



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3272/2018\*, \*\*

<i>Communication submitted by:</i>	Arslan Begenchovich Begenchov (represented by counsel, Shane Brady and Haykaz Zoryan)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Turkmenistan
<i>Date of communication:</i>	19 June 2018 (initial submission)
<i>Document reference:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 7 December 2018 (not issued in document form)
<i>Date of adoption of Views:</i>	11 March 2022
<i>Subject matter:</i>	Conscientious objection to compulsory military service
<i>Procedural issues:</i>	Admissibility – exhaustion of domestic remedies; failure to cooperate
<i>Substantive issues:</i>	Arbitrary detention; freedom of religion
<i>Articles of the Covenant:</i>	9 (1) and (3) and 18 (1) and (3)
<i>Article of the Optional Protocol:</i>	5 (2) (b)

1. The author of the communication is Arslan Begenchovich Begenchov, a national of Turkmenistan born on 16 May 1999. He claims that the State party has violated his rights under articles 9 (1) and (3) and 18 (1) and (3) of the Covenant. The Optional Protocol to the Covenant entered into force for the State party on 1 August 1997. The author is represented by counsel.

#### Factual background

2.1 At the time the communication was submitted, the author was 19 years old. He is a member of the Jehovah's Witnesses. Based on his religious conscience, he firmly believes that the Holy Scriptures prohibit individuals from taking up arms and performing military

\* Adopted by the Committee at its 134th session (28 February–25 March 2022).

\*\* The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobayyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.



service. He is willing to perform alternative civilian service if it is genuinely not of a punitive or deterrent nature.

2.2 In the spring of 2017, the author received a summons to report for military service. He complied with the summons and was required by the military to undergo a medical examination. During the examination, he was diagnosed with mitral valve prolapse of the first degree.

2.3 Despite that diagnosis, in October 2017 the author was once again summoned to report for military service. The author complied with the summons and was sent by the military for another medical examination. On 11 November 2017, a medical commission declared that the author was fit to undertake military service. The medical commission ignored the previous diagnosis of mitral valve prolapse of the first degree.

2.4 On that same date, 11 November 2017, the author provided a written statement to the military authorities in which he requested the opportunity to undertake alternative civilian service on the basis of his health problems. The military commissariat ignored that request and summoned the author to report for military service on 16 November 2017.

2.5 On 16 November 2017, the author appeared at the military commissariat in response to the summons. He verbally informed the military officials that his religious conscience as a Jehovah's Witness did not permit him to perform military service. He also provided to the officials the following handwritten statement: "I, Arslan Begenchov, refuse to perform military service, as my conscience does not allow me to, because in military service you are taught to fight with weapons in your hands. To kill people or to cause any kind of harm to another person does not agree with my beliefs. Another reason is that if I kill a person or harm him, I will have to answer before the law. Article 4 of the Constitution of Turkmenistan states that protection, support and service to people are the main goals of State authorities. In addition, articles 18 and 42 state that every person has the right to freedom of thought and speech; on this basis I refuse to perform military service."

2.6 The military commissariat refused to act on the author's statement and instead took the author to the Office of the Prosecutor for questioning. The author explained his religious objection to military service and requested the opportunity to perform alternative civilian service. On 17 November 2017, the author voluntarily went to the Office of the Prosecutor and provided a written statement in which he explained his refusal to perform military service and his request for alternative service.

2.7 On 14 December 2017, the author was summoned to the Office of the Prosecutor and was asked if he had changed his mind. The author reiterated that based on his religious conscience, he refused to perform military service. The prosecutor replied that the author was being charged with violating article 219 (1) of the Criminal Code<sup>1</sup> and that he would face criminal proceedings in court. The author was permitted to leave and returned home.

2.8 On 30 December 2017, the author submitted a complaint to the Office of the Prosecutor of Türkmenabat. In the complaint, the author alleged that the information provided by the medical commission of the Registration and Enlistment Office of the military concerning his state of health was false and that the final decision in which the Conscription Commission found that the author was fit to serve in the military was unlawful.

2.9 On 2 January 2018, an official of the Office of the Prosecutor came to the author's home and took him to a police station, where he was arrested and placed in pretrial detention. The law enforcement officials did not explain why it was necessary to place the author in pretrial detention. The author had fully cooperated with all previous requests and summon and had not at any point attempted to abscond or interfere with the investigation.

2.10 On 6 January 2018, the author's father submitted an administrative complaint to the Office of the Prosecutor for the Charjew district of Türkmenabat. In the complaint, the author's father argued that there was no legal basis for the author's detention and requested the prosecutor to release the author and instead impose a measure of restraint that did not involve the deprivation of liberty. The author's father also sent copies of the complaint to the

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<sup>1</sup> Under article 219 (1) of the Criminal Code, refusal to serve in the armed forces in peacetime, in the absence of legal grounds for exemption, is punishable by a maximum penalty of two years of imprisonment, or two years of corrective labour. The Military Service and Military Duty Act does not list conscientious objection as a legal ground for exemption from military service.

Office of the Prosecutor General of Turkmenistan and to State representatives of the National Institute for Democracy and Human Rights. On 16 January 2018, the Office of the Prosecutor General forwarded the author's complaint to a prosecutor in Lebap Region, requesting that the latter respond to the author by 25 January 2018. On 25 January 2018, the Office of the Prosecutor for the Charjew district of Türkmenabat responded to the author's father and informed him that the investigation into his complaint had been terminated, because it had been established that the author, despite having been deemed fit for military service following medical examinations, had refused to perform military service and had been charged in accordance with article 219 (1) of the Criminal Code.

2.11 Meanwhile, on 17 January 2018, the author was brought before the Charjew district court in Lebap Region for his trial. On the same date, the court convicted the author of having violated article 219 (1) of the Criminal Code, and sentenced him to one year of imprisonment in a general regime penal colony for his conscientious objection to military service. In its decision, the district court stated that the author had been deemed medically fit to perform military service but refused to serve without any legitimate basis. According to the district court, the author professed to be a Jehovah's Witness and asserted that the Holy Scriptures prohibited the use of arms and military service.

2.12 On 29 January 2018, the author filed a cassation appeal against the decision of the Charjew district court. On 13 February 2018, the Lebap regional court rejected his appeal on the ground that the author's guilt had been fully proven by the testimony of witnesses questioned during the trial and by other unspecified case material. The Lebap regional court considered that the author's conduct had been correctly classified by the court of first instance as a violation of article 219 (1) of the Criminal Code. The court also considered that the sentence imposed, which required his deprivation of liberty, was lawful and reflected the nature of the crime, the degree of public danger implicated by the crime and the mitigating and aggravating circumstances involved. The court further considered that in accordance with the law, the Charjew district court had already examined the arguments raised in the appeal.

2.13 The author maintains that he has exhausted all domestic remedies to challenge his conviction and imprisonment. In a further submission dated 21 September 2018, the author stated that the Criminal Code of Turkmenistan only provides for one level of appeal, and that while a supervisory appeal may also be filed, it constitutes an extraordinary, discretionary remedy. In that regard, the supervisory appeal procedure is similar to procedures that have been deemed to constitute ineffective remedies by the European Court of Human Rights.<sup>2</sup> Moreover, to date the courts of the State party have not granted any appeal filed by a conscientious objector to military service.

2.14 The author states that he has not submitted his complaint to any other procedure of international investigation or settlement. At the time the communication was submitted, the author was serving his prison sentence at the LBK-12 prison colony in Seydi. Aside from the charge mentioned above, the author has never been charged with any other crime or administrative offence.

### **Complaint**

3.1 The author submits that by arbitrarily arresting, detaining and imprisoning him for refusing on the basis of his religious beliefs to perform compulsory military service, the State party violated his rights under articles 9 (1) and (3) and 18 (1) and (3) of the Covenant. With respect to article 9 (1) of the Covenant, the author was taken from his home by an official of the Office of the Prosecutor on 2 January 2018 and was arbitrarily arrested and placed in pretrial detention solely on account of his conscientious objection to undertaking compulsory military service. The author's objection was based on his sincere and genuinely-held religious conscience as a Jehovah's Witness. The arrest was not justifiable. The Committee has considered that imprisoning a conscientious objector for his religious objection to military service violates article 9 of the Covenant.<sup>3</sup> Indeed, under the well-settled jurisprudence of the Committee, article 18 of the Covenant "entitles any individual to an exemption from compulsory military service if such service cannot be reconciled with that individual's

<sup>2</sup> The author cites European Court of Human Rights, *Kashlan v. Russian Federation*, application No. 60189/15, judgment of 19 April 2016, paras. 28–30.

<sup>3</sup> The author cites *Young-kwan Kim et al v. Republic of Korea* (CCPR/C/112/D/2179/2012), para. 7.5.

religion or beliefs. The right must not be impaired by coercion”.<sup>4</sup>The author relies *mutatis mutandis* on his arguments under article 18 of the Covenant below.

3.2 In violation of article 9 (3) of the Covenant, the author was arbitrarily detained in police custody from 2 to 17 January 2018. Imprisoning a conscientious objector for his religious objection to military service violates article 9 of the Covenant. The Office of the Prosecutor did not provide any justification for the pretrial detention of the author. The Committee has considered that “pretrial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party”.<sup>5</sup>The State party must produce evidence proving that pretrial detention is necessary, as mere conjecture does not justify an exception to article 9 (3) of the Covenant.<sup>6</sup>In the present case, the State party provided no evidence or justification to prove that the author’s detention was necessary. Furthermore, no such justification existed.

3.3 In addition, as the Committee has repeatedly held, the right to conscientious objection is inherent in the rights guaranteed by article 18 (1) of the Covenant and is not subject to any justification under article 18 (3) of the Covenant.<sup>7</sup>In at least eight judgments, the European Court of Human Rights has upheld the rights of conscientious objectors to military service.<sup>8</sup>

3.4 The author has repeatedly informed the State party’s authorities that he is willing to perform genuine alternative civilian service in lieu of military service. That would be consistent with his civic duties, according to the Committee’s decisions in numerous cases concerning conscientious objectors who have been prosecuted and convicted by the State party.<sup>9</sup>In each of those cases, the Committee concluded that “the State party is under an obligation to avoid similar violations of the Covenant in the future” and that it “should revise its legislation in accordance with its obligation under article 2 (2), in particular the Military Service and Military Duty Act, as amended on 25 September 2010, with a view to ensuring the effective guarantee of the right to conscientious objection under article 18 (1) of the Covenant”. The State party has to date ignored the Committee’s request.

3.5 With respect to remedies, the author asks that the Committee provide declaratory relief and request the State party to acquit him of the charges under article 219 (1) of the Criminal Code, expunge his criminal record and provide compensation for moral damages and legal expenses.

#### **Lack of cooperation from the State party**

4. On 7 December 2018, 23 November 2020 and 27 January 2021, the Committee requested the State party to submit its detailed observations on the admissibility and merits of the communication. The Committee notes, however, that no such observations have been received to date. The Committee regrets the State party’s failure to provide any information regarding the admissibility or the merits of the author’s claims. The Committee recalls that, in accordance with article 4 (2) of the Optional Protocol, the State party is required to submit to the Committee written explanations or statements clarifying the matter and indicating the measures, if any, that have been taken by the State to remedy the situation. In the absence of a reply from the State party, due weight must be given to the author’s allegations, to the extent that they are sufficiently substantiated.<sup>10</sup>

<sup>4</sup> The author cites *Abdullayev v. Turkmenistan* (CCPR/C/113/D/2218/2012), para. 7.7.

<sup>5</sup> The author cites *Hill v. Spain* (CCPR/C/59/D/526/1993), para. 12.3.

<sup>6</sup> *Ibid.*

<sup>7</sup> The author cites, for example, *Young-kwan Kim et al v. Republic of Korea*, para. 7.3, and *Atasoy and Sarkut v. Turkey* (CCPR/C/104/D/1853-1854/2008), para. 10.4.

<sup>8</sup> The author cites, for example, European Court of Human Rights, *Bayatyan v. Armenia*, application No. 23459/03, judgment of 7 July 2011, paras. 111 and 124–127.

<sup>9</sup> The author cites, for example, *Nasyrlyayev v. Turkmenistan* (CCPR/C/117/D/2219/2012), para. 10; *Matyakubov v. Turkmenistan* (CCPR/C/117/D/2224/2012), para. 9; and *Nurjanov v. Turkmenistan* (CCPR/C/117/D/2225/2012), para. 11.

<sup>10</sup> See, for example, *Nazarov et al. v. Turkmenistan* (CCPR/C/126/D/2302/2013), para. 5.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

5.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

5.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not currently being examined under another procedure of international investigation or settlement.

5.3 The Committee takes note of the claim that the author has exhausted all available effective domestic remedies. In the absence of any objection by the State party in this connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

5.4 In the Committee's view, the author has sufficiently substantiated, for the purpose of admissibility, his claims under articles 9 (1) and (3) and 18, of the Covenant. The Committee thus declares those claims admissible and proceeds to examine them on the merits.

### *Consideration of the merits*

6.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

6.2 The Committee notes the author's claims that his rights under article 18 of the Covenant have been violated, owing to the absence in the State party of an alternative to compulsory military service, as a result of which his refusal to perform military service because of his religious beliefs led to his criminal prosecution and subsequent conviction and imprisonment. The Committee notes that military service is compulsory for male citizens in the State party's territory, and that in the absence of legal grounds for exemption from military service, evasion of the draft for military service is punishable under article 219 (1) of the Criminal Code.

6.3 The Committee recalls its general comment No. 22 (1993), in which it stated that the fundamental character of the freedoms enshrined in article 18 (1) is reflected in the fact that this provision cannot be derogated from even in times of public emergency, as stated in article 4 (2) of the Covenant (para. 1).<sup>11</sup> The Committee recalls its prior jurisprudence, according to which although the Covenant does not explicitly refer to a right of conscientious objection, such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of thought, conscience and religion.<sup>12</sup> The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to exemption from compulsory military service if such service 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.<sup>13</sup>

<sup>11</sup> See, for example, *Nazarov et al. v. Turkmenistan*, para. 7.3; *Durdyyev v. Turkmenistan* (CCPR/C/124/D/2268/2013), para. 7.2; *Petromelidis v. Greece* (CCPR/C/132/D/3065/2017), para. 9.3; and *Bae et al. v. Republic of Korea* (CCPR/C/128/D/2846/2016), para. 7.3.

<sup>12</sup> *Nazarov et al. v. Turkmenistan*, para. 7.3; *Durdyyev v. Turkmenistan*, para. 7.3; *Petromelidis v. Greece*, para. 9.3; *Yoon and Choi v. Republic of Korea* (CCPR/C/88/D/1321-1322/2004), para. 8.3; *Jong-nam Kim et al. v. Republic of Korea* (CCPR/C/106/D/1786/2008), para. 7.3; *Atasoy and Sarkut v. Turkey*, para. 10.4; *Young-kwan Kim et al. v. Republic of Korea*, para. 7.4; *Abdullayev v. Turkmenistan*, para. 7.7; *Mahmud Hudaybergenov v. Turkmenistan* (CCPR/C/115/D/2221/2012), para. 7.5; *Ahmet Hudaybergenov v. Turkmenistan* (CCPR/C/115/D/2222/2012), para. 7.5; *Japparov v. Turkmenistan* (CCPR/C/115/D/2223/2012), para. 7.6; *Nurjanov v. Turkmenistan*, para. 9.3; and *Uchetov v. Turkmenistan* (CCPR/C/117/D/2226/2012), para. 7.6.

<sup>13</sup> *Nazarov et al. v. Turkmenistan*, para. 7.3; *Yegendurdyyev v. Turkmenistan* (CCPR/C/117/D/2227/2012), para. 7.5; *Petromelidis v. Greece*, para. 9.5; *Jeong et al. v. Republic of Korea* (CCPR/C/101/D/1642-1741/2007), para. 7.3; *Jong-nam Kim et al. v. Republic of Korea*, para. 7.4; *Abdullayev v. Turkmenistan*, para. 7.7; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.5;

6.4 In the present case, the Committee notes that the author was sentenced to a term of 12 months of imprisonment, despite having allegedly informed the State party's authorities of his willingness to perform a civilian alternative to military service. The Committee considers that the author's refusal to be drafted for compulsory military service derives from his religious beliefs, which he claims are genuinely held. The Committee recalls that the repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibits the use of arms, is incompatible with article 18 (1) of the Covenant.<sup>14</sup> Accordingly, the Committee considers that the author's prosecution, conviction and imprisonment for refusing to perform compulsory military service owing to his religious beliefs and conscientious objection amounted to an infringement of his right to freedom of thought, conscience and religion, in breach of article 18 (1) of the Covenant.

6.5 The Committee notes the author's claim that imprisoning him as punishment for refusing to perform military service amounts to arbitrary detention under article 9 of the Covenant. Article 9 (1) of the Covenant provides that no one may be subjected to arbitrary arrest or detention. The Committee recalls that the notion of "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.<sup>15</sup> The Committee further recalls that deprivation of liberty as punishment for the legitimate exercise of a right protected under the Covenant, including freedom of religion and conscience as guaranteed by article 18 of the Covenant, is ipso facto arbitrary in nature.<sup>16</sup> In the present case, the Committee notes that the Charjew district court in Lebap Region convicted the author of having violated article 219 (1) of the Criminal Code and sentenced him to 12 months of imprisonment for his conscientious objection to military service, while recognizing that the author professed to being a Jehovah's witness and asserted that the Holy Scriptures prohibited the use of arms and military service (para. 2.11 above). Consequently, the Committee also finds that the State party has violated the author's rights under article 9 (1) of the Covenant.

6.6 The Committee notes the author's claim that by placing him in pretrial detention without a need to do so, the State party violated his rights under article 9 (3) of the Covenant. The Committee recalls its general comment No. 35 (2014), in which it stated that pretrial detention should be the exception rather than the rule (para. 38).<sup>17</sup> Pretrial detention should not be mandatory for all defendants charged with a particular crime, but must instead be based on an individualized determination that such detention is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security".<sup>18</sup>

6.7 The information made available to the Committee indicates that the author entered pretrial detention on 2 January 2018 and was released on 17 January 2018, when he was brought before the Charjew district court on a charge of violating article 219 (1) of the Criminal Code. The Committee also notes that on 6 January 2018, the author's father sent a detailed complaint to the Office of the Prosecutor for the Charjew district of Türkmenabat, arguing that there was no legal basis for the author's detention and requesting the prosecutor to release the author and instead impose a measure of restraint that did not involve his deprivation of liberty. On 25 January 2018, the Office of the Prosecutor responded to the author's father, informing him that the investigation into his complaint had been terminated, because it had been established that the author, despite having been deemed fit for military

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*Ahmet Hudaybergenov v. Turkmenistan*, para. 7.5; *Japparow v. Turkmenistan*, para. 7.6; *Nurjanov v. Turkmenistan*, para. 9.3; and *Uchetov v. Turkmenistan*, para. 7.6.

<sup>14</sup> *Nazarov v. Turkmenistan*, para. 7.4; *Durdyev v. Turkmenistan*, para. 7.3; *Bae et al. v. Republic of Korea* para. 7.5; *Atasoy and Sarkut v. Turkey*, para. 10.5; *Jeong et al. v. Republic of Korea*, para. 7.4; *Jong-nam Kim et al. v. Republic of Korea*, para. 7.5; *Young-kwan Kim et al. v. Republic of Korea*, para. 7.4; *Abdullayev v. Turkmenistan*, para. 7.8; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.6; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.6; *Japparow v. Turkmenistan*, para. 7.7; *Nurjanov v. Turkmenistan*, para. 9.4; and *Uchetov v. Turkmenistan*, para. 7.7.

<sup>15</sup> *Bae et al. v. Republic of Korea*, para. 7.6.

<sup>16</sup> *Ibid.* See also *Petromelidis v. Greece*, para. 9.8.

<sup>17</sup> *Marino Demonte v. Argentina* (CCPR/C/123/D/2424/2014), para. 11.4; *Smantser v. Belarus* (CCPR/C/94/D/1178/2003), para. 10.3; *Marinich v. Belarus* (CCPR/C/99/D/1502/2006), para. 10.4; and *Cedeño v. Bolivarian Republic of Venezuela*, (CCPR/C/106/D/1940/2010), para. 7.10.

<sup>18</sup> General comment No. 35 (2014), para. 38.

service following medical examinations, had refused to perform military service and had been charged in accordance with article 219 (1) of the Criminal Code. The Committee notes that neither the Office of the Prosecutor nor any other law enforcement officers stated why it was necessary to have detained the author, or whether alternatives to deprivation of liberty had been considered. The Committee notes that the author responded to the military service summons sent to him and appeared before the authorities as requested. The Committee considers that the information before it does not indicate that the author was likely to abscond or otherwise interfere with the activities of law enforcement. In the absence of contrary information from the State party, the Committee also considers that the pretrial detention of the author constituted a violation of his rights under article 9 (3) of the Covenant.

7. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the author's rights under articles 9 (1) and (3) and 18 (1) of the Covenant.

8. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to expunge the author's criminal record and to provide him with adequate compensation, including by reimbursing any legal costs he has incurred. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future. In this connection, the Committee reiterates that, in accordance with its obligation under article 2 (2) of the Covenant, the State party should review its legislation with a view to ensuring the effective guarantee of the right to conscientious objection under article 18 (1) of the Covenant, for instance by providing for the possibility of alternative service of a civilian nature.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.

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