

**Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on freedom of religion or belief**

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on freedom of religion or belief, pursuant to Human Rights Council resolutions 34/18 and 40/10.

Our mandates have previously commented on the criminalisation of conscientious objection in the Republic of Korea, (communication KOR 2/2018), and welcomed the decision by the Constitutional Court of the Republic of Korea to de-criminalise conscientious objection, (communication KOR 4/2018). According to information that has been made available to us, a draft bill is currently with the Parliamentary Assembly for consideration. The draft has been made available in an unofficial English translation.

With this letter, we would like to welcome the efforts by the Parliamentary Assembly to comply with the ruling of the Constitutional Court and implement the rights of conscientious objectors in its domestic legal system. We would like to bring to the attention of your Excellency's Government our preliminary reactions to the Act on transfer to and performance of alternative military service (the draft bill), taking into consideration the Republic of Korea's obligations to respect, protect and promote the right to freedom of thought, conscience and belief, as well as opinion and expression under international human rights law.

In connection with the above, we respectfully remind your Excellency's Government of the general international legal obligation in the International Covenant on Civil and Political Rights (ICCPR) Article 2, whereby the State is under a duty to adopt laws that give domestic legal effect to the rights, and adopt laws as necessary to ensure that the domestic legal system is compatible with the Covenant.

**Main elements of the Alternative Service Bill**

The draft alternative service bill proposes the establishment of alternative military service. The purpose of the bill is to establish an alternative service to military service for individuals qualifying for such service under the Constitution Article 19 of the Republic of Korea (see draft bill Art. 1 and Art. 2 (1)).

**Chapter 2**

Chapter 2 of the draft bill regulates the procedure for the transfer of persons from military service to alternative service. In short, alternative service is subject to application

by the individual concerned. For the purpose of accepting or rejecting applications for alternative service, the draft bill proposes the establishment of the Alternative military service judging committee (hereinafter the Alternative Service Committee) (Article 7). The Alternative Service Committee is empowered to conduct fact-finding investigations for the purposes of accepting or rejecting applications for alternative service (Article 13).

### Chapter 3

Chapter 3 of the draft bill regulates the Alternative Service Committee itself. It provides that the Alternative Service Committee is to be carried out in: penitentiaries, detention centers, branch offices of penitentiaries and detention centers or other public or public interest related facilities designated by Presidential Decree (Article 17). The duration of alternative service is set to 36 months (Article 19).

The law further describes the circumstances which can lead to extension of service and warnings for failure to comply with duties of service (Article 24). Finally, the chapter indicates the circumstances which will lead to the cancellation of the transfer to alternative service and transfer to military service (Article 25).

### Chapter 4

Chapter 4 criminalises the falsification of application forms or statements with the intention of transferring to alternative service (Article 27) and the issuance of false documents (Article 28).

### The addendum

The addendum to the law regulates, amongst others, the transfer of conscientious objectors serving sentences for violation of the Military Service Act Article 88 to alternative service.

### **Legal standards protecting conscientious objectors**

Conscientious objection is protected under the right to freedom of belief (Article 18 (1)), as well as the freedom of opinion (Article 19 (1)) and expression (Article 19 (2)) of the Covenant. The Human Rights Committee is the organ established under the ICCPR charged with the interpretation of that instrument, CCPR/C/GC/33 para. 13. As such, the interpretation by the Committee must be given great weight in the interpretation of the Covenant, see *Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of Congo) (Merits) [2010] ICJ Rep 639 at para. 66. As already affirmed in my previous letter, the right to alternative service has been recognised by the Committee in its individual communications and its general comment no 22. As indicated in *Jeong et al v Republic of Korea*:

“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 this 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." (para 7.3)

In *Atasoy and Sartuk v Turkey*, the Human Rights Committee confirmed that the right to conscientious objection is an absolute right. Thus, it is not subject to limitations in accordance with Article 18 (3), see para 10.5. Like the freedom of belief, the right to freedom of opinion is absolute, see CCPR/C/GC/34 para 9 – 10.

The right to freedom of expression is subject to the limitations prescribed in Article 19 (3). That is, they must meet the requirements of legality, legitimate aim, and necessity and proportionality.

In implementing the rights under the Covenant, the general obligation under the ICCPR Art. 2 (1) prescribes that the State must respect and ensure respect of the rights recognised under the Covenant to everyone "without distinction of any kind". This general obligation is supplemented by the non-discrimination provision in Article 26 provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... religion ... other opinion ... or other status". The

Lastly, the Covenant Article 2 (3) provides for the duty to provide effective remedies to victims of violations. The duty to provide effective remedies entails a duty to provide reparations to victims of human rights violations. Beyond compensation, this can entail "restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.", CCPR/C/21/Rev.1/Add. 13 para 16.

## **Main concerns of the draft bill**

The proposed draft law raises several areas of concern relating to its compatibility with the obligations of the Republic of Korea under international law.

We welcome that the draft refers to Article 19 of the Constitution of the Republic of Korea, which guarantees the freedom of conscience. However, we reiterate the duty of the State to ensure that the interpretation of Article 19 of the Constitution is in conformity with the scope of Article 18 (1) and 19 (1) of the International Covenant on Civil and Political Rights, and remind that compliance with domestic law does not justify non-

compliance with international law, see Vienna Convention on the Law of Treaties Article 27, reaffirmed by the Human Rights Committee in CCPR/C/21/Rev.1/Add. 13 para. 4.

Furthermore, despite the reference to Article 19 of the Constitution, we express concern that several elements in the draft bill create a conflict between the draft bill and freedom of thought conscience and religion. Despite the existence in domestic law of principles of conflict resolution (such as, for example, the principle of *lex superior*), we express real concern that the application of the draft bill will codify and institutionalise a permanent tension with international human rights standards.

#### *Procedural issues*

First, there is a concern on the terminology used. Nowhere does the draft bill recognise a right to alternative service. Instead, the draft bill gives conscientious objectors a right to apply for alternative service (“may apply for”, in Art 5 of the draft bill). A plain reading of the draft bill therefore suggests that there could be circumstances where an individual is a conscientious objector but nevertheless is denied the right to perform alternative service.

Second, for the purposes of deciding on an application of transfer to alternative service, the draft bill Article 13 (2) seems to allow the Alternative Service Committee to disregard the opinions of the individual himself or herself by a vote. This competence is not subject to further conditions. As previously indicated, the standard set by the Human Rights Committee is that the belief is genuinely held. Therefore, giving the Alternative Service Committee competence to disregard testimony by the individual concerned is likely to lead to results contrary to Article 18 (1) of the Covenant.

Third, the draft bill excludes individuals aged 30 years or more from alternative service (subject to the exceptions in the addendum Art. 3). Unless there are reasons in domestic law for making this distinction, for example that individuals above the age of 30 are excluded from military service altogether, an age requirement for qualifying for alternative service is likely to be contrary to Article 18 (1) of the Covenant.

Fourth, there are several concerns relating to the prohibition of reapplication in Article 6. For concerns relating to Article 6 (3) of the draft bill?, which makes reference to Article 25, see below. Article 6 (1) of the draft bill precludes individuals who have previously withdrawn their application from resubmitting an application. There might be many reasons for individuals to withdraw their application, one of which is the persistent and well-documented stigma regarding conscientious objection in the Republic of Korea.

#### *Real service to the community*

As indicated by the Human Rights Committee, the alternative service must be a real service to the community and compatible with respect for human rights. While it is not contested that service in penitentiaries, detention centers, branch offices of penitentiaries and detention centers constitutes work of real service to the community, we

express certain concerns relating to the exclusive emphasis on places of detention. In particular because many conscientious objectors might be transferred from a situation of incarceration to a situation where they perform service in prisons.

Furthermore, despite draft article 17 (2) 1 excluding activities which require the use of arms or weapons, activities which entail the use of force against other individuals is not excluded.

We note that in order to ensure that alternative service is of real service to the community and ensure the dignity of alternative service members, alternative service should take into consideration the competencies and preferences of the alternative service member.

We therefore suggest that Article 17 be amended, for example in the following way:

“(1) Alternative service members shall perform services in the public interest. These services shall not entail the use or management of weapons or the use of force, or that would otherwise be contrary to international human rights law.

(2) In the assessment of the placement of alternative service members, including the agency and post of the service member, the competencies and preferences of the alternative service member shall be taken into consideration.

(3) Agencies which may receive alternative servicemen shall be designated by Presidential Decree”

#### *Punitive elements*

There are several aspects of the draft bill that seem to entail punitive elements that would be contrary to the State obligations of the Republic of Korea under Article 18 (1) of the Covenant.

First, the bill proposes that alternative service should be 36 months, which, as far as we understand, is longer than military service. There does not seem to be any objective justification for this distinction. To be compatible with the Covenant, any unequal treatment on the basis of belief must be based on objective grounds, and be necessary and proportionate. The failure to provide such a justification is not only contrary to Article 26 of the Covenant, but also considered a punitive measure in violation of Article 18 (1) of the Covenant.

Second, we raise particular concerns with respect to Article 25 of the draft bill, which provides for cancellation of transfer to alternative service. Out of the 7 circumstances in paragraph 1 to Article 25 which determine when a transfer shall be cancelled, only one of them raises no concerns, namely the voluntary cancellation in subparagraph 7. The rest (sub-paragraphs 1 – 6) provide for cancellation of transfer

where the individual has breached the rules of procedure and/or the rules applicable, but where the individual might legitimately be a conscientious objector:

- Subparagraph 1 provides for the cancellation of transfer, where the transfer is made using unlawful means such as falsification of documents.

The fact that an individual has breached rules of procedure, including through the falsification of documents, does not necessarily exclude the individual from a legitimate claim of conscientious objection. The penalty provision in Article 27 of the draft bill, providing for a minimum of one year imprisonment, already provides a severe reaction in these circumstances.

- Subparagraph 2 provides for the cancellation of transfer where the individual “walks away from his post or fails to serve in the relevant field without justifiable grounds for a total of eight days or more”.

The fact that an individual fails to comply with the duties of service does not entail that he or she is not a conscientious objector. We remind that there are suitable alternatives to cancellation of transfer, such as disciplinary measures under administrative or labour law. The cancellation of transfer therefore seems neither to be an appropriate nor proportionate response.

- Subparagraph 3 provides that the cancellation of transfer shall happen when four or more warnings resulting in extension of service have been provided. Under Article 24 (2) of the draft bill, such a warning might be given “obstruct another persons service or instigates a third party to neglect service”, or when he “engages in any political activity”.

Article 24 (2) of the draft bill providing for a restriction on “any” political activity constitutes a restriction on the freedom of expression and the freedom of association, and potentially also on the right to political participation. It must therefore comply with the requirements of Articles 19 (3), 21 and 25 of the Covenant. That is, they must be in accordance with the law, serve a legitimate aim and be necessary and proportionate.

First, the prohibition on “any political activity” raises concerns relating the requirement of legality and seems to risk arbitrary decision-making. As previously indicated, the requirement of legality entails a duty of foreseeability of which acts might be contrary to the law. It is not clear from the draft bill to what extent it restricts the freedom of expression, of association and of political participation.

With regards to the requirement of necessity and proportionality, we reiterate the duty to implement the least restrictive measures necessary to achieve the legitimate aim. Thus, restrictions on the activities, must generally be limited to what is strictly necessary for fulfilling the functions of the public service. The present wording is so broad so as raise serious concerns relating to its proportionality.

Similar concerns relating to the foreseeability can be raised with respect to warnings in situations where an alternative service member “obstructs another person’s service or instigates a third party to neglect service”. Does this, for example, constitute an interference in the right to strike in collective labour disputes?

Lastly, for the same reasons mentioned under the other grounds for cancellation, warnings under Article 24 (2) of the draft bill have no bearing on the recognition of an individual as a conscientious objector. Therefore, a decision to cancel the transfer of such individuals is likely to be contrary to Article 18 (1) of the Covenant.

- Subparagraph 4 of Article 24 of the draft bill provides that cancellation shall be made if the individual is sentenced to imprisonment for a criminal offense.

The criminal offense in question might have no bearing on the assessment of whether the individual is a conscientious objector. Therefore, the cancellation of transfer seems rather to be an additional punishment rather than to reflect a correct decision on whether or not the individual has the right to alternative service.

- Subparagraphs 5 and 6 of Article 24 of the draft bill, leaves the Republic of Korea and when he fails to return to the country contrary to the requirements of service.

Like the comments to the previous provisions, the failure to comply with these requirements has no bearing on the decision on whether the individual is a conscientious objector or not, and should therefore be irrelevant in the determination of a cancellation of transfer.

In sum, none of the grounds mentioned are such as to call into question that the individual is a conscientious objector. The automatic cancellation of transfer in these circumstances is therefore clearly contrary to Article 18 (1) of the Covenant.

#### *No adequate reparations for past and current violations*

We raise concerns that there are no adequate remedies in the law for past and ongoing violations of Articles 18 and 19 of the Covenant. We recall the duty under Article 2 (3) of the Covenant of the State to provide effective remedies to victims of violations.

In the addenda to the draft law, Article 2 provides for the suspension of the sentence of those individuals convicted and sentenced based on violation of Article 88 of the previous Military Service Act. If qualifying for alternative military service, the period of the sentence already served shall be included in the alternative military service period. This provision fails to recognise that the conviction conscientious objectors is contrary to international human rights law. For these reasons, the draft bill should make clear that the conviction and sentencing of conscientious objectors is and has been unlawful, and it should erase all effects of the conviction.

Furthermore, equating time spent serving a criminal conviction with time remaining in alternative service further highlights the punitive nature of alternative service. Serving a criminal sentence is in no way comparable with contribution to society in the form of alternative service. We strongly urge your Excellency's Government to consider ways to accentuate the difference between the nature of criminal punishment and alternative service in Article 2 of the addendum.

Furthermore, we raise concerns at the cut-off point in Article 2 of the addendum. We note that it is already from the point that charges were brought against the conscientious objector that the acts by the government authorities would have constituted an interference with his or her right to freedom of belief. Therefore, the Government should consider taking into account the time since charges were brought against the individuals.

In addition to the points highlighted above, we highlight the separate obligations of the State to provide effective remedies to victims of human rights violations in the form of reparations, for through restitution, compensation and just satisfaction by the State. The adoption of the draft law will not preclude the duty of the State to fulfil these separate obligations, and a failure to meet these separate obligations will constitute a separate violation of the Covenant. We reiterate the recommendations adopted by the Human Rights Committee, in its concluding observations on the Republic of Korea in 2015, in which it calls upon the State "Immediately release all conscientious objectors condemned to a prison sentence for exercising their right to be exempted from military service [and] Ensure that conscientious objectors' criminal records are expunged, that they are provided with adequate compensation and that their personal information is not publicly disclosed", see CCPR/C/KOR/CO/4 para. 45.

Lastly, the State is under a general obligation under Article 2 (1) of the Covenant to take all measures necessary to implement their human rights obligations without distinction. The State "must adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations [...] it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large", see CCPR/C/21/Rev.1/Add. 13 para. 7. Therefore, the State should take active steps to combat the negative stigma that is associated with conscientious objection in the country.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide information any additional information that may be relevant.
2. Please provide information on what measures are being taken by the parliament to ensure that the draft bill will be compatible with the obligations of the Republic of Korea under international human rights law.

3. Please provide information as to measures taken, beyond the adoption of an alternative service bill, to ensure effective remedies to conscientious objectors that have been subject to criminal prosecution.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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