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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018

Opinion No. 69/2018 concerning Jeong-ro Kim (Republic of Korea)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 16 August 2018 the Working Group transmitted to the Government of the Republic of Korea a communication concerning Jeong-ro Kim. The Government submitted a late response on 17 October 2018. The Republic of Korea is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

* In accordance with paragraph 5 of the Working Group's methods of work, Seong-Phil Hong did not participate in the discussion of the present case.

Submissions

Communication from the source

4. Jeong-ro Kim is a 22-year-old Korean citizen who usually resides in Taean-gun, Chungcheongnam-do, Republic of Korea. Mr. Kim is a Jehovah's Witness and a conscientious objector to military service.

5. The source reports that Mr. Kim was indicted for evading military service by refusing to enlist on 8 May 2017. On 1 September 2017, he was sentenced to 18 months' imprisonment by the Seosan branch of Daejeon district court. According to the source, the legal basis for the detention was article 88 (1) of the Military Service Act.

6. Mr. Kim appealed that decision. On 25 April 2018, the Daejeon district court upheld the decision of the trial court and ordered that Mr. Kim's sentence be implemented with immediate effect. Mr. Kim was taken into custody in the courtroom in order to begin serving his sentence in Daejeon prison. According to the source, the decision of the district court to detain Mr. Kim was a rare and harsh court order concerning a conscientious objector. The source argues that the sole reason for Mr. Kim's detention was his refusal to perform military service on the basis of his religious beliefs. In its appeal judgment, the Daejeon district court noted that Mr. Kim was willing to perform alternative civilian service.

7. Mr. Kim appealed the decision of the Daejeon district court to the Supreme Court of the Republic of Korea, which granted bail *ex officio* to Mr. Kim pending a decision on his appeal. Mr. Kim was released on 6 July 2018 after spending over two months in prison. At the time of the source's submission, Mr. Kim's appeal to the Supreme Court was ongoing.

8. The source reports that the Government continues to criminalize conscientious objection to military service. As of April 2018, 235 individuals had been deprived of their liberty for that reason. Over the past 70 years, more than 19,300 conscientious objectors have been imprisoned in the Republic of Korea for exercising their freedom of conscience, with their accumulated sentences amounting to more than 36,700 years of imprisonment.

9. The source recalls that the right to conscientious objection to military service is protected by the Covenant and that this protection has been recognized by both the Working Group on Arbitrary Detention and the Human Rights Committee.

10. In particular, the source notes that the Human Rights Committee recognizes that the right to conscientious objection to military service is inherent in the right to freedom of conscience under article 18 (1) of the Covenant.¹ In addition, the source asserts that imprisonment for the legitimate exercise of a right constitutes arbitrary detention under article 9 of the Covenant. The source also refers to recommendations made by States during the universal periodic review of the Republic of Korea in November 2017 calling for the introduction of alternative civilian service to accommodate the rights of conscientious objectors.

11. Accordingly, the source considers that the prosecution, conviction and detention of Mr. Kim for refusing to undertake military service on the basis of his religious beliefs is arbitrary and in violation of article 18 of the Universal Declaration of Human Rights and articles 9, 18 and 26 of the Covenant. The source submits that Mr. Kim's deprivation of liberty falls within categories I, II, III and IV.

Response from the Government

12. On 16 August 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 16 October 2018 about the current situation of Mr. Kim. The Working Group also requested the Government to clarify the legal provisions justifying his detention, as well as its compatibility with the Republic of Korea's obligations under international human rights law.

¹ See *Jeong et al. v. Republic of Korea*, (CCPR/C/101/D/1642-1741/2007), para. 7.3.

13. The Government replied to the regular communication on 17 October 2018, one day after the deadline for its response. The response is therefore considered late, and the Working Group cannot accept the response as if it was presented within the time limit. The Government did not request an extension of the time limit for its reply, as provided for in the methods of work of the Working Group.

14. The Working Group takes note that the Government's response in the present case is very similar to a previous response that it submitted prior to the deadline in relation to Opinion No. 40/2018. The Working Group fully considered the submissions made by the Government, as well as the information presented by the source, in that case prior to adopting the opinion on 20 August 2018.

15. In the present case, the Government did, however, provide an update, noting that the Supreme Court of the Republic of Korea recently held an open court hearing with regard to cases concerning conscientious objectors and is considering its previous decisions in similar cases, which have been invoked as legal grounds for the punishment of conscientious objectors.² According to the Government, if the Supreme Court changes its existing interpretation that conscientious objection to military service does not amount to a justifiable ground for refusing to enlist under article 88 (1) of the Military Service Act, there may be a not guilty judgment in Mr. Kim's case. In those circumstances, Mr. Kim would be eligible to claim compensation for his detention pursuant to the procedures prescribed in the Act on Criminal Compensation and Restoration of Impaired Reputation.

Discussion

16. The Working Group welcomes the release of Mr. Kim from detention on 6 July 2018. According to paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion on whether the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. Mr. Kim was released on bail pending a decision of the Supreme Court in relation to his matter and the legality of his previous detention has not yet been resolved. In addition, given that the present case involves an important question of principle concerning the right to conscientious objection to military service, the Working Group considers that it is important to reiterate its approach to this topic.

17. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

18. In determining whether Mr. Kim's deprivation of liberty was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a *prima facie* case for breach of the international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68).

19. The present case concerns the right to conscientious objection to performing military service. In its opinion No. 40/2018, the Working Group stated the principles relating to this right, drawing upon its own legal analysis and jurisprudence, as well as that of the Human Rights Committee and other human rights mechanisms. In particular, the Working Group emphasized that its approach to the issue had evolved over time to a more progressive view that treats the detention of a conscientious objector as a violation *per se* of article 18 (1) of the Covenant. That is, the Working Group strongly considers that the right to conscientious objection to military service is an absolutely protected right to hold a belief under article 18 (1) of the Covenant, which cannot be restricted by States.³

20. In the present case, it is clear that Mr. Kim's deprivation of liberty is the direct result of his genuinely held religious and conscientious beliefs as a Jehovah's Witness in refusing

² The Working Group understands that its opinion No. 40/2018 was placed before the Supreme Court of the Republic of Korea at the public hearing, held on 30 August 2018, on the issue of whether to acknowledge conscientious objection as a justifiable ground for refusing to enlist in military service.

³ See *Kim et al. v. Republic of Korea* (CCPR/C/112/D/2179/2012). Several members of the Committee provided dissenting views on this point.

to enlist in military service. Accordingly, the Working Group finds that his detention violates the absolutely protected right to hold or adopt a religion or belief under article 18 of the Universal Declaration of Human Rights and article 18 (1) of the Covenant. Unlike the manifestation of religious belief, the absolutely protected right to hold or adopt a religion or belief is not subject to limitation under article 18 (3) of the Covenant. In the view of the Working Group, there can be no limitation or possible justification under the Covenant for forcing a person to perform military service, as to do so would completely undermine the right to freedom of thought, conscience and religion in article 18 (1) of the Covenant.⁴ The Working Group does not accept that this interpretation may result in a de facto invalidation of article 18 (3) of the Covenant. That provision still applies to various forms of manifestation of religion or belief. Moreover, other forms of conscientious objection that do not involve military service may be determined in future as being subject to limitation under article 18 (3).⁵

21. Accordingly, the Working Group concludes that Mr. Kim's deprivation of liberty is arbitrary under category II. His deprivation of liberty also falls within category I because it amounts to a per se violation of article 18 (1) of the Covenant and therefore lacks legal basis.

22. Furthermore, the Working Group considers that Mr. Kim was deprived of his liberty, including being subjected to unusually harsh treatment by being detained with immediate effect because of his beliefs as a Jehovah's Witness. The Working Group finds that Mr. Kim was deprived of his liberty on discriminatory grounds owing to his religion, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. His deprivation of liberty was therefore arbitrary according to category V. The Working Group refers the case to the Special Rapporteur on freedom of religion or belief.

23. The Working Group takes note that, although Mr. Kim indicated his willingness to undertake alternative civilian service, there is currently no such alternative available in the Republic of Korea to accommodate the beliefs of conscientious objectors. However, the Government is undertaking consultations on the development of alternative service in light of a recent ruling of the Constitutional Court that article 5 (1) of the Military Service Act is unconstitutional because it violates freedom of conscience by not specifying alternative service for conscientious objectors. The Working Group urges the Government to adopt measures as a matter of urgency to exempt conscientious objectors from military service or to provide a non-punitive alternative compatible with respect for human rights.

24. In addition to the findings of the Working Group, there is widespread concern in the international community about the deprivation of liberty of conscientious objectors in the Republic of Korea. That concern is reflected in the recommendations made in the report of the Working Group on the Universal Periodic Review on the Republic of Korea in December 2017. The recommendations included the decriminalization of conscientious objection to military service, the release of conscientious objectors and the introduction of a civilian alternative to military service (A/HRC/37/11, paras. 132.94–106). Moreover, in its concluding observations on the fourth periodic report of the Republic of Korea, the Human Rights Committee expressed concern that conscientious objectors continued to be subjected to criminal punishment. The Committee stated that persons detained for refusing to perform military service should be immediately released and compensated, and that their criminal records should be expunged (CCPR/C/KOR/CO/4, paras. 44–45 and 59).

25. In light of the analysis above, the Working Group urges the Government to uphold the right to conscientious objection to military service in accordance with its obligations under the Covenant. As the Working Group has previously stated, the duty to comply with international human rights rests not only on the Government but on all officials, including judges, police and security officers, and prison officers with relevant responsibilities.⁶ Accordingly, the Working Group urges the domestic courts of the Republic of Korea,

⁴ See *Atasoy and Sarkut v. Turkey* (CCPR/C/104/D/1853-1854/2008). Individual concurring opinion of Committee member Fabían Omar Salvioli, para. 18.

⁵ *Ibid.*, paras. 2 and 18.

⁶ See, for example, opinions No. 47/2012, para. 22, No. 64/2011, para. 25, and No. 16/2011, para. 5.

particularly the Supreme Court, to apply the jurisprudence of the Working Group and the Human Rights Committee on conscientious objection to military service by ordering Mr. Kim's unconditional release, according him an enforceable right to compensation for his detention from 25 April to 6 July 2018 and expunging his criminal record. Such an order would ensure that Mr. Kim has an effective remedy in accordance with article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant.

26. The Working Group would welcome the opportunity to engage constructively with the Government on issues relating to the arbitrary deprivation of liberty. The Working Group has held discussions with the Government in relation to conducting a country visit, and on 24 September 2018 renewed its request to visit. The Working Group recalls that the Government issued a standing invitation to all thematic special procedures mandate holders on 3 March 2008 and looks forward to a positive response to its request to visit the Republic of Korea.

Disposition

27. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Jeong-ro Kim, being in contravention of articles 2, 7, 9 and 18 of the Universal Declaration of Human Rights and articles 2 (1), 9, 18 (1) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and V.

28. The Working Group requests the Government of the Republic of Korea to take the steps necessary to remedy the situation of Mr. Kim without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

29. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Kim unconditionally, accord him an enforceable right to compensation and other reparations, in accordance with international law, and expunge his criminal record.

30. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Kim and to take appropriate measures against those responsible for the violation of his rights.

31. The Working Group requests the Government to bring its laws, particularly the Military Service Act, into conformity with the recommendations made in the present opinion and with the commitments of the Republic of Korea under international human rights law.

32. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on freedom of religion or belief, for appropriate action.

33. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

34. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Kim has been released unconditionally and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Kim and whether his criminal record has been expunged;
- (c) Whether an investigation has been conducted into the violation of Mr. Kim's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Republic of Korea with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

35. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

36. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

37. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.⁷

[Adopted on 20 November 2018]

⁷ See Human Rights Council resolution 33/30, paras. 3 and 7.