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ANNEX*

Views of the Human Rights Committee under article 5, paragraph 4,

of the Optional Protocol to the International Covenant

on Civil and Political Rights

- Sixty-ninth session -

Communications No. 690/1996 & 691/1996*

Submitted by: Marc Venier and Paul Nicolas (represented by François Roux, legal counsel)

Alleged victim: The authors

Alleged victim: The authors

State party: France

Date of communications: 14 and 17 November 1995

Date of admissibility decision: 11 July 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 10 July 2000

Having concluded its consideration of communications No. 690/1996 & 691/1996 submitted to the Human Rights Committee by Marc Venier and Paul Nicolas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol**

1. The authors of the communications, dated 14 and 17 November 1995, are Marc Venier and Paul Nicolas, French citizens born in 1967 and 1968, respectively, and currently domiciled at Audincourt, France and Gabarret, France, respectively. They claim to be victims of violations by France of articles 18, 19 and 26, juncto article 8, of the International Covenant on Civil and Political Rights. The authors are represented by counsel, François Roux.

The facts as submitted by the authors

2.1 The authors, recognized conscientious objectors, began their civilian service duties on 23 June 1988 (Mr. Nicolas) and 16 November 1989 (Mr. Venier). After approximately one year of service, the authors notified the authorities that they intended to cease performing their civilian service duties, and did so on 1 July 1989 and 1 February 1991, respectively. The authors invoked the allegedly discriminatory character of article 116 (6) of the National Service Code (Code du service national), pursuant to which conscientious objectors were required to perform civilian national service duties for a period of 24 months, whereas military service did not exceed 12 months.

2.2 The authors were charged before the Criminal Court (Tribunal Correctionnel) of Paris and the Criminal Court of Orléans, respectively, with desertion in peacetime, pursuant to articles 398 and 399 of the Code of Military Justice. On 4 July 1991, the Criminal Court of Paris found Mr. Nicolas guilty as charged and sentenced him to one year's imprisonment; on 17 June 1992 the Criminal Court of Orléans found Mr. Venier also guilty and sentenced him to 10 months' imprisonment, rejecting the arguments of the defence, which had invoked articles 9, 10 and 14 of the European Convention on Human Rights and articles 18 and 19 of the Covenant.

2.3 On appeal by Mr. Nicolas, the Paris Court of Appeal confirmed the guilty verdict but modified the sentence into a two months' suspended prison sentence. On 8 February 1993, the Court of Appeal of Orléans confirmed the Criminal Court's decision concerning Mr. Venier but reduced the sentence to eight months' imprisonment (of which six months were suspended). On 14 December 1994, the Court of Cassation rejected the authors' further appeals, holding that article 116 (6) of the National Service Code was not discriminatory and did not violate articles 9, 10 and 14 of the European Convention on Human Rights. With that latter decision, all available remedies are said to have been exhausted.

The complaints

3.1 According to the authors, both article 116 (6) of the National Service Code (in its version of July 1983 prescribing a period of 24 months of civilian service for conscientious objectors) and article L.2 of the National Service Code in its version of January 1992 (as amended by Act No. 92-9 of 4 January 1992), which sets the duration of civilian service for conscientious objectors at 20 months, violates articles 18, 19 and 26, juncto article 8 of the Covenant in that they double the duration of service for conscientious objectors in comparison with that for persons performing military service.

3.2 The authors acknowledge that in case No. 295/1988 **(1)** the Committee has held that an extended period of alternative service was neither unreasonable nor punitive, and has found no violation of the Covenant. However, they invoke and quote at length from the individual opinions appended to the Committee's Views by three of its members, who had concluded that the challenged legislation was not based on either reasonable or objective criteria, such as a more severe type of service or the need for special training to perform the longer service. The authors fully endorse the conclusions of those three members of the Committee.

3.3 The authors observe that under articles L.116 (2) to L.116 (4) of the National Service Code, each application for recognition as a conscientious objector has to be approved by the Minister for the Armed Forces. If he refuses, an appeal to the Administrative Tribunal is possible under article L.116 (3). In such circumstances, the authors argue, it cannot be assumed that the length of civilian service was fixed purely for reasons of administrative convenience, since anyone agreeing to perform civilian service twice as long as military service should be deemed to have genuine convictions. Rather, the length of civilian service must be deemed to have a punitive character, which is not based on reasonable or objective criteria.

3.4 In support of their contention, the authors invoke a judgement of the Italian Constitutional Court of July 1989, which held that the provision for non-military service lasting eight months longer than military service was incompatible with the Italian Constitution. They further point to a decision adopted by the European Parliament in 1967 which, on the basis of article 9 of the European Convention on Human Rights, suggested that the duration of alternative service should be the same as that of military service. Moreover, the Committee of Ministers of the Council of Europe has declared that alternative service must not have a punitive character and that its duration, in relation to military service, must remain within reasonable limits (Recommendation No. R(87)8 of 9 April 1987). Finally, the authors note that the United Nations Commission on Human Rights declared, in a resolution adopted on 5 March 1987, **(2)** that conscientious objection to military service should be regarded as a legitimate exercise of the right to freedom of thought, conscience and religion, as recognized by the Covenant.

3.5 In these circumstances, the authors submit that requiring them to perform civilian service that is twice as long as military service constitutes unlawful and prohibited discrimination on the basis of opinion, and that the possibility of imprisonment for refusal to perform civilian service beyond the length of time of military service constitutes a violation of articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant.

The State party's observations on admissibility and the authors' comments thereon

4.1 The State party contends firstly that the communications are incompatible ratione materiae with the provisions of the Covenant since, on the one hand, the Committee has acknowledged in its decision on communication No. 185/1984 (L.T.K. v. Finland) that "the Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as to imply that right" and since, on the other hand, by virtue

of article 8, paragraph 3 (c) (ii) of the Covenant, the internal regulation of national service, and therefore of conscientious objector status for those States which recognize it, does not fall within the scope of the Covenant and remains a matter for domestic legislation.

4.2 Subsidiarily, the State party contends that domestic remedies have not been exhausted by the authors. In this connection, it submits that the authors of the communications have exhausted the judicial remedies open to them, but have not exhausted all administrative remedies. The argument put forward in this connection is that, by leaving their duty stations before having received replies from the military authorities concerning their requests for a reduction in the length of their service, the authors violated the provisions of the National Service Code, thus becoming liable to criminal prosecution, and did not wait for the military authorities to refuse their requests and then bring the matter before the Administrative Tribunal.

4.3 Third and last, the State party contends that the authors do not qualify as victims of a violation of articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant. With regard to articles 18 and 19 of the Covenant, the State party claims that by recognizing conscientious objector status and offering conscripts a choice as to the form of their national service, it allows them to opt freely for the national service appropriate to their beliefs, thus enabling them to exercise their rights under articles 18 and 19 of the Covenant. In this connection, the State party concludes, quoting the decision on communication No. 185/1984 cited above, that as the authors were "not prosecuted and sentenced because of [their] beliefs or opinions as such, but because [they] refused to perform military service", they cannot therefore claim to be victims of a violation of articles 18 and 19 of the Covenant.

4.4 With regard to the alleged violation of article 26 of the Covenant, the State party, noting that the authors complain of a violation of this article because the length of alternative civilian service is double that of military service, submits first of all that "the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment", which must be "based on reasonable and objective criteria" (communication No. 196/1985, Gueye v. France). The State party argues in this connection that the situation of conscripts performing alternative civilian service differs from that of those performing military service, notably in respect of the heavier constraints of service in the army, and that a longer period of alternative civilian service constitutes a test of the sincerity of conscientious objectors, designed to prevent conscripts from claiming conscientious objector status for reasons of comfort, ease and security. The State party also quotes the Committee's Views on communication No. 295/1988 (Järvinen v. Finland), where the Committee held that the 16-month period of alternative service imposed for conscientious objectors - double the eight-month period of military service - was "neither unreasonable nor punitive". The State party therefore concludes that the difference of treatment complained of by the authors is based on the principle of equality, which requires different treatment of different situations.

4.5 For all of these reasons, the State party requests the Committee to declare the communications inadmissible.

5.1 Concerning the State party's first argument as to the Committee's competence ratione materiae, the authors cite the Committee's General Comment No. 22 (48), where it is stated that the right to conscientious objection "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. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no

discrimination against conscientious objectors because they have failed to perform military service". According to the authors, it is clear from these comments that the Committee is competent to determine whether or not there has been a violation of the right to conscientious objection under article 18 of the Covenant.

5.2 The authors claim that the problem posed in their case lies not in a possible infringement of conscientious objectors' freedom of belief by French legislation, but in the conditions for the exercise of that freedom, since alternative civilian service is twice the length of military service, without this being justified by any provision to protect public order, in violation of article 18, paragraph 3, of the Covenant. The authors invoke in this context the Committee's General Comment No. 22 (48), which states that "limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. (...) Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner", and conclude that requiring conscientious objectors to perform alternative civilian service which is twice the length of military service constitutes a discriminatory restriction on the enjoyment of the rights set forth in article 18 of the Covenant.

5.3 As to the question of the exhaustion of domestic remedies, the authors state that domestic remedies in respect of the criminal proceedings brought against them have, in fact, been exhausted since the Court of Cassation dismissed their appeals against the Court of Appeal judgements on 14 December 1994. With regard to the non-exhaustion of administrative remedies, the authors maintain that such remedies were not open to them inasmuch as, not having been notified of any administrative decision, they could not bring the matter before the Administrative Tribunal.

5.4 Concerning the alleged violation of article 26, the authors claim that requiring a period of civilian service twice the length of military service constitutes a difference of treatment which is not based on "reasonable and objective criteria" and therefore constitutes discrimination prohibited by the Covenant (communication No. 196/1985 cited above). In support of this conclusion, the authors argue that there is no justification for making civilian service twice the length of military service; in fact, unlike in the Järvinen case (communication No. 295/1988 cited above), the longer duration is not justified by any relaxation of the administrative procedures for obtaining conscientious objector status since, under articles L.116 (2) and L.116 (4) of the National Service Code, applications for conscientious objector status are subject to approval by the Minister for the Armed Forces following an examination which may result in refusal. Nor is it justified in the general interest or as a test of the seriousness and sincerity of the beliefs of the conscientious objector. Indeed, the mere fact of taking special steps to test the sincerity and seriousness of the beliefs of conscientious objectors in itself constitutes discrimination based on the recognition of a difference of treatment between conscripts. Furthermore, conscientious objectors derive no benefit or privilege from their status - unlike, for example, persons assigned to perform international cooperation services instead of military service, who have the opportunity to work abroad in a professional field corresponding to their university qualifications for 16 months (i.e. four months less than the civilian service for conscientious objectors) - and a difference of treatment is not, therefore, justified on that ground.

The Committee's decision on admissibility

6.1 At its 60th session, the Committee decided to join the consideration of communications Nos. 690/1996 and 691/1996. It then proceeded to consider the admissibility of the communications.

6.2 Concerning the requirement of exhaustion of available domestic remedies, the Committee took note of the fact that the authors had exhausted all the judicial remedies

that were open to them. The Committee also considered that administrative remedies were not available to the authors of the communications. The Committee therefore concluded that it was not prevented by article 5, paragraph 2 (b), of the Optional Protocol from dealing with the communications.

6.3 The Committee took note of the State party's arguments concerning the incompatibility of the communications ratione materiae with the provisions of the Covenant. In this regard, the Committee considered that the matter raised in the communications did not concern a violation of the right to conscientious objection as such. The Committee considered that the authors had sufficiently substantiated their claim, for the purposes of admissibility, that the communications might raise issues under provisions of the Covenant.

7. Accordingly, on 11 July 1997, the Committee decided that the communications were admissible.

The State party's observations on the merits of the communication

8.1 By submission of 18 June 1998, the State party argues that the communication should be rejected because the authors are not victims of a violation of the Covenant, and because their complaints are ill-founded.

8.2 According to the State party, article L.116 of the National Service Code in its version of July 1983 instituted a genuine right to conscientious objection, in the sense that the sincerity of the objections is said to be shown by the request alone, if presented in accordance with the legal requirements (that is, justified by an affirmation of the applicant that he has personal objections to using weapons). No verification of the objections took place. To be admissible, requests had to be presented on the 15th of the month preceding the incorporation into the military service. Thus a request could only be rejected if it was not justified or if it was not presented in time. A right to appeal existed to the administrative tribunal.

8.3 Although the normal length of military service since January 1992 in France was 10 months, some forms of national service lasted 12 months (military service of scientists) and 16 months (civil service of technical assistance). The length of the service for conscientious objectors was 20 months. The State party denies that the length has a punitive or discriminatory character. It is said to be the only way to verify the seriousness of the objections, since the objections are no longer tested by the administration. After having fulfilled their service, conscientious objectors have the same rights as those who have finished civil national service.

8.4 The State party informs the Committee that on 28 October 1997 a law was adopted to reform the national service. Under this law, all young men and women will have to participate between their 16th and 18th birthday in a one day call-up to prepare for defence. Optional voluntary service can be done for a duration of 12 months, renewable up to 60 months. The new law is applicable to men born after 31 December 1978 and women born after 31 December 1982.

8.5 According to the State party, its system of conscientious objection was in accordance with the requirements of articles 18, 19 and 26 of the Covenant, and with the Committee's general comment No. 22. The State party notes that its regime for conscientious objection did not make any difference on the basis of belief, and no process of verification of the justification forwarded by the applicants occurred, other than in many neighbouring countries. No discrimination existed against conscientious objectors, as their service was a recognised form of the national service, on equal footing with military service or other forms of civil service. In 1997, just under 50% of

those performing civil service were doing this on the basis of conscientious objections to military service.

8.6 The State party submits that the authors of the present communications have not been victims of discrimination on the basis of their choice to perform national service as a conscientious objector. It notes that they were convicted for not complying with their obligations under the civil service, which they had freely chosen. Their convictions were thus not because of their personal beliefs, nor on the basis of their choice for alternative civil service, but on the basis of their refusal to respect the conditions of that type of service. The State party notes that at the time when the authors requested to perform alternative military service, they had not indicated any objection to the length of service. Moreover, in the case of Mr. Venier, the State party notes that the reason which he gave for abandoning his civil service, was "the attitude of his country towards the Third World", and thus unrelated to the alleged discriminatory character of the length of service for conscientious objectors. In this context, the State party notes that it would have been open to the authors to choose another form of unarmed national service, such as one of technical assistance. On this basis, the State party argues that the authors have not established that they are victims of a violation by the State party.

8.7 Subsidiarily, the State party argues that the authors' claims are ill-founded. In this context, the State party recalls that according to the Committee's own jurisprudence, not all differences in treatment constitute discrimination, as long as they are based on reasonable and objective criteria. In this context, the State party refers to the Committee's Views in case No. 295/1988 (Jarvinen v. Finland), where the service for conscientious objectors was 16 months and that for other conscripts 8 months, but the Committee found that no violation of the Covenant had occurred because the length of the service ensured that those applying for conscientious objector status would be serious, since no further verification of the objections occurred. The State party submits that the same reasoning should apply to the present cases.

8.8 In this context, the State party also notes that the conditions of the alternative civil service were less onerous than that of military service. The conscientious objectors had a wide choice of posts. They could also propose their own employer and could do their service within their professional interest. They also received a higher indemnity than those serving in the armed forces. In this context, the State party rejects counsel's claim that the persons performing international cooperation service received privileged treatment vis à vis conscientious objectors, and submits that those performing international cooperation service did so in often very difficult situations in a foreign country, whereas the conscientious objectors performed their service in France. In the case of Mr. Venier, he performed his civil service with the secretariat of the "Movement for a non violent alternative", whereas Mr. Nicolas was posted with the international civil service in Ile de France.

8.9 The State party concludes that the length of service for the authors of the present communications had no discriminatory character compared with other forms of civil service or military service. The differences that existed in the length of the service were reasonable and reflected objective differences between the types of service. Moreover, the State party submits that in most European countries the time of service for conscientious objectors is longer than military service.

Counsel's comments on the State party's submission

9.1 In his comments, dated 21 December 1998, counsel submits that at issue are the modalities of civil service for conscientious objectors. He submits that the double length of this service was not justified by any reason of public order and refers in this context to paragraph 3 of article 18 of the Covenant which provides that the right to manifest one's

religion or beliefs may be subject only to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. He also refers to the Committee's general comment No. 22 where the Committee stated that restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. He argues that the imposition upon conscientious objectors of civil service of double length as that of the military service constitutes a discriminatory restriction, because the manifestation of a conviction such as the refusal to carry arms, does not in itself affect the public safety, order, health, or morals or the fundamental rights and freedoms of others since the law expressly recognizes the right to conscientious objection.

9.2 Counsel states that, contrary to what the State party has submitted, persons who requested status as a conscientious objector were subject to administrative verification and did not have a choice as to the conditions of service. In this context, counsel refers to the legal requirements that a request had to be submitted before the 15th of the month of incorporation into the military service, and that it had to be reasoned. Thus, the Minister for the Armed Forces might refuse a request and no automatic right to conscientious objector status existed. According to counsel, it is therefore clear that the reasons given by the conscientious objector were being tested.

9.3 Counsel rejects the State party's argument that the authors had made an informed choice as to the kind of service they were going to perform. Counsel emphasizes that they made their choice on the basis of their convictions, not on the basis of the length of service. They had no choice in the modalities of the service. Counsel argues that no reasons of public order exist to justify that the length of civil service for conscientious objectors be twice the length of military service.

9.4 Counsel maintains that the length of service constitutes discrimination on the basis of opinion. Referring to the Committee's Views in communication No. 295/1988 (Järvinen v. Finland), counsel submits that the present case is to be distinguished, since in the earlier case the extra length of service was justified, in the opinion of the majority in the Committee, by the absence of administrative formalities in having the status of conscientious objector recognized.

9.5 As far as other forms of civil service are concerned, especially those doing international cooperation service, counsel rejects the State party's argument that these were often performed in difficult conditions and on the contrary, asserts that this service was often fulfilled in another European country and under pleasant conditions. Those performing the service moreover built up a professional experience. According to counsel, the conscientious objector did not draw any benefit from his service. As regards the State party's argument that the extra length of service is a test for the seriousness of a person's objections, counsel argues that to test the seriousness of conscientious objectors constitutes in itself a flagrant discrimination, since those who applied for another form of civil service were not being subjected to a test of their sincerity. With regard to the advantages mentioned by the State party (such as no obligation to carry a uniform, not being under military discipline), counsel notes that the same advantages were being enjoyed by those performing other kinds of civil service and that these did not exceed 16 months. With regard to the State party's argument that the conscientious objectors received a higher pay than those performing military service, counsel notes that they worked in structures where they were treated as employees and that it was thus normal that they would receive a certain remuneration. He states that the pay was little in comparison with the work done and much less than that received by normal employees. According to counsel, those performing cooperation service were better paid.

Issues and proceedings before the Committee

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

10.2 The Committee has noted the State party's argument that the authors are not victims of any violation, because they were not convicted for their personal beliefs, but for deserting the service freely chosen by them. The Committee notes, however, that during the proceedings before the courts, the authors raised the right to equality of treatment between conscientious objectors and military conscripts as a defence justifying their desertion and that the courts' decisions refer to such claim. It also notes that the authors contend that, as conscientious objectors to military service, they had no free choice in the service that they had to perform. The Committee therefore considers that the authors qualify as victims for purposes of the Optional Protocol.

10.4 The issue before the Committee is whether the specific conditions under which alternative service had to be performed by the authors constitute a violation of the Covenant **(3)**. The Committee observes that under article 8 of the Covenant, States parties may require service of a military character and, in case of conscientious objection, alternative national service, provided that such service is not discriminatory. The authors have claimed that the requirement, under French law, of a length of 24 months for national alternative service, rather than 12 months for military service, is discriminatory and violates the principle of equality before the law and equal protection of the law set forth in article 26 of the Covenant. The Committee reiterates its position that article 26 does not prohibit all differences of treatment. Any differentiation, as the Committee has had the opportunity to state repeatedly, must however be based on reasonable and objective criteria. In this context, the Committee recognizes that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service. In the present case, however, the reasons forwarded by the State party do not refer to such criteria or refer to criteria in general terms without specific reference to the authors' cases, and are rather based on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions. In the Committee's view, such argument does not satisfy the requirement that the difference in treatment involved in the present cases was based on reasonable and objective criteria. In the circumstances, the Committee finds that a violation of article 26 occurred, since the authors were discriminated against on the basis of their conviction of conscience.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. The Human Rights Committee notes with satisfaction that the State party has changed the law so that similar violations will no longer occur in the future. In the circumstances of the present case, the Committee considers that the finding of a violation constitutes sufficient remedy for the authors.

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. P.N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, Mr. Abdallah Zakhia. Under rule 85 of the

Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the case.

** The text of an individual opinion by Committee members Nisuke Ando, Eckart Klein, David Kretzmer and Abdallah Zakhia is appended to this document.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix

Individual opinion by Nisuke Ando, Eckart Klein, David Kretzmer and Abdallah Zakhia

(dissenting)

We dissent from the Committee's Views for the same reasons we have laid down in our separate dissenting opinion on the Foin case (Communication No. 666/1995).

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

1. Järvinen v. Finland, Views adopted on 25 July 1990, paras. 6.4 to 6.6.
2. E/CN.4/1987/L.73 dated 5 March 1987.
3. See also the Committee's Views in case No. 666/1995, Foin v. France, CCPR/C/67/D/666/1995.