621/07, the Constitutional Court found that the part of the law which authorized the Government to define the value of the quota unconstitutional, reasoning that the quota was basically a tax or contribution, and that the power to determine taxes is within the domain of the Colombia Congress and cannot be delegated to the Government. The decision is of limited scope and does not affect the obligation to carry the *libreta militar*.

⁴ *Xavier Aljandro León Vega v. Ecuador*, Case 278-02, Report No. 22/06, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc.5 (2006) (admissibility).

⁵ Child Rights Information Network, News Release, 2 April 2008. As of 1 February 2008, the Convention had been ratified by Costa Rica, Ecuador, the Dominican Republic, Honduras and Spain.

⁶ Registro Oficial No. 114, 27 de Junio del 2007 (Ecuador).

15. In terms of national trends regarding conscription, the picture is mixed. It has been reported that a number of countries are considering suspending (Croatia), ending conscription (Georgia, Morocco), or have decided to end it (Bulgaria, the former Yugoslav Republic of Macedonia, Lebanon, Romania, Ukraine). However, some countries are considering introducing conscription or have already done so (Cambodia, Jordan, Uganda). It has also been reported that some States, such as Norway and Sweden, with military conscription for men are considering the possibility of making military service mandatory for women as well.⁷

16. OHCHR is in the process of preparing a publication on conscientious objection to military service and the related subject of alternative service programmes for persons determined to be conscientious objectors. This publication will consolidate, in one source, applicable law and jurisprudence. It will also take note of resolutions and recommendations adopted by intergovernmental bodies at the international and regional levels. It will contain examples of practice at the national level with a view to illustrating different national approaches to implementation relating to this subject. The goal of the publication will be to provide guidance to States, intergovernmental and non-governmental organizations, human rights advisers, lawyers and academics on the applicable law and practice on this subject. A two-day expert meeting was held in November 2006 with a view to preparing the publication.

⁷ CO Update Nos. 25-39 (issues December 2006 to May/June 2008); see the website <http://wri-rg.org>.