Human Rights Law Review, 2019, 19, 787–810
doi: 10.1093/hrlr/ngz031
Advance Access Publication Date: 21 January 2020
Short Articles & Recent Development

The Right to Conscientious Objection to Military Service: Recent Jurisprudence of the United Nations Working Group on Arbitrary Detention

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KEYWORDS: conscientious objection to military service, arbitrary detention, freedom of thought, conscience and religion, Article 18 International Covenant on Civil and Political Rights, United Nations Working Group on Arbitrary Detention, Republic of Korea

1. INTRODUCTION

The criminalisation of conscientious objection to military service has a long history and has been a common practice, particularly in countries that are experiencing conflict or those that perceive that conflict may occur in future. Until recently, the Republic of Korea has been among the countries that imprison conscientious objectors, arguing that longstanding tension on the Korean Peninsula necessitates the imposition of compulsory military service to safeguard national security. Since the end of the Korean War in 1953, the Republic of Korea has imprisoned conscientious objectors to military service at an alarmingly high rate, with over 19,300 young men sentenced to a combined total of more than 36,700 years in prison.[1] Most of these conscientious objectors are Jehovah's Witnesses and were conscripted in their early twenties. They reportedly face economic and social disadvantages lasting beyond their typical 18-month sentence,

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1 Amnesty International, *The Right to Conscientious Objection to Military Service: Opinion submitted to the Supreme Court of Korea*, 20 July 2018, at 11; Jehovah's Witnesses, 'Historic Korean Constitutional Court Decision: Absence of Alternative Service Declared Unconstitutional', 28 June 2018, available at: www.jw.org [last accessed 23 September 2019].

including limited career prospects due to their criminal record, difficulties in marrying and being ostracised from family and community members.[2]

Against this background, two complaints were filed in January and April 2018 with the United Nations (UN) Working Group on Arbitrary Detention ('Working Group') on behalf of two Jehovah's Witnesses who had each been sentenced to 18 months' imprisonment for refusing to enlist for military service due to their religious beliefs. The Working Group was asked to determine whether both men had been subjected to arbitrary detention and, if so, to seek their immediate release, an enforceable right to compensation and expunging of their criminal records. The Working Group adopted Opinion No 40/2018 in August 2018, finding that the detention of conscientious objectors to military service violated Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR)[3] and that the two men had been arbitrarily deprived of their liberty.[4] The Working Group's Opinion was submitted to the Supreme Court of Korea during a public hearing on conscientious objection on 30 August 2018 by lawyers acting for another Jehovah's Witness who had been sentenced to imprisonment. Following the hearing, the Supreme Court delivered a landmark judgment on 1 November 2018, ruling that conscientious objection is a justifiable ground for failing to enlist or comply with a call-up for military service.[5]

This article examines the Working Group's jurisprudence on the right to conscientious objection to military service, with a focus on Opinion No 40/2018. Section 2 commences with an overview of the factual and legal background to the Opinion, including the circumstances that resulted in the allegations of arbitrary deprivation of liberty being brought before the Working Group. Section 3 places the Opinion in context by briefly considering the Working Group's mandate and procedures, followed by an analysis of its previous jurisprudence concerning conscientious objectors. The discussion traces the evolution of the Working Group's views, demonstrating that those views have advanced from an initially limited recognition of the right to conscientious objection to military service to a more progressive approach that regards the deprivation of liberty of conscientious objectors as a violation *per se* of Article 18(1) of the ICCPR. Section 4 considers the impact of Opinion No 40/2018, particularly its use in domestic legal proceedings before the Supreme Court of Korea, noting the role that the Opinion played in contributing to change in the Republic of Korea. The potential effect of the Opinion on the Working Group's broader jurisprudence and practice is also explored. Finally, section 5 reviews the status of the right to conscientious objection to military service, with reference to developments in the Republic of Korea since Opinion No 40/2018 was adopted. While significant progress has been made in decriminalising conscientious objection to military service, this section identifies remaining issues that need to be addressed to ensure that conscientious objectors can effectively exercise their right to freedom of thought, conscience and religion.

2 Special Rapporteur on freedom of religion or belief, Allegation letter KOR 4/2015, 11 December 2015, at 1, available at: spcommreports.ohchr.org [last accessed 23 September 2019].

3 1966, 999 UNTS 171.

4 Working Group on Arbitrary Detention, Opinion No 40/2018 concerning *Jeong-in Shin and Seung-hyeon Baek* (Republic of Korea), 20 August 2018, A/HRC/WGAD/2018/40.

5 Supreme Court of Korea Decision 2016Do10912, 1 November 2018 (*en banc*). A summary of the Supreme Court's main findings is available at: eng.scourt.go.kr [last accessed 23 September 2019].

2. FACTUAL AND LEGAL BACKGROUND

Opinion No 40/2018 involved two Korean citizens: Jeong-in Shin and Seung-hyeon Baek, who were 23 and 21 years of age respectively and were both Jehovah's Witnesses. Both men were indicted for evading military service by refusing to enlist. Both men had no previous criminal record. Given the similarity of the two cases, the Working Group decided to review them together, even though they had been the subject of separate submissions.

At first instance, the trial judge acknowledged that Mr Shin had been a devout Jehovah's Witness since he was very young, and noted that he was willing to perform alternative service. The trial judge concluded that Mr Shin's situation fell within the freedom of conscience guaranteed by Article 19 of the Korean Constitution and found him not guilty.[6] Mr Shin's acquittal was, however, short-lived, as it was overturned eight months later by the Incheon District Court following an appeal by the prosecutor. The Incheon District Court ruled that the limitation of Mr Shin's freedom of conscience was justified by Article 37(2) of the Korean Constitution,[7] which permits the restriction of freedoms and rights when necessary for national security, the maintenance of law and order or for public welfare. Moreover, the Court considered that the absence of alternative service did not amount to a violation of Article 18 of the ICCPR. Mr Shin was sentenced to 18 months' imprisonment.[8] The Supreme Court of Korea upheld the decision of the Incheon District Court on 15 June 2017.[9]

Mr Baek was found guilty at first instance and sentenced to 18 months' imprisonment.[10] The trial judge found that, while the former UN Commission on Human Rights and the Human Rights Committee had recognised the right to conscientious objection to military service based on Article 18 of the ICCPR, their findings are not directly binding in the Republic of Korea. In addition, the trial judge considered that there was no customary international law protecting the right to conscientious objection to military service. As a result, the Court did not accept Mr Baek's claim that a right to refuse to perform military service for reasons of conscience should be recognised under the Korean Constitution and the ICCPR.[11] Mr Baek's appeal against this decision in the Korean courts was pending when his case was submitted to the Working Group.

Mr Shin and Mr Baek were both detained under the Military Service Act (MSA).[12] According to Article 3(1) of the MSA, only men are required to complete mandatory military service, but women can voluntarily undertake active or reserve service. In practice, able-bodied Korean men between the ages of 18 and 35 years must perform military service, spending between 21 and 23 months in active service.[13] Article 5(1)

6 Judgment of the Bucheon Branch of Incheon District Court, 2016Godan78, 9 June 2016.

7 Constitution of the Republic of Korea 1948 (as amended).

8 Judgment of the Incheon District Court, 2016No2174, 3 February 2017.

9 Judgment of the Supreme Court Petty Bench 2, 2017Do3125, 15 June 2017. Mr Shin was later released on parole.

10 Judgment of the Yeoju Branch of Suwon District Court, 2018Godan118, 4 April 2018. Mr Baek was later released on bail.

11 Opinion No 40/2018, supra n 4 at para 12.

12 Byeongyeokbeob [Military Service Act], Act No 41 of 6 August 1949, as amended by Act No 14611 of 21 March 2017, available at: elaw.klri.re.kr [last accessed 25 August 2019].

13 Opinion No 40/2018, supra n 4 at para 32. See also Article 18 MSA, which provides for the length of active duty service for different branches of the military. Cabinet has reportedly approved the reduction of the

of the MSA sets out the categories of military service, including active duty and reserve service, but does not provide for alternative civilian service for conscientious objectors. Article 88(1) of the MSA establishes a criminal offence for failing to enlist or to comply with a call for active duty without justifiable grounds. The courts in Mr Shin and Mr Baek's cases determined that their objection to enlistment based on religious conscience did not constitute a 'justifiable ground' for refusing service under this provision. Article 88(1) provides:

> Any person who has received a notice of enlistment for active duty service or a notice of call (including a notice of enlistment through recruitment) and fails to enlist in the military or to comply with the call, even after the expiration of the following report period from the date of enlistment or call *without justifiable grounds*, shall be punished by imprisonment with labor for not more than three years . . . .[14]

Although the maximum sentence for evading military service is up to three years' imprisonment, the practice of the courts in the Republic of Korea was to sentence conscientious objectors to 18 months' imprisonment. This was the minimum period of imprisonment required to prevent conscientious objectors from receiving a further notice of enlistment.[15] In recent years, however, judges in the lower courts were increasingly acquitting conscientious objectors, citing international human rights law and standards.[16] As of 29 June 2018, 86 verdicts of acquittal had been handed down by the courts,[17] including the initial acquittal of Mr. Shin referred to earlier. There was also an increase in the number of cases held pending by the lower courts ahead of the anticipated Supreme Court of Korea ruling on conscientious objection, with 966 cases awaiting judgment at courts of all levels.[18] This suggests a growing unease among the Korean judiciary in imposing criminal penalties upon individuals who were acting on their beliefs, making it an ideal time for changes in the law.

The turning point came in June 2018 while Mr Shin and Mr Baek's case was still under consideration by the Working Group. On 28 June 2018, the Constitutional Court of Korea ruled by a 6:3 majority that Article 5(1) of the MSA violates the freedom of conscience found in Article 19 of the Korean Constitution because it does not provide for alternative service for conscientious objectors.[19] The Constitutional Court also

mandatory service period by three months by 2021, which is expected to reduce the service period for the Army and Marine Corps to 18 months: see 'Cabinet approves proposal to shorten military service period', *The Korea Times*, 4 September 2018, available at: www.koreatimes.co.kr [last accessed 23 September 2019].

14 Article 88(1) MSA (emphasis added). This provision specifies a reporting period of three days from the notice of enlistment or call for duty.

15 Opinion No 40/2018, supra n 4 at para 32. See also Article 136(1)(2)(a) Byeongyeokbeob sihaengryeong [Enforcement Decree of the MSA], Presidential Decree No 281 of 1 February 1950, as amended by Presidential Decree No 28340 of 22 September 2017, available at: elaw.klri.re.kr [last accessed 23 September 2019].

16 Amnesty International, supra n 1 at 11. See Kim, 'Sharp rise in not guilty verdicts for conscientious objectors', *Hankyoreh*, 15 January 2018, available at: english.hani.co.kr [last accessed 23 September 2019].

17 Amnesty International, supra n 1 at 11. This refers to the number of acquittals handed down by the courts since 2004.

18 Ibid. at 12. The number of pending cases was current as of July 2018.

19 Decision of the Constitutional Court, No 2011 Hun-Ba 379, 28 June 2018. The relationship between the Constitutional and Supreme Courts of Korea is complex. The Constitutional Court has power to strike

decided that Article 88(1) of the MSA did not violate the Korean Constitution, and must be maintained to punish military service evaders, not conscientious objectors. The Court ordered the Government to introduce alternative civilian service by 31 December 2019. Since the decision, attempts have been made to comply with the Court's ruling, with a government bill on alternative service submitted to the National Assembly on 25 April 2019.[20] This development was followed by the Supreme Court's historic ruling in November 2018, discussed further below.

3. THE WORKING GROUP'S OPINION NO 40/2018

While the Working Group is well-known to civil society organisations and governments that interact regularly with the UN Special Procedures, the Working Group's opinions and, in particular, the framework that it employs to assess whether deprivation of liberty is arbitrary, may be less familiar to the broader human rights community. This is changing as the Working Group continues to receive high profile complaints of arbitrary deprivation of liberty from around the world that attract media coverage, public attention and scholarly review.[21] Nevertheless, it is important to place Opinion No 40/2018 in context by briefly reviewing the Working Group's mandate[22] and the five categories of arbitrary deprivation of liberty set out in its Methods of Work. The commentary then focuses on the Working Group's previous jurisprudence on conscientious objection to military service before turning to the findings made in Mr Shin and Mr Baek's case.

A. Mandate and Methods of Work

On 5 March 1991, the former UN Commission on Human Rights decided to create, for a three-year period.

> a working group composed of five independent experts, with the task of investigating cases of detention imposed arbitrarily or otherwise inconsistently with the

down unconstitutional legislation. Under Article 111 of the Korean Constitution, the Constitutional Court has jurisdiction over issues such as impeachment, dissolution of political parties and disputes between State agencies. The Supreme Court is the highest court in civil, criminal, family, administrative and military cases. Under Article 107(2) of the Constitution, the Supreme Court has power to review the constitutionality or legality of administrative decrees, regulations or actions, when this is at issue in a trial.

20 Amnesty International, *South Korea marks International Conscientious Objection Day with Alternative Service Plan that falls short*, AI ASA 25/0352/2019, 15 May 2019. Three legislative proposals to introduce alternative civilian service had previously been made in 2016 and 2017, but did not progress further: see Amnesty International, supra n 1 at 12.

21 The Working Group has adopted opinions concerning Liu Xiaobo (Opinion No 15/2011, China), Anwar Ibrahim (Opinion No 22/2015, Malaysia), Gloria Macapagal-Arroyo (Opinion No 24/2015, Philippines), Mohamed Nasheed (Opinion No 33/2015, Maldives), Julian Assange (Opinion No 54/2015, Sweden, United Kingdom), Kem Sokha (Opinion No 9/2018, Cambodia) and Jordi Cuixart I Navarro et al. (Opinion Nos 6 and 12/2019, Spain). The Working Group's opinions can be found at: www.ohchr.org/EN/Issues/Detention/Pages/OpinionsadoptedbytheWGAD.aspx [last accessed 23 September 2019]. For an example of the discussion of a high profile opinion, see Happold, 'Julian Assange and the UN Working Group on Arbitrary Detention', *EJIL: Talk!,* Blog of the European Journal of International Law, 5 February 2016, available at: www.ejiltalk.org [last accessed 23 September 2019].

22 This article focuses on the Working Group's mandate to investigate individual complaints. The Human Rights Council has also entrusted the Working Group with other functions, such as issuing urgent actions, undertaking country visits and developing deliberations on thematic issues: see HRC Res 42/22, 26 September 2019, A/HRC/RES/42/22, at paras 4, 7–8.

> relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.[23]

In discharging this mandate, the Working Group accepts complaints from the alleged victims of arbitrary deprivation of liberty, their families or representatives, governments, intergovernmental and non-governmental organisations, as well as national human rights institutions (NHRIs).[24] Importantly, the Working Group's mandate is not limited by a requirement that domestic remedies be exhausted before it can accept a complaint.[25] This means that submitting a complaint to the Working Group is a relatively quick avenue of redress compared to other human rights mechanisms, such as the UN treaty bodies, which generally require the exhaustion of domestic remedies.[26] It also means that the victim of arbitrary deprivation of liberty may, in some cases, have an opinion from the Working Group before his or her matter is subject to final judgment in the domestic courts.[27] This was critically important to Opinion No 40/2018, as the Working Group was able to adopt the Opinion on 20 August 2018 despite the fact that Mr Baek's appeal had not yet been heard. This in turn allowed the Working Group to make the Opinion available for submission to the Supreme Court of Korea during its hearing on 30 August 2018, just 10 days after the Opinion was adopted.

Another important feature of the Working Group's mandate to investigate individual complaints is that it derives from resolutions of the former UN Commission on Human Rights, and currently, the Human Rights Council.[28] The mandate is renewed through a Human Rights Council resolution every three years, with the next renewal due in September 2022. Since the Working Group is one of the Human Rights Council's Special Procedures and not a treaty-based mechanism, it does not depend on a State recognising its competence to consider complaints of arbitrary deprivation of liberty.[29] The Working Group can also consider complaints from individuals anywhere in the world and involving any UN Member State or non-Member Observer State,[30] even if the State is not party to any particular treaty, such as the ICCPR.[31]

23 UNCHR Res 1991/42, Question of Arbitrary Detention, 5 March 1991, E/CN.4/RES/1991/42 at para 2.

24 Methods of work of the Working Group on Arbitrary Detention, 13 July 2017, A/HRC/36/38 at para 12.

25 Working Group on Arbitrary Detention, 'Deliberation No. 2 on admissibility of the communications, national legislation, and documents of a declaratory nature' in Commission on Human Rights, Report of the Working Group on Arbitrary Detention, 12 January 1993, E/CN.4/1993/24 at 10, paras 3–8. See also Working Group on Arbitrary Detention, Opinion No 78/2018 concerning *Hamza Yaman* (Turkey), 21 November 2018, A/HRC/WGAD/2018/78 at para 65.

26 See, for example, Article 5(2)(b) of the Optional Protocol to the ICCPR 1966, 999 UNTS 302.

27 For recent examples, see Human Rights Council, Report of the Working Group on Arbitrary Detention, 16 July 2019, A/HRC/42/39 at paras 71–76 (discussing the use of the Working Group's opinions in domestic proceedings).

28 HRC Res 42/22, supra n 22.

29 See Working Group on Arbitrary Detention, Revised Fact Sheet No 26, 8 February 2019, at 4.

30 The Working Group had previously adopted opinions in relation to the Palestinian Authority, most recently in Working Group on Arbitrary Detention, Opinion No 9/2011 concerning *Mohammad Ahmad Mahmoud Soukyeh* et al. (Palestinian Authority), 3 May 2011, A/HRC/WGAD/2011/9.

31 It has been argued that the legal basis for the Working Group's ability to receive individual complaints is the obligation of UN Member States to cooperate with the UN under Article 56 of the UN Charter: see Rudolf, 'The Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights' (2000) 4 *Max Planck Yearbook of United Nations Law* 289 at 314. If the State is not a party to the ICCPR, the

In Mr Shin and Mr Baek's case, the Working Group considered the Republic of Korea's obligations under the Universal Declaration of Human Rights (UDHR) and the ICCPR, without requiring any specific recognition by the State of its ability to do so. In any event, the Republic of Korea cooperated with the Working Group through timely submissions and providing updates on the outcome of domestic court proceedings.[32]

Once the Working Group determines that the complaint falls within its mandate (that is, there is a *prima facie* case of arbitrary deprivation of liberty), it transmits the allegations to the relevant State as part of an adversarial process that allows both the source of the information (known as the 'source') and the State to fully argue their respective positions.[33] If the State responds to the Working Group,[34] that response is sent to the source for final comments. This procedure was followed in Mr Shin and Mr Baek's case, which involved thorough submissions from both the source and the Republic of Korea.

When considering the merits of each case, the Working Group considers two questions: first, whether there is, or has been,[35] a deprivation of liberty, and second, whether that deprivation of liberty is arbitrary. In answering the first question, the Working Group interprets its mandate broadly to include all forms of deprivation of liberty, provided that the individual is not, as a matter of fact, able to leave the place of detention.[36] This is not always easy to determine, particularly with the expansion of holding centres, transit zones, camps and other facilities used to keep people in custody for criminal, administrative and immigration-related purposes. In Mr Shin and Mr Baek's case, this was not in dispute, as both men were incarcerated in prison following their criminal convictions.[37]

Answering the second question requires a more nuanced analysis. Neither the UDHR nor the ICCPR provide a definitive explanation of what amounts to arbitrary deprivation of liberty, with Article 9 of both instruments simply stating that no one shall be subjected to arbitrary arrest or detention. The Working Group developed its own criteria for determining whether deprivation of liberty is arbitrary, drawing upon the rights and freedoms found in the UDHR and ICCPR and other instruments, such as the Body of Principles for the Protection of All Persons under Any Form of Detention or

Working Group applies the Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948, 217 A (III).

32 See Opinion No 40/2018, supra n 4 at paras 21, 34. See also section 4 below.

33 Methods of work, supra n 24 at paras 15–16. See also Weissbrodt and Mitchell, 'The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence' (2016) 38 *Human Rights Quarterly* 655 at 667–8 (outlining the Working Group's procedures in investigating complaints of arbitrary deprivation of liberty).

34 In 2017, States provided a timely response to the Working Group's communications in approximately 60 per cent of the cases in which the Working Group adopted an opinion: see Human Rights Council, Report of the Working Group on Arbitrary Detention, 2 July 2018, A/HRC/39/45 at para 70.

35 The Working Group has the discretion to adopt opinions even if the alleged victim of arbitrary deprivation of liberty has been released from custody at the time of its consideration of the case: see Methods of Work, supra n 24 at para 17(a).

36 Human Rights Council, Report of the Working Group on Arbitrary Detention, 19 July 2017, A/HRC/36/37 at paras 50–56.

37 Opinion No 40/2018, supra n 4 at paras 10, 14.

Imprisonment.[38] That is, the Working Group regards deprivation of liberty as arbitrary if a case falls into one or more of the following five categories:

(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 and 18–21 of the UDHR and, insofar as States parties are concerned, by Articles 12, 18–19, 21–22 and 25–27 of the ICCPR ('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 UDHR 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').[39]

The Working Group considers all of the available information on each case at its three sessions held in Geneva every year, and adopts an opinion. The outcome of each opinion is notified to the Human Rights Council in the Working Group's annual report. In Opinion No 40/2018, the Working Group concluded that the deprivation of liberty of both Mr Shin and Mr Baek was arbitrary according to Categories I, II and V.[40] In doing so, the Working Group considered that it was an appropriate time to review its previous jurisprudence on conscientious objection to military service, taking into account the views of other UN human rights mechanisms, as well as the 'growing consensus regarding the harm to society involved in obliging individuals to take up arms despite their convictions.[41]

B. Previous Jurisprudence

The right to conscientious objection to military service is based on Article 18 of the ICCPR, which guarantees the right to freedom of thought, conscience and religion. According to Article 18(1), this right includes freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice

38 GA Res 43/173, 9 December 1988, A/RES/43/173. See also Revised Fact Sheet No 26, supra n 29 at 5–6.
39 Methods of Work, supra n 24 at para 8.
40 Opinion No 40/2018, supra n 4 at para 51.
41 Ibid. at para 43(b).

and teaching.[42] While this provision does not explicitly refer to a right to conscientious objection to military service, the Human Rights Committee has stated that 'such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief'.[43]

Prior to adopting Opinion No 40/2018, the Working Group had considered complaints involving the arrest and detention of conscientious objectors to military service on five occasions. The first of these was a case brought against Turkey in 1998 involving a conscientious objector who had been repeatedly imprisoned for refusing to perform military service and had been held in continuous detention for three years.[44] At the time, Turkey was not party to the ICCPR, but the source claimed that the detention violated the right to freedom of thought, conscience and religion enshrined in Article 18 of the UDHR.[45] The Working Group did not discuss the source's argument that Article 18 of the UDHR had been violated, finding instead that the conscientious objector's initial detention was not arbitrary.[46] However, his subsequent convictions and deprivation of liberty for the same matter violated the principle of *non bis in idem* under Article 10 of the UDHR and was arbitrary under Category III.[47]

In 2003, the Working Group considered the detention of four conscientious objectors in Israel.[48] Interestingly, the case involved selective conscientious objection as the four individuals refused to perform military service because of an objection to the occupation of the Palestinian Territories, rather than to armed conflict in general.[49] The case also demonstrates that conscientious objection can be based on ethical considerations and not just religious views. The source argued that the detention was arbitrary because it punished the exercise of the freedom of conscience.[50] Again, the Working Group did not uphold this argument, noting that international law is evolving toward recognition of the right to refuse military service on the grounds of religious belief or conscience, but that 'at the present time it cannot be said that this evolution has reached a stage where the rejection by a State of the right to conscientious objection is incompatible

42 Article 18(1) ICCPR.

43 Human Rights Committee, General Comment No 22 (48) (Article 18), 20 July 1993, at para 11.

44 Opinion No 36/1999 concerning *Osman Murat Ülke* (Turkey), 2 December 1999, in Commission on Human Rights, Opinions adopted by the Working Group on Arbitrary Detention, 9 November 2000, E/CN.4/2001/14/Add.1 at 53. The Working Group had very briefly considered the detention of a conscientious objector as not arbitrary in Decision No 34/1993 concerning Dimitrios Tsironis (Greece), 29 September 1993, although it did not elaborate on its reasons.

45 Ibid. at 54, para 6.

46 Ibid. at 55, para 10.

47 Ibid. at 54–5, paras 8–11. Turkey challenged this finding, but the Working Group upheld its Opinion: see Commission on Human Rights, Report of the Working Group on Arbitrary Detention, 20 December 2000, E/CN.4/2001/14 at para 48.

48 Opinion No 24/2003 concerning *Matan Kaminer et al.* (Israel), 28 November 2003, in Commission on Human Rights, Opinions adopted by the Working Group on Arbitrary Detention, 19 November 2004, E/CN.4/2005/6/Add.1 at 18.

49 Ibid. at 20, para 18. See also GA Res 33/165, 20 December 1978, A/RES/33/165 at paras 1–2 (affirming the right to selective conscientious objection in relation to military forces used to enforce *apartheid*).

50 Opinion No 24/2003, supra n 48 at 21, para 26.

with international law'.[51] The Working Group went on to find that the second and subsequent deprivations of liberty of the four individuals were arbitrary under Category III for having violated the *non bis in idem* principle in Article 14(7) of the ICCPR, and that repeated penalties are tantamount to compelling a person to change his or her beliefs.[52]

In 2008, the Working Group adopted two opinions in relation to conscientious objectors in Colombia and Turkey respectively. In these cases, the Working Group took a different approach, concluding that the deprivation of liberty of conscientious objectors to military service could amount to a violation of Article 18 of the ICCPR. However, the Working Group viewed conscientious objection to military service as a manifestation of one's religion or belief that could be subject to limitation under Article 18(3). In the Colombian case, the Working Group found that the deprivation of liberty of two conscientious objectors who had been forcibly recruited into the military violated Article 18 of the ICCPR.[53] The Working Group pointed out that the deprivation of liberty had no legal basis because the relevant legislation only allowed for fines to be imposed for failure to enlist, not arrest and detention, and it was arbitrary under Category I.[54] In the Turkish case, the Working Group found that Turkey did not put forward any justification for the absence of alternative service and for the necessity of criminal prosecution of a conscientious objector that might have supported a limitation on the freedom to manifest his religion or belief under Article 18(3) of the ICCPR.[55] The deprivation of liberty was therefore arbitrary under Category II as it resulted from the exercise of the right to freedom of thought, conscience and religion, and also under Category III, given the potential repeated punishment of the conscientious objector contrary to the principle of *non bis in idem*.[56]

51 Ibid. at 21, para 27. The Working Group explained in Opinion No 16/2008 that this statement related to the assessment under Article 18(3) of the ICCPR as to whether the freedom to manifest a religion or belief could be restricted: see Opinion No 16/2008 concerning *Halil Savda* (Turkey), 9 May 2008, in Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention, 4 February 2009, A/HRC/10/21/Add.1, 139 at 144–5, para 36.

52 Opinion No 24/2003, supra n 48 at 22, paras 30–31. See also Commission on Human Rights, Report of the Working Group on Arbitrary Detention, 20 December 2000, E/CN.4/2001/14 at paras 91–94 (stating that repeated incarceration of conscientious objectors is directed toward changing their beliefs, which is incompatible with Article 18(2) of the ICCPR); Human Rights Committee, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, at para 55 (citing the Working Group's Opinion Nos 36/1999 and 24/2003).

53 Opinion No 8/2008 concerning *Frank Yair Estrada Marin et al.* (Colombia), 8 May 2008, in Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention, 4 February 2009, A/HRC/10/21/Add.1 at 110, 113.

54 Ibid. at 113–14, paras 22–24.

55 Opinion No 16/2008, supra n 51 at 145, para 38. See also European Court of Human Rights, *Bayatyan v Armenia* Application No 23459/03, Merits and Just Satisfaction, 7 July 2011, at para 65 (noting the change in the Working Group's approach to conscientious objection in Opinion No 16/2008); Human Rights Committee, *Young-kwan Kim et al. v Republic of Korea* (2179/2012), Views, CCPR/C/112/D/2179/2012 at paras 3.2, 7.5 (citing the Working Group's Opinion Nos 36/1999, 24/2003 and 16/2008 in finding that the deprivation of liberty of conscientious objectors was arbitrary under Article 9(1) of the ICCPR).

56 Opinion No 16/2008, ibid. at 147, para 44. As discussed in section 2, Mr Shin and Mr Baek were sentenced to 18 months' imprisonment, which exempted them from future military service. The *non bis in idem* principle did not apply.

Finally, in 2017, the Working Group considered the case of a Jehovah's Witness who had been placed in detention without trial at a military training camp in Tajikistan for refusing to perform military service.[57] The source argued that there was no legal basis for the deprivation of liberty as the relevant law permitted a person to substitute compulsory military service with alternative civilian service, but did not authorise the detention of a person for refusing military service.[58] The Working Group found that the deprivation of liberty resulted from the exercise of religious expression and was arbitrary under Category II,[59] without elaborating on the distinction between having or adopting a religion and manifesting a religion under Article 18 of the ICCPR. It also found violations of Categories I, III and V.[60] The Category V finding referred to the Jehovah's Witness having been a victim of discrimination based on his religion, in violation of Article 26 of the ICCPR.[61]

The Working Group's jurisprudence has evolved from a limited recognition of the right to conscientious objection to military service to a more contemporary view that the detention of conscientious objectors is a violation of Article 18 of the ICCPR. The remaining step was to determine whether it is still appropriate for a State to impose limitations on the exercise of the freedom of conscience. That question was directly raised in the submissions in Mr Shin and Mr Baek's case.

C. Findings of the Working Group

In its submissions, the source argued that the ICCPR must be interpreted as a living instrument that reflects the progress of international human rights law, including the evolution of the right to conscientious objection to military service.[62] That right has been recognised by the Commission on Human Rights and the Human Rights Committee, and recent jurisprudence of the Committee has found that the right to conscientious objection is inherent in Article 18(1) of the ICCPR and not a mere manifestation of religion.[63] If the restriction of the right to conscientious objection due to national security concerns is a legitimate act, as the State submits, the purpose of Article 18(1) would be defeated. In addition, Article 18(3) of the ICCPR should be strictly interpreted to prevent infringement of the rights protected in Article 18. Given

57 Working Group on Arbitrary Detention, Opinion No 43/2017 concerning *Daniil Islamov* (Tajikistan), 21 August 2017, A/HRC/WGAD/2017/43.

58 Ibid. at paras 17–19.

59 Ibid. at para 34.

60 Ibid. at paras 34–36.

61 The Working Group added Category V to its Methods of Work in 2010. In Opinion No 43/2017, the Working Group found for the first time that the detention of a conscientious objector was arbitrary under Category V: see Toomey, 'Detention on Discriminatory Grounds: An Analysis of the Jurisprudence of the United Nations Working Group on Arbitrary Detention' (2018) 50 *Columbia Human Rights Law Review* 185 at 197 (discussing the Category V jurisprudence).

62 The source's submissions are outlined in Opinion No 40/2018, supra n 4 at paras 17–19, 35–40.

63 See, for example, the majority view of the Committee in *Min-Kyu Jeong et al. v Republic of Korea* (1642–1741/2007), Views, CCPR/C/101/D/1642–1741/2007 at paras 7.2–7.4; *Cenk Atasoy and Arda Sarkut v Turkey* (1853/2008 and 1854/2008), Views, CCPR/C/104/D/1853–1854/2008 at paras 10.2–10.5. See also *Young-kwan Kim et al. v Republic of* Korea, supra n 55 at paras 7.3–7.5 (concluding that the deprivation of liberty of conscientious objectors was arbitrary under Article 9(1) of the ICCPR).

that national security is not included as a permissible limitation in Article 18(3), it cannot be a basis to limit the freedom of conscience.[64]

The Republic of Korea submitted that conscientious objection to military service constitutes an act of explicitly manifesting one's religion or belief and, as a result, the exercise of that right must be subject to the limitations prescribed in Article 18(3) of the ICCPR.[65] Mr Shin and Mr Baek were sentenced to imprisonment based on Article 39 of the Korean Constitution, which provides that all citizens shall have the duty of national defence. Their detention was necessary to protect public safety and the fundamental rights and freedoms of others in light of the unique security situation on the Korean Peninsula. Furthermore, if one compares the length of service of active duty soldiers and the length of imprisonment, a sentence of 18 months' imprisonment for conscientious objectors does not violate the principle of proportionality. The Republic of Korea also argued that interpreting conscientious objection as an absolute right may result in a *de facto* invalidation of Article 18(3).

Having carefully considered these submissions, the Working Group recalled that, in its earlier jurisprudence, it regarded conscientious objection to military service as a manifestation of one's religion or beliefs, which could be subject to limitations under Article 18(3) of the ICCPR that are prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[66] However, the Working Group stated that a more progressive approach that expands the scope of human rights, and reflects a growing consensus regarding the harm to society involved in obliging individuals to take up arms and to take part in a military process involving training in the use of force despite their convictions, is now warranted.

Taking into account the jurisprudence of the Human Rights Committee, and previous resolutions of the Commission on Human Rights and the Human Rights Council, the Working Group found that the detention of a conscientious objector is a violation *per se* of Article 18(1) of the ICCPR.[67] That is, the right to conscientious objection to military service is part of the absolutely protected right to have or adopt a religion or belief under Article 18(1), which cannot be restricted by States. Accordingly, there was no legal basis for Mr Shin and Mr Baek's deprivation of liberty, which was arbitrary according to Article 9 of the ICCPR and under Category I. Moreover, their deprivation of liberty resulted from the exercise of the right to freedom of thought, conscience and religion under Article 18 of the ICCPR and Article 18 of the UDHR, and therefore fell within Category II. The deprivation of liberty also amounted to discrimination on the basis of a genuinely held religious belief under Category V, in violation of Articles 2(1) and 26 of the ICCPR.[68]

In reaching this conclusion, the Working Group was persuaded by the argument of the Human Rights Committee that there can be no possible justification under Article 18(3) of the ICCPR for forcing a person to perform military service and to potentially

64 Human Rights Committee, General Comment No 22, supra n 43 at para 8.

65 The Government's submissions are outlined in Opinion No 40/2018, supra n 4 at paras 21–34.

66 See, for example, Opinion No 16/2008, supra n 51 at 145, para 36. See above at section 3B.

67 Opinion No 40/2018, supra n 4 at para 44. The Opinion was adopted by a four-member consensus. The fifth member is a national of the Republic of Korea who recused himself, as required under the Methods of Work, supra n 24 at para 5.

68 Opinion No 40/2018, supra n 4 at paras 47, 51.

take another person's life, as to do so would completely undermine the right to freedom of thought, conscience and religion found in Article 18.[69] As a former member of the Human Rights Committee eloquently stated:

> It follows that, in accordance with the contemporary interpretation of the Covenant, there can no longer be any restriction or possible justification to enable a State to compel a person to perform military service. The Committee has provided ample explanation for its new approach, which is legally robust, and reflects the evolution of the right to freedom of thought, conscience and religion. . . . Were we to continue to apply the former interpretation—which enjoys the support of the minority—a State would be able to find reasons for compelling a person, against his or her will, to use weapons; to become involved in armed conflict; to run the risk of dying and, what is even worse, of killing, without such act(s) constituting a violation of the Covenant.[70]

The Working Group considered that this interpretation would not result in *de facto* invalidation of Article 18(3), as 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).[71]

Additionally, the Working Group urged the Republic of Korea to adopt appropriate measures as a matter of urgency to exempt conscientious objectors from military service or to provide a non-punitive alternative, as recommended during the State's most recent Universal Periodic Review (UPR).[72] The Working Group recalled that a civilian alternative to military service must be outside the military sphere and not under military command. The Working Group also reiterated that alternative service must not be punitive, it must be a real service to the community, and it must be compatible with respect for human rights.[73]

The Working Group subsequently upheld these findings in Opinion No 69/2018, which was adopted on 20 November 2018.[74] The approach taken by the Working Group in Opinion No 40/2018 to the right to conscientious objection to military service is now settled jurisprudence.[75]

69 Human Rights Committee, *Atasoy and Sarkut v Turkey*, supra n 63 (individual concurring opinion of Fabían Omar Salvioli, at paras 16–18). It would also be contrary to Article 4(2) of the ICCPR, which provides that Article 18 is non-derogable.

70 Human Rights Committee, *Jong-nam Kim et al. v Republic of Korea* (1786/2008), Views, CCPR/C/106/D/1786/2008 (individual concurring opinion of Fabían Omar Salvioli at paras 6–7). The Committee has now achieved consensus on this issue. See *Danatar Durdyyev v Turkmenistan* (2268/2013), Views, CCPR/C/124/D/2268/2013, 17 October 2018; *Arslan Dawletow v Turkmenistan* (2316/2013), Views, CCPR/C/125/D/2316/2013, 29 March 2019.

71 Opinion No 40/2018, supra n 4 at para 44.

72 Ibid. at para 46. See also Human Rights Council, Report of the Working Group on the Universal Periodic Review of the Republic of Korea, 27 December 2017, A/HRC/37/11 at paras 132.94–132.106.

73 Human Rights Committee, *Min-Kyu Jeong et al. v Republic of Korea*, supra n 63 at para 7.3.

74 Working Group on Arbitrary Detention, Opinion No 69/2018 concerning *Jeong-ro Kim* (Republic of Korea), 20 November 2018, A/HRC/WGAD/2018/69 at paras 19–22.

75 The principles that the Working Group applies in cases involving conscientious objectors to military service are found in Human Rights Council, Report of the Working Group on Arbitrary Detention, 16 July 2019, A/HRC/42/39 at paras 59–64.

4. IMPACT OF THE OPINION

It is often not clear what, if any, changes take place as a result of the work of human rights mechanisms. In order to better understand the impact of its work, the Working Group introduced a follow-up procedure in the concluding paragraphs of its opinions from August 2016.[76] The follow-up procedure seeks information from the source and the State on the implementation of recommendations made in opinions so that the Working Group can inform the Human Rights Council of progress made, as well as any failure to take action.[77] More specifically, the procedure requests the parties to provide information to the Working Group within six months of the date of transmission of the opinion on whether the victim has been released, whether compensation or other reparations have been made, whether an investigation has been conducted into the violation of the victim's rights, whether changes have been made to harmonise the State's domestic law and practice with its international human rights obligations, and any other action taken to implement the opinion.[78]

After the adoption of Opinion No 40/2018, both the source and the Republic of Korea provided follow-up information,[79] including on the placement of the Opinion before the Supreme Court of Korea in August 2018 and the Court's decision in November 2018. This section considers the impact of Opinion No 40/2018 in two key respects: first, its use during the proceedings before the Supreme Court and, second, its potential effect on the Working Group's other jurisprudence and practice.

A. Use of the Opinion in Domestic Proceedings

On 30 August 2018, the Supreme Court of Korea—the highest judicial body in the State—held a public hearing on the issue of conscientious objection to military service. The level of media and public interest was high, and the proceedings were streamed live over the internet.[80] The case concerned a Jehovah's Witness who had been found guilty of refusing to perform military service, but was seeking to overturn the verdict on appeal. During the closing statements, counsel for the defence submitted Opinion No 40/2018 to the Supreme Court justices for their review, explaining that the Working Group had found the deprivation of liberty of other conscientious objectors (Mr Shin and Mr Baek) to be arbitrary and in violation of the UDHR and ICCPR. Notably, when submitting the Opinion to the Court, defence counsel stated:

> The international community now views the imprisonment of our young men as a form of persecution, grants them refugee status and views the courts' decisions to detain them as being arbitrary. It is as if they are telling us 'No, you should not treat a fellow human being in such a way.' The time has arrived to listen to

76 All opinions adopted by the Working Group in which it concludes that the deprivation of liberty is arbitrary now include the follow-up procedure: see, for example, Opinion No 40/2018, supra n 4 at paras 58–61.

77 Methods of Work, supra n 24 at para 20.

78 See Human Rights Council, Report of the Working Group on Arbitrary Detention, 19 July 2017, A/HRC/36/37 at paras 10–11 (explaining the new follow-up procedure).

79 The follow-up information submitted by the source is on file with the Working Group. The follow-up information submitted by the Republic of Korea on 22 February 2019 is available at: www.ohchr.org [last accessed 23 September 2019].

80 The final eight-minute live streaming of the closing arguments before the Supreme Court is available at: www.youtube. com (in Korean) [last accessed 23 September 2019].

> their consistent voice. We ask the Court to answer to that voice through a not guilty decision. Such a decision shall be in harmony with the stature of a liberal democracy. Furthermore, the legal defence believes that in view of the critical juncture at which we await the implementation of alternative service, a milestone ruling is needed to introduce the criteria for differentiating those who refuse military service based on sincere conscience from simple evaders.[81]

The Supreme Court of Korea reserved its decision until 1 November 2018, when a 9:4 majority decided that conscientious objection was a 'justifiable ground' under Article 88(1) of the MSA for failing to enlist or comply with a call-up to military service, overruling other precedents to the contrary.[82] The majority found that the 'normative clash' between their freedom of conscience and the duty of national defence under Articles 19 and 39 of the Korean Constitution should be resolved by interpreting the Constitution to realise fundamental rights to the fullest extent possible.[83] Forcing conscientious objectors to perform military service may excessively restrict their freedom of conscience. Given that conscientious objectors do not deny the duty of national defence, but refuse to perform that duty in the way enacted by the MSA through military training and bearing arms, the recognition of the freedom of conscience will not unduly impede national security. The majority also observed that alternative civilian service, which is to be introduced in the Republic of Korea by the end of 2019,[84] is premised on the recognition of conscientious objection, though it does not have to be in place before conscientious objection is recognised. The Supreme Court reversed the lower court judgment and remanded the case to the Changwon District Court for further proceedings consistent with the ruling.

While it may appear to be a modest achievement, the placement of Opinion No 40/2018 before the Supreme Court represents in itself a significant, though rare, step forward for the Working Group in the implementation of its opinions. When the Working Group determines that the deprivation of liberty is arbitrary, it is far more common for parties with an interest in the case[85] to use the opinion as leverage in placing political pressure on the State concerned to remedy the situation.[86] However, the success of this course of action depends on whether the State is sufficiently motivated by pressure and publicity to comply with its international human rights obligations, which is often not

81 Excerpt from the closing statement of Mr Du-jin Oh, 30 August 2018. The source provided an English transcript of the closing arguments that were streamed live over the internet. This transcript is on file with the Working Group.

82 The Supreme Court's judgment is available in English at: library.scourt.go.kr [last accessed 23 September 2019].

83 Article 20 of the Korean Constitution protects the freedom of religion, but was not referred to at length by the Court.

84 The decision of the Constitutional Court requiring the introduction of alternative service is discussed in section 2 above.

85 This may include the source, the victim's family or legal representative, civil society, NHRIs and other governments.

86 See Genser and Winterkorn-Meikle, 'The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice' (2008) 39 *Columbia Human Rights Law Review* 101 at 131–51 (providing four case studies of Working Group opinions that were used as an advocacy tool in promoting compliance with international human rights law). As discussed in section 3 above, the Working Group's procedures are relatively quick. Its opinions can be used to advocate for change as they are often adopted while a case is still the focus of public attention.

the case when an influential domestic constituency[87] supports detaining an individual, group or an unpopular minority.[88] The strategy employed by the source in seeking a judicial remedy was arguably more effective because it resulted in an enforceable ruling from the highest court in the Republic of Korea, which may give the outcome greater legitimacy than an executive decision. Moreover, a judicial ruling often has a broader impact beyond one individual's situation. In this case, the Supreme Court's decision on the scope of 'justifiable grounds' under Article 88(1) of the MSA was in favour of the defendant, but also benefits all conscientious objectors, including Mr Shin and Mr Baek, who refuse to perform military service because of their genuinely held religious or other beliefs. As of 28 February 2019, all Jehovah's Witnesses who had been imprisoned for conscientious objection to military service were reportedly released on parole[89]—the first time that this has occurred since 1953.[90] While this is a positive development, the Working Group considers that unconditional release, compensation and expunging of the objectors' criminal records are the appropriate remedies.

For these reasons, the Working Group encourages interested parties to place its opinions before national courts and to report on the proceedings under the follow-up procedure.[91] Although the Working Group provides its authoritative interpretation of the international human rights law on detention practices, it is ultimately for national bodies to translate those norms to the domestic setting. It is hoped that the use of Opinion No 40/2018 in a national court will serve as a positive example for human rights advocates in securing the adherence of States to human rights standards.

The other important aspect of Opinion No 40/2018 relates to its contribution to the Supreme Court's ruling. Several justices in the majority found that the recognition by UN human rights mechanisms of the right to conscientious objection under Article 18 of the ICCPR is an appropriate normative basis to interpret the phrase 'justifiable grounds' under Article 88(1) of the MSA.[92] In a separate concurring judgment that interpreted Article 88(1) of the MSA 'from the perspective of the ICCPR', three justices found that '[u]nder the principle of the respect for international law, the interpretation

87 See Dai, 'Information and leverage: The domestic effects of international human rights law', 25 November 2009, available at: www.follesdal.net [last accessed 23 September 2019] (discussing the key role that domestic constituencies play in influencing States to comply with their international treaty obligations).

88 See Guichard, *Regime Transition and the Judicial Politics of Enmity: Democratic Inclusion and Exclusion in South Korean Constitutional Justice* (2016) at 166 (arguing that the debate over compulsory military service relates to issues of social tolerance and a military that saw itself as endangered by pluralism and diversity). See also Mun, 'An Analysis of the Debate over Conscientious Objection in Korea' (2012) 25 *Seoul Journal of Korean Studies* 243 (asserting that attitudes to conscientious objection changed when society saw it as a human rights issue rather than a matter concerning minority Christian denominations deemed socially unacceptable by the majority).

89 The Republic of Korea informed the Working Group that 127 conscientious objectors were released on parole after the Constitutional Court and Supreme Court rulings: see the Republic of Korea follow-up submission, supra n 79 at 3.

90 Human Rights Without Frontiers, 'South Korea: No more Jehovah's Witnesses in prison', 1 April 2019, available at: hrwf.eu/south-korea-no-more-jehovahs-witnesses-in-prison/ [last accessed 23 September 2019].

91 Human Rights Council, Report of the Working Group on Arbitrary Detention, 16 July 2019, A/HRC/42/39 at para 76.

92 Supreme Court of Korea Decision 2016Do10912, supra n 5 at section 10F (separate concurring opinion of Justices Park Jung-hwa, Kim Seon-soo and Noh Jeong-hee). In reaching this conclusion, the Justices observed that according to Article 6(1) of the Korean Constitution the ICCPR has the same effect as domestic laws of the Republic of Korea.

by international organizations regarding universal treaties such as the ICCPR ought to serve as a convincing basis for statutory construction'.[93] Similarly, four other justices in the majority considered that 'global empirical views and attitude shifts regarding the issue of conscientious objection may be considered when construing justifiable cause under the Military Service Act'.[94]

To the extent that the Working Group's Opinion contributed to the body of legal analysis that recognised the right to conscientious objection to military service under Article 18 of the ICCPR, it can be seen as having positively influenced change in the Republic of Korea. It is no small matter that the Working Group's jurisprudence—which had itself evolved—was invoked to assist in the evolution of jurisprudence within the Republic of Korea. In Opinion No 40/2018, the Working Group unequivocally reinforced the views of other UN human rights mechanisms that 'there can be no limitation or possible justification under the Covenant for forcing a person to perform military service'.[95] This was a powerful statement to have placed before a court that was considering whether to, and did in fact, overrule longstanding precedent on conscientious objection in its historic judgment. That said, it is important not to overstate the significance of the Opinion. The Opinion does not appear to have been cited by any of the justices in their respective opinions, perhaps reflecting that the Supreme Court is less familiar with the Working Group than with other human rights mechanisms.[96] The Working Group's Opinion was also one of many pronouncements by UN human rights mechanisms affirming the right to conscientious objection to military service, including the Commission on Human Rights and Human Rights Council, the Human Rights Committee (whose jurisprudence was extensively cited by several justices), and the UPR.[97] Moreover, as indicated by the earlier ruling in June 2018 by the Constitutional Court and the increasing acquittals in the lower courts, there was already strong momentum within Korean society seeking to put an end to the imprisonment of conscientious objectors.[98]

Nevertheless, the contribution made by the Working Group's Opinion to the adjudication of the right to conscientious objection to military service in the Republic of Korea—which has been described as the 'single most important domestic human rights issue in that country'[99]—represents real progress in promoting the implementation of the Working Group's recommendations. The use of the Working Group's opinions in domestic proceedings is likely to be repeated, including in different country contexts, as awareness of the Working Group increases and its jurisprudence continues to evolve to reflect contemporary developments in international human rights law.

93 Ibid.

94 Supreme Court of Korea Decision 2016Do10912, supra n 5 at section 9F (separate concurring opinion of Justices Kwon Soon-il, Kim Jae-hyung, Cho Jae-youn and Min You-sook).

95 Opinion No 40/2018, supra n 4 at para 44.

96 Another factor may be that the Opinion was only cited during closing statements and not in the appellate brief. The Opinion was adopted on 20 August 2018 and received by the defence 10 days later on the same day as the hearing.

97 The views of other UN human rights mechanisms are outlined in Opinion No 40/2018, supra n 4 at paras 43, 48.

98 See the discussion above at section 2.

99 Mun, supra n 88 at 244.

B. Effect on the Working Group's Jurisprudence

One area of the Working Group's jurisprudence that continues to evolve is the scope of Category I. According to the Methods of Work, Category I applies 'when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty'.[100] The Working Group's Methods of Work gives examples of arbitrary deprivation of liberty under Category I, including when a person is kept in detention after the completion of a sentence or despite an amnesty law.[101] In recent years, the Working Group has consistently found a Category I violation when States do not follow arrest and detention procedures, and therefore fail to invoke a legal basis for the deprivation of liberty under Article 9(1) of the ICCPR.[102]

There are, however, more challenging situations brought to the Working Group's attention involving individuals who have been detained pursuant to national laws that are on their face contrary to international human rights norms. Prior to adopting Opinion No 40/2018, the Working Group had, in limited circumstances, found that Category I applied when the legislation authorising the detention itself violated international human rights law, and the State could therefore not invoke a legal basis justifying the deprivation of liberty. For example, the Working Group concluded that an individual had been deprived of his liberty without a legal basis following his conviction under legislation that criminalised consensual same-sex relationships between adults.[103] The Working Group reached a similar conclusion under Category I in relation to the detention of three human rights lawyers under laws that were so vague and overly broad that they violated the principle of legality.[104] The Working Group has been cautious in extending this reasoning, reserving such findings for cases in which the underlying law[105] manifestly violates the UDHR or ICCPR.

The facts in Mr Shin and Mr Baek's case offered the Working Group another opportunity to apply Category I of its Methods of Work when the underlying legislative provision (namely, Article 88(1) of the MSA) violated international human rights law.

100 Methods of Work, supra n 24 at para 8(a).

101 Ibid.

102 See, for example, Working Group on Arbitrary Detention, Opinion No 9/2019 concerning *Trần Thị Xuân* (Viet Nam), 25 April 2019, A/HRC/WGAD/2019/9 at para 29 (arrest without a warrant); Working Group on Arbitrary Detention, Opinion No 52/2018 concerning *Xiyue Wang* (Islamic Republic of Iran), 23 August 2018, A/HRC/WGAD/2018/52 at para 69 (reasons for the arrest not provided and no prompt notification of the charges); Working Group on Arbitrary Detention, Opinion No 94/2017 concerning *Yousuf bin Khamis bin Moosa al Balouchi* (Oman), 24 November 2017, A/HRC/WGAD/2017/94 at para 55 (*incommunicado* detention and denial of the right to be brought promptly before a judge).

103 Working Group on Arbitrary Detention, Opinion No 14/2017 concerning *Cornelius Fonya* (Cameroon), 21 April 2017, A/HRC/WGAD/2017/14 at para 49 (finding that the legislation violated Articles 2, 17 and 26 of the ICCPR).

104 Working Group on Arbitrary Detention, Opinion No 62/2018 concerning *Wang Quanzhang et al.* (China), 24 August 2018, A/HRC/WGAD/2018/62 at paras 57–59 (noting that the principle of legality under Article 11(2) of the UDHR and Article 15(1) of the ICCPR requires laws to be formulated with such precision that the individual can regulate his or her conduct).

105 The Working Group has also concluded that detention will be arbitrary if undertaken pursuant to case law that violates international law: see, for example, Working Group on Arbitrary Detention, Opinion No 28/2017 concerning *Abdalrahman Hussein* (Australia), 25 April 2017, A/HRC/WGAD/2017/28 at paras 38–40 (determining that the effect of a domestic court decision was that non-citizens could not challenge the continued legality of their administrative detention and that the detention was therefore discriminatory under Category V).

As discussed in section 3 above, the Working Group found that the right to conscientious objection to military service is part of the absolutely protected right to have or adopt a religion or belief under Article 18(1) of the ICCPR, which cannot be restricted by States. As a result, the detention of conscientious objectors pursuant to legislation that criminalised the refusal to perform military service amounted to a violation per se of Article 18(1) of the ICCPR and Article 18 of the UDHR. Mr Shin and Mr Baek were arbitrarily deprived of their liberty according to Category I, as there could be no legal basis for their detention under a law that is contrary to international norms.[106]

The jurisprudence under Category I continues to develop incrementally as the Working Group encounters different situations in which national laws violate international human rights law. For example, the Working Group recently considered a case involving detention under the *lèse-majesté* law in Thailand that punishes anyone who 'defames, insults or threatens' the Thai royal family.[107] The Working Group determined that the detention took place pursuant to legislation that expressly violates the right to freedom of expression under Article 19 of the UDHR and Article 19 of the ICCPR, and that there was therefore no legal basis for the deprivation of liberty.[108] The Working Group cited Opinion No 40/2018 in support of this conclusion, noting that it was again confronted with legislation that violated a core tenet of a democratic society—in this case, freedom of expression—which may have serious consequences, such as individuals refraining from debate on matters of public interest.[109]

In addition, the Working Group's findings in Opinion No 40/2018 have influenced the remedies that it recommends in cases of arbitrary deprivation of liberty. In Mr Shin and Mr Baek's case, the Working Group stated that the appropriate remedy would be to release both individuals immediately, to accord them an enforceable right to compensation and other reparations, and to expunge their criminal records.[110] As far as this author is aware, this was the first time that the Working Group urged a State to expunge criminal records, though it was certainly not the last time. The Working Group went on to recommend the expunging of the criminal record of the conscientious objector whose case was considered in Opinion No 69/2018,[111] as well as in another case that did not involve conscientious objection to military service.[112] The expunging of criminal records may well become a key measure of restitution in the Working Group's opinions and other analysis in future. In addition, in Opinion No 40/2018, the Working Group requested the Republic of Korea to bring the MSA into conformity with the recommendations made in the Opinion, and with the State's commitments under international human rights law.[113] While a recommendation to review domestic law is

106 See also Opinion No 69/2018, supra n 74 at para 21 (confirming the finding under Category I).

107 Article 112 of the Criminal Code of Thailand.

108 Working Group on Arbitrary Detention, Opinion No 4/2019 concerning *Siraphop Kornaroot* (Thailand), 24 April 2019, A/HRC/WGAD/2019/4.

109 Ibid. at para 49.

110 Opinion No 40/2018, supra n 4 at para 53.

111 Opinion No 69/2018, supra n 74 at para 29.

112 Working Group on Arbitrary Detention, Opinion No 84/2018 concerning *Andrew Craig Brunson* (Turkey), 23 November 2018, A/HRC/WGAD/2018/84 at para 77. See also Working Group on Arbitrary Detention, Opinion No 79/2018 concerning *Husain Ebrahim Ali Husain Marzooq et al.* (Bahrain), 21 November 2018, A/HRC/WGAD/2018/79 at para 107.

113 Opinion No 40/2018, supra n 4 at para 55. See also Opinion No 69/2018, supra n 74 at para 31.

not new and is now routinely included in the Working Group's opinions,[114] it forms part of ongoing efforts by the Working Group to secure guarantees of non-repetition of arbitrary deprivation of liberty.

Opinion No 40/2018 had an important impact in terms of its use of in domestic proceedings, as well as on the Working Group's jurisprudence and practice. The Opinion will not, of course, only apply to conscientious objection to military service in the Republic of Korea. While each case is decided on its merits, Opinion No 40/2018 sets out the principles generally applicable to conscientious objection to military service, and it is hoped that it will serve as an example to other countries that detain individuals who refuse to perform military service because of their religion or beliefs.

5. REMAINING ISSUES

The right to conscientious objection to military service is undergoing profoundly positive change in the Republic of Korea following the decisions of the Constitutional Court and the Supreme Court in 2018. However, neither these decisions nor the Working Group's Opinion No 40/2018 fully resolved how the rights of conscientious objectors to military service will be upheld in practice. In particular, there are remaining issues to be addressed concerning the recognition of conscientious objector status, and the introduction of alternative civilian service in a manner consistent with international human rights law.

A. Recognition of Conscientious Objectors

The first outstanding issue is how conscientious objector status will be determined. In Opinions Nos 40/2018 and 69/2018, it was not contested that the refusal of the three conscientious objectors to enlist in military service was based upon their genuine religious beliefs as Jehovah's Witnesses.[115] As a result, the Working Group did not address in detail their status as conscientious objectors.

This issue was, however, directly raised in the Supreme Court of Korea's judgment of 1 November 2018 (discussed above). The Court identified the criteria to be applied in determining whether a person will be recognised as a conscientious objector. According to the majority, if a person accused of violating the MSA asserts conscientious objection, the moral or religious belief behind the objection must be 'devout, firm, and sincere'.[116] The key determinants in making this assessment include the religious creed claimed; whether refusal of military service is required by that creed; whether the religion recognises the objector as an official member; whether the objector is familiar with and complies with the tenets of the religion and his objection follows such religious doctrine; the objector's motives; whether the objector converted to the religion and the reasons for doing so, and the period in which the objector has performed religious activities.[117] The cases of individuals who possess beliefs identical to that of the objector and who are already serving a prison sentence on the ground of conscientious

114 For a recent example, see Working Group on Arbitrary Detention, Opinion No 3/2019 concerning *Uon Chhin and Yeang Sothearin* (Cambodia), 24 April 2019, A/HRC/WGAD/2019/3 at para 68.

115 Opinion No 40/2018, supra n 4 at para 44; Opinion No 69/2018, supra n 74 at para 20. See also Opinion No 43/2017, supra n 57 at para 34.

116 Supreme Court of Korea Decision 2016Do10912, supra n 5 at section 4A.

117 Ibid. at section 4B.

objection can serve as an element for consideration. The majority considered that the objector's overall life should be examined, including his family environment, childhood, education and social experience. While the prosecution bears the burden of proof that there are no 'justifiable grounds' for refusing to undertake military service, the objector is required to present *prima facie* evidence of his genuine beliefs.[118] Notably, the four dissenting justices strongly disagreed, arguing that the task of objectively proving or disproving a claim that a person's beliefs are genuine is 'next to impossible'.[119]

In this case, the majority found that the objector had provided sufficient *prima facie* evidence of his genuine religious beliefs, having demonstrated that he was baptised at the age of 13 years, and had refused to enlist for 15 years because of his faith as a Jehovah's Witness. Moreover, the objector's father and brother had previously served a prison term for violating the MSA after having objected to military service on the same ground. The objector had also risked criminal punishment despite having a young family. There was therefore scope to find that his refusal to enlist constituted 'justifiable grounds' under Article 88(1) of the MSA.

In a context such as the Republic of Korea where conscientious objection to military service has been controversial for many years, it is unclear how, and how stringently, the Supreme Court's criteria will be applied, particularly in more complicated cases. There are early indications that applying the criteria may lead to results that are inconsistent with the freedom of thought, conscience and religion and other human rights. In a development that has been criticised as violating the right to privacy, Korean prosecutors are reportedly investigating the online gaming history of conscientious objectors to determine whether they have actively played violent video games.[120] It has been reported that this information will be taken into account in verifying the sincerity of their objection to military service.[121]

In addition, it is unclear how the courts in the Republic of Korea will treat the right to conscientious objection by non-religious pacifists whose beliefs may be no less sincere, but are difficult to demonstrate. Unlike Jehovah's Witnesses who can rely on testimony from fellow believers as proof, as well as the accounts of family members who have been imprisoned in the past for conscientious objection, pacifists may only outwardly manifest their objection when called to perform military service or in times of emergency or conflict.[122] In February 2019, it was reported that a court recognised a non-religious conscientious objector's refusal to take part in army reserves training.[123] However, the conviction of another pacifist was upheld on appeal in May 2019.[124]

118 Ibid. at section 4C.

119 Ibid. at section 8 (dissenting opinion by Justices Kim So-young, Jo Hee-de, Park Sang-ok and Lee Ki-taik).

120 See Kang, 'Prosecutors looking into military objectors' gaming history stirs up controversy', *Yonhap News Agency*, 8 March 2019, available at: en.yna.co.kr [last accessed 23 September 2019].

121 Kwon and Griffiths, 'S Korea to investigate whether conscientious objectors played violent video games', *CNN*, 11 January 2019, available at: edition.cnn.com [last accessed 23 September 2019].

122 Ko, 'Courts struggle with issue of convictions of non-religious conscientious objectors', *Hankyoreh*, 28 April 2019, available at: english.hani.co.kr [last accessed 23 September 2019].

123 'Court recognizes non-religious conscientious objection to reserves training', *Hankyoreh*, 19 February 2019, available at: english.hani.co.kr [last accessed 23 September 2019].

124 Seoul Western District Court, 2018No1086, 16 May 2019.

In some States, applications for conscientious objector status are accepted without further inquiry,[125] avoiding the need to subject a person's deeply-held convictions to detailed examination. Both the Commission on Human Rights and the Human Rights Council have welcomed this practice.[126] Both bodies have also called upon States that do not have such a system to establish independent and impartial decision-making bodies to determine whether conscientious objection to military service is genuinely held, taking into account the requirement not to discriminate between conscientious objectors on the basis of their particular beliefs.[127] The UN Special Rapporteur on freedom of religion or belief has also observed that decisions concerning the status of conscientious objectors should, when possible, be made by an impartial tribunal set up for that purpose or by a regular civilian court, applying the legal safeguards provided for in international human rights instruments. There should always be a right to appeal to an independent, civilian judicial body. The decision-making body should be entirely separate from the military, and the conscientious objector should be granted a hearing, be entitled to legal representation and be able to call relevant witnesses.[128]

It appears that the Supreme Court's criteria apply specifically to cases involving alleged violation of the MSA, and it is open to the Republic of Korea to establish an independent tribunal to conduct an assessment of conscientious objector status before the matter reaches the courts. The Government recently attempted to establish such a body through a bill to introduce alternative service that was submitted to the National Assembly on 25 April 2019. However, civil society has expressed concern about the independence of the 'evaluation committee' established under the bill to assess applications for conscientious objection status.[129] In particular, the proposed committee would operate under the auspices of the Ministry of National Defense, rather than a civilian body separate from the military. The bill also makes provision for almost one third of the committee members to be nominated by the Minister of National Defense, a composition that does not guarantee impartiality.[130]

B. Alternative Civilian Service

The second outstanding issue is how the Republic of Korea will comply with the ruling of the Constitutional Court requiring the introduction of alternative civilian service by 31 December 2019. In its Opinion No 40/2018, the Working Group provided guidance

125 Office of the United Nations High Commissioner for Human Rights (OHCHR), Approaches and challenges with regard to application procedures for obtaining the status of conscientious objector to military service in accordance with human rights standards, 24 May 2019, A/HRC/41/23 at paras 10–12.

126 See, for example, UNCHR Res 1998/77, 22 April 1998, E/CN.4/RES/1998/77 at para 2; HRC Res 24/17, 27 September 2013, A/HRC/RES/24/17 at para 7.

127 UNCHR Res 1998/77, supra n 126 at para 3; HRC Res 24/17, supra n 126 at para 8.

128 Commission on Human Rights, Report submitted by Mr Angelo Vidal d'Almeida Ribeiro, 18 December 1991, E/CN.4/1992/52 at para 185; Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, 20 July 2007, A/HRC/6/5 at para 22.

129 Amnesty International, *South Korea marks International Conscientious Objection Day with Alternative Service Plan that falls short*, supra n 20 at 1.

130 Ibid. The Ministry of National Defense is to officially appoint the 29 committee members, with 10 members named by the National Human Rights Commission, 10 named by the Minister of Justice, and nine named by the Minister of National Defense. The Chairperson will be selected through a vote by the members: see 'Conscientious objectors to serve at correctional facilities for 36 months', *The Korea Herald*, 28 December 2018. See also OHCHR, supra n 125 at para 36.

on alternative service, reiterating the Human Rights Committee's requirements that such service must not be punitive, it must be a real service to the community and it must be compatible with respect for human rights.[131] The Working Group did not, however, provide further details or give examples of how this might be accomplished.

While attempts have been made to introduce draft legislation on alternative service, progress appears to have been limited by the Government's efforts to balance multiple, and perhaps competing, objectives of maintaining fairness *vis-a-vis* active-duty service members, preventing exploitation of alternative service to avoid conscription, and not compromising security readiness.[132] The bill submitted to the National Assembly on 25 April 2019 set the length of alternative service at 36 months. The bill also proposed that conscientious objectors undertake alternative service in prisons, detention centres or other correctional facilities in roles that do not involve the use of firearms or other weapons, the possible use of lethal force, or the destruction of any facilities.[133]

Civil society has expressed concern regarding the length and form of the proposed alternative civilian service, claiming that, if enacted, the legislation will result in conscientious objection continuing to be treated as a crime and not a right.[134] According to Amnesty International, the proposed length of alternative service for 36 months is significantly longer than most branches of the Korean military and double the length of proposed army service.[135] This would make the Republic of Korea's alternative service regime the longest in the world, which suggests a motivation to either deter or penalise conscientious objection, without reasonable and objective criteria to justify the additional length.[136] The National Human Rights Commission of Korea has reportedly expressed similar misgivings about the disproportionate term of alternative service.[137]

In addition, civil society has pointed out that the only field of service explicitly indicated in the bill is work within correctional facilities. Amnesty International argues that, instead of only prescribing one specific type of alternative service, different forms of service should be made available.[138] Restricting individuals to only one type of service may be incompatible with their reasons for conscientious objection, and after more than 60 years of sending conscientious objectors to prison, the new bill would continue to send young men to the same facilities.[139] As one news report put it, '[t]hey may even still go to prison. But at least they will be guarding the cells, not occupying

131 Opinion No 40/2018, supra n 4 at paras 43(c), 46. See also UNCHR Res 1998/77, supra n 126 at para 4; HRC Res 24/17, supra n 126 at para 9.

132 See 'Conscientious objectors to serve at correctional facilities for 36 months', supra n 130 (quoting the Chief of the Personnel Welfare Office at the Ministry of National Defense).

133 Ibid.

134 Amnesty International, supra n 20.

135 Ibid. See also OHCHR, supra n 125 at para 58.

136 Amnesty International, *Open Letter: Alternatives to Military Service for Conscientious Objectors*, AI ASA 25/9408/2018, 4 December 2018 (arguing that the duration of alternative service should not be made longer to test whether an individual's conscience or other personal conviction is genuine). See also OHCHR, supra n 125 at para 57; Human Rights Committee, *Frédéric Foin v France* (666/1995), Views, CCPR/C/67/D/666/1995 at para 10.3.

137 'Rights watchdog recommends shortening alternative service term', *Yonhap News Agency*, 22 March 2019.

138 Amnesty International, supra n 136. See also OHCHR, supra n 125 at para 54; UNCHR Res 1998/77, supra n 126 at para 4; HRC Res 24/17, supra n 126 at para 9.

139 Amnesty International, supra n 20.

one'.[140] This form of service might also limit the number of conscientious objectors who can undertake alternative service, given the limited number of positions likely to be available in correctional facilities. Conscientious objectors also bring a range of skills that could arguably be better used in a broader programme of real service to the community.

It is clear that the Republic of Korea is attempting to meet its international and domestic obligations to give effect to the right to conscientious objection by recognising conscientious objectors and introducing alternative civilian service. However, concerns have been expressed that the draft legislation does not yet meet international standards, and further consideration will need to be given to guaranteeing the independence of a civilian body tasked with assessing applications for conscientious objector status, and to ensuring that the length of alternative service is comparable to that of military service and that different forms of service are made available.

6. CONCLUSION

Recognition of the right to conscientious objection to military service by the courts in the Republic of Korea is life-changing for many young men who would otherwise face criminal punishment and social stigma as a result of their religion or beliefs. It is also significant for the Republic of Korea, which is transitioning from a society that deprived thousands of conscientious objectors of their liberty to one that increasingly accommodates the convictions of those individuals whose religious and other beliefs do not allow them to undertake military service.

The UN human rights mechanisms, including the Working Group on Arbitrary Detention, played an important role in this process, serving as a consistent voice that there can no longer be any justification under international human rights law for forcing a person to take up arms, and in contributing to the momentum for change. The Working Group's Opinion No 40/2018 was cited during the proceedings that led to the recognition of the right to conscientious objection by the Supreme Court of Korea, potentially opening new avenues for implementation of the Working Group's recommendations at the domestic level.

While there are remaining issues as to how the right to conscientious objection will be given practical effect, UN human rights mechanisms and civil society have offered important guidance on how the Republic of Korea can meet its international human rights obligations and, in so doing, ensure that the rights of all its citizens are upheld.

140 'Blessed are the peacemakers: South Korea's conscientious objectors escape military conscription', *The Economist*, 9 February 2019.