HUMAN RIGHTS COMMITTEE

Drake et. al. v. New Zealand

Communication No. 601/1994

3 April 1997

CCPR/C/59/D/601/1994*

ADMISSIBILITY

Submitted by: Evan Drake and Carla Maria Drake

Victims: The authors and the "New Zealand Veterans"

State party: New Zealand

Date of communication: 20 February 1994 (initial submission)

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

Meeting on 3 April 1997,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Evan Julian and Carla Maria Drake (née Driessen), New Zealand citizens, who submit the communication on their own behalf and on that of New Zealand citizens and residents incarcerated during the Second World War by the Japanese, or widows and children of those (hereafter the "New Zealand Veterans"). They claim to be victims of a violation by New Zealand of articles 2, paragraph 3(a), and 26 of the International Covenant on Civil and Political Rights. They are represented by Mr. H. C. Zeeman, Chairman, and Mr. E. W. Gartrell, Deputy Chairman of the New Zealand Action Committee ex-Japanese War Victims (EJOs).

The facts as submitted by the authors

2.1 Ms. Drake was born on 6 September 1941 on Sumatra of Netherlands parents. She immigrated to New Zealand with her parents in 1958. She became a naturalized New Zealand citizen in 1964.

In 1942, when she was seven months old, she was incarcerated with her mother, her sister and two brothers in an internment camp at Brastagi, Sumatra. In July 1945 she was moved to a camp at Aek Paminke, also in Sumatra. When the camp was liberated in October 1945, she was suffering from severe malnutrition, had never walked and had suffered from serious infectious diseases, including dysentery, jaundice, whooping cough and diphtheria, none of which had been treated; she was covered with sores, some of which left scars that are still visible today. After liberation, the camp stores were found to contain a large number of Red Cross parcels containing food and medicines. The author submits that the terrible effects of her experiences of the first four years of her life, of which she later learned more details through a diary that her mother had kept while interned, were a blight on her childhood and teenage years and still affect her to the present day.

2.2 The second author, Mr. Evan Julian, was a fighter pilot with the RAF in a Hurricane Squadron 232. He fought in Singapore, Sumatra and Java. After his capture by the Japanese, he was transported by cargo ship from Batavia to Singapore, then to Saigon, Formosa (where he stayed 18 months), Japan, Korea and Mukden in Manchuria. He states that the conditions of both his internment and of the shipping from one location to another (packed on shelves, no hygiene, fed on slush, no air and dozens of men dying per day) were sheer horror. He states that he still suffers from the effects and that he is half crippled.

2.3 The authors submit that, after the surrender of the Dutch East Indies, the New Zealand veterans were incarcerated by the Japanese in three major groups, members of the armed forces, civilian males from age 10 up and females and children. The authors submit that the conditions in the Japanese camps were inhuman. Maltreatment and torture took place regularly. Prisoners were forced to march long distances under hard conditions, many of those dropping out being killed by the guards. They were forced to do slave labour in tropical heat without protection against the sun. Lack of housing, food and medical supplies led to diseases and deaths. In this context, reference is made to the judgement of the International Military Tribunal for the Far East of November 1948, which deals with the atrocities committed in the camps (pages 395-448), and which found that it was general practice and indeed policy of the Japanese forces to subject the prisoners of war and civilian internees to serious maltreatment, torture and arbitrary executions, in flagrant violation of the laws of war and humanitarian law.

2.4 In August 1945, following the Japanese surrender to Allied Forces, the horrific fate of the Far East prisoners of war was fully discovered. The New Zealand Veterans had been imprisoned by the Japanese in indescribable conditions with hardly any food, little or no protection against the elements, only the medical care they could improvise themselves and exposed to all manner of tropical and other diseases. The vast majority had been used as forced slave labour on road and airfield construction. Some had been used for medical experimentation in Mukden. Many had been transported in inhumane and unsanitary conditions by sea to Japan to work on the docks, the shipyards and in coal and copper mines.

2.5 As a consequence of the barbaric conditions in the camps, the released prisoners were in bad physical condition, suffered severely from malnutrition with vitamin deficiency diseases such as beri-beri and pellagra, malaria and other tropical diseases, tuberculosis, tropical sores and the effects of physical ill-treatment. It is submitted that as a direct consequence, the New Zealand Veterans still suffer significant residual disabilities and incapacities.

2.6 Although the Peace Treaty of 1952 between Japan and the Allied Forces ultimately resulted in certain nominal indemnification for the New Zealand Veterans, this indemnification did not include appropriate compensation for the slave labour and gross violations of human rights experienced by them.

2.7 The authors indicate that, in 1987, the New Zealand Action Committee Ex-Japanese War Victims submitted a claim to the United Nations Commission on Human Rights, in accordance with the procedure established by Economic and Social Council resolution 1503 (XLVIII), with respect to the gross violations of human rights committed by Japan in relation to the incarceration of the New Zealand servicemen and civilian internees held as prisoners of war. In 1991, the Subcommission on Prevention of Discrimination and Protection of Minorities concurred with the interpretation of its Working Group on Communications that "the procedure governed by Economic and Social Council resolution 1503 (XLVIII) could not be applied as a reparation or relief mechanism in respect of claims of compensation for human suffering or other losses which had occurred during the Second World War".

2.8 The authors claim that they have exhausted all domestic remedies. It is submitted that following many years of attempted negotiations to obtain compensation for New Zealand veterans, it has remained the consistent position of the Government of New Zealand that any reparation to be paid to New Zealand prisoners of war and civilian internees was provided for in the Peace Treaty with Japan.

2.9 The authors reiterate that the Peace Treaty did not encompass the damages suffered by the veterans under the conditions of imprisonment imposed by the Government of Japan during the war and, more particularly, that the Peace Treaty did not address the question of indemnification for the gross violations of human rights and slave labour. It is further submitted that as a matter of law the Government of New Zealand had no legal authority or mandate to waive their rights to a remedy for the gross violations of their rights. In support of this argument, the authors refer to the Hague Convention of 18 October 1907, the Third Geneva Convention of 1949, Protocol I of the Geneva Convention and the legal commentaries prepared by the International Committee of the Red Cross (ICRC), as well as to the study concerning the right to reparation for gross violations of human rights presented to the Subcommission on Prevention of Discrimination and Protection of Minorities by Mr. Theo van Boven.

The complaint

3.1 The authors argue that the New Zealand Veterans still suffer substantial physical, mental and psychological disability and incapacity caused by their incarceration. These residual disabilities and incapacities continue to the current day, have had a devastating impact on the lives of the New Zealand Veterans and will remain a permanent concern for these individuals and their families. In this context, reference is made to the Canadian Pension Commission "Report of a Study of Disabilities and Problems of Hong Kong Veterans 1964-1965", the conclusions of which are said to be applicable to all former prisoners of war and civilian internees incarcerated by Japan. Further reference is made to a report prepared by Prof. Gustave Gingras, entitled "The sequelae of inhuman conditions and slave labour experienced by members of the Canadian Components of the Hong Kong Forces, 1941-1945, while prisoners of the Japanese Government", which outlines the nature

and severity of the residual disabilities and incapacities at present being experienced by the Hong Kong veterans and other allied prisoners of war and civilian detainees.

3.2 The authors argue that the actions of the Government of New Zealand in entering into the 1952 Peace Treaty with Japan and releasing the Japanese from further reparation obligations is in clear violation of international law and continues to have ongoing effects on the fundamental rights of New Zealand Veterans. In this context, it is stated that the Government of New Zealand has expressly relied on the Peace Treaty as a basis for its lack of support for the claim of compensation for New Zealand Veterans in international forums. It is submitted that the continued acts of the New Zealand Government in this regard have resulted in a deprivation of the "right to a remedy" enshrined in article 2, paragraph 3(a), of the Covenant.

3.3 The authors further claim that the Government of New Zealand has through its actions discriminated against the New Zealand Veterans in violation of article 26 of the Covenant, since it has failed to provide appropriate financial assistance and compensation for the residual disabilities and incapacities suffered by the authors.

State party's submission on admissibility and authors' comments thereon

4.1 By submission of 30 January 1995, the State party argues that the communication is inadmissible ratione materiae and ratione temporis.

4.2 As regards the authors' allegation that by entering into the Peace Treaty with Japan, the Government of New Zealand has deprived them of a remedy, in violation of article 2, paragraph 3(a), the State party observes that the Human Rights Committee has decided that this article can only be invoked in conjunction with an alleged breach of a substantive right guaranteed by the Covenant, and that the right to a remedy only arises after a violation of a Covenant right has been established.[1] Although the authors do also claim a violation of article 26 of the Covenant, they do not claim that they have been deprived of a remedy for the breach of article 26, but invoke article 2, paragraph 3, independently. The State party thus submits that this claim is inadmissible as being incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

4.3 As regards the authors' claim that the failure of the Government to provide a remedy for the injustices suffered by the authors during their incarceration by Japan and for the residual disabilities and incapacities is in violation of article 26 of the Covenant, the State party refers to the Committee's definition of discrimination.[2] The State party submits that the authors have not indicated how they are treated differently to other New Zealand citizens, how they have been singled out or how they have been treated differently to other war veterans in relation to the receipt of war pensions or in access to health services. In this context, the State party explains that war pensions (for disablement or death while on service), veterans pensions (for those who suffered significant disability as a result of war service) and special allowances are available to all veterans who were resident in New Zealand at the outbreak of the Second World War. Further, all citizens have access to the public health system.

4.4 The State party also observes that the Committee has held that article 26 does not of itself contain any obligation with respect to the matters that may be provided for by legislation.[3] The State

party notes that the authors allege that the Government has discriminated against them by not providing financial assistance and compensation, but that they do not allege that any discriminative legislation has been passed, nor have they substantiated in what manner administrative action may have amounted to discrimination. The State party thus argues that the authors have failed to put forward a prima facie case. The State party contends that the authors' claim under article 26 is inadmissible for being incompatible with the provisions of the Covenant and for lack of substantiation.

4.5 Finally, the State party refers to the Committee's jurisprudence that it is only competent to consider alleged violations which occurred on or after the date of entry into force of the Optional Protocol for the State party concerned.[4] In this context, the State party explains that it signed the Peace Treaty with Japan in September 1951, that the Covenant entered into force for New Zealand on 28 March 1979, and the Optional Protocol on 26 August 1989. As to the authors' argument that the signing of the Peace Treaty has continuing effects, the State party argues that the authors have not demonstrated that the consequences constitute in themselves a violation of the Covenant. In this context, the State party notes that the authors have not cited any action of the Government after the entry into force of the Optional Protocol for New Zealand in support of their allegation of continuing violations. The State party therefore submits that the communication is inadmissible ratione temporis.

5.1 In their comments on the State party's submission, the authors submit that discrimination exists of civilian detainees of the Imperial Japanese Army since war pensions are only provided for service personnel and their dependants. They further submit that discrimination exists of veterans who were incarcerated by Japan, since military personnel incarcerated by Germany received ex gratia payments by the Government of New Zealand in 1988, whereas no such payment has been made available to those in Japanese incarceration.

5.2 The authors further point out that those veterans who did not live in New Zealand at the outbreak of the Second World War are excluded from war pensions, and that war pensions are available only for narrowly defined specific forms of disability.

5.3 As regards the definition of discrimination, the authors submit that "other status" refers to particular groups or classes in society, and therefore covers their case. In this context, the authors point out that a State party has a positive duty of protection against discrimination. The authors argue that the existing legislation discriminates against civilian detainees, since they are totally excluded from obtaining a war pension, whereas they have suffered the same treatment as military detainees. Similarly, the granting of an ex gratia payment to military detained by Germany while excluding an ex gratia payment to military detained by Japan is said to be discriminatory. In this context, the authors explain that the purported reason for the ex gratia payment was that because of the absence of a treaty or agreement with Germany, New Zealanders could not claim compensation from the Government of Germany. The authors point out that, because New Zealand concluded the Peace Treaty with Japan in 1951, they cannot claim compensation from the Government of Japan, and argue that their situation is thus similar, so that an ex gratia payment should also have been made available to them.

5.4 According to the authors, the conclusion of the Peace Treaty with Japan is discriminatory

because their rights to compensation were waived, whereas otherwise they had been entitled under international law to a remedy. In this context they argue that to uphold the waiver, as the State party does by refusing to assist them in bringing their claim against Japan, is in violation of jus cogens and the principles of international law. Since the State party had no right to waive the authors' claims, the continued endorsement of the Treaty by the State party is said to constitute discrimination, depriving the authors from their right to a remedy. In this context, the authors argue that the condition for the waiver, namely the difficult situation of Japan's economy, does no longer exist.

5.5 The authors further claim that, because of their experience during the Second World War, they have different needs than ordinary citizens and that the entitlements of the public health system, to which the State party refers, do not take into account the breaches of human rights they suffered.

5.6 As regards the State party's argument that their communication is inadmissible ratione temporis, the authors refer to the Committee's jurisprudence[5] where the Committee decided that the discrimination complained of had continuing effects, and that the Committee was thus competent to examine the complaint. The authors argue that the Peace Treaty with Japan has continuing effects, since it is still in force and therefore the discrimination still exists. After the Optional Protocol was ratified by New Zealand the State party's continued inaction itself shows that the violation of the authors' rights continues.

5.7 As regards the exhaustion of domestic remedies, the authors refer to the Committee's earlier jurisprudence that litigation may not always be an effective method.[6] The authors state that they have requested the Prime Minister to address the matter, which he has refused. They argue that the refusal of support by the Government indicates that domestic remedies are non-existent and inadequate.

Further submission from the State party and authors' comments thereon

6.1 In a further submission of May 1996, the State party notes that the authors have not submitted any relevant information to substantiate their original claim that by entering into a Peace Treaty with Japan the Government violated the authors' rights under article 26 of the Covenant. In this connection, the State party explains that compensation was received by ex-prisoners of war of the Japanese pursuant to article 16 of the Treaty, in 1962-1963[7] and again in 1973. The State party reiterates that the claim is inadmissible for being incompatible with the provisions of the Covenant and for not having been sufficiently substantiated for purposes of admissibility.

6.2 As regards the authors' claim that it is in violation of article 26 that civilian detainees are not eligible for war pensions whereas service people and their dependants are, the State party explains that war pensions are available under the War Pensions Act 1954 to former members of the armed service regardless of the theatre of war in which they served or the nature of the service. The only civilians eligible for benefits are those who served overseas in connection with any war or emergency otherwise than as a member of the armed forces and in respect of this service was paid by the Government of New Zealand.

6.3 The State party notes that the distinction between members of the armed services and civilians is in no way related to the fact that the civilians may have been interned by Japan. The State party

argues that the distinction that is made by the legislation is based on criteria that are reasonable and objective. In this connection, the State party explains that the War Pensions Act 1954 makes pensions available to compensate death or disablement caused by, attributable to or aggravated by war service for New Zealand overseas. They are not provided to compensate for incarceration as such. The State party submits that the authors have not put forward a prima facie breach of article 26, since it is not shown how the distinction impaired the recognition, enjoyment or exercise of any right or freedom of the civilian group.

6.4 As regards the authors' claim that article 26 has been violated because the war pensions are only offered to a narrow class of disability, the State party notes that they do not claim that the procedures and criteria are not applied equally to all. The State party argues therefore that the authors have no claim under article 2 of the Optional Protocol and refers to the Committee's jurisprudence in this regard.

6.5 As regards the authors' claim of discrimination between military personnel incarcerated by Germany and those incarcerated by Japan, the State party acknowledges that in 1987 a sum of $250,000 was appropriated to pay compensation to those prisoners of war who were held in German concentration camps. The State party explains that it took this measure because it was felt that, in the absence of a final peace treaty with Germany, the prospects of obtaining any compensation would be slight. The compensation was paid only to those who were placed in other than ordinary prisoner-of-war camps, in recognition of the unduly harsh treatment they had endured. The State party argues that the compensation available was aimed at a distinct and special group in recognition of their exceptional circumstances.[8] The State party points out that the ex-prisoners of war of the Japanese had already received compensation pursuant to article 16 of the Peace Treaty with Japan. The State party argues that the differentiation in treatment between armed services personnel incarcerated in German concentration camps and other armed service personnel incarcerated by Germany or Japan was reasonable and objective and does not amount to a violation of article 26 of the Covenant. The State party contends therefore that the claim is inadmissible as being incompatible with the provisions of the Covenant and as having been insufficiently substantiated for purposes of admissibility.

6.6 Finally, the State party notes that the payments to the ex-prisoners of war who had been incarcerated in German concentration camps were made in 1988 and that the Optional Protocol entered into force for New Zealand on 26 August 1989. The State party further notes that the authors have not claimed that the allegedly discriminatory payment has continuing effects. The State party, referring to the Committee's jurisprudence, therefore argues that the claim is inadmissible ratione temporis.

7.1 In their comments, the authors argue that the distinction between ex-prisoners of war in German concentration camps and those in Japanese camps cannot be supported on reasonable or objective grounds, but is clearly discriminatory as the circumstances in the Japanese camps were worse than those in German concentration camps, and thus just as exceptional. Moreover, the compensation excludes all civilian detainees. In this context, the authors state that the payment under article 16 of the Peace Treaty with Japan was derisory[9] in the light of the serious breaches of human rights and contrasts starkly with the ex gratia payments paid by the Government to the ex-prisoners of war in German concentration camps.

7.2 The authors further point out that both in respect to Germany and Japan the Government was to blame for the impossibility for the victims to claim compensation directly from the State concerned, in the case of Germany because of the failure of being a party to a peace treaty, and in the case of Japan because of having concluded a peace treaty with a waiver of compensation claims. So, they claim that the compensation for only the prisoners of war in the German concentration camps and not for those in Japan entails different treatment of similar situations and thus constitutes discrimination.

7.3 Since the victims still suffer today from the effects of the harsh treatment by the Japanese, the authors claim that the breach of article 26 is ongoing in that no reparation has been made to them and in that the Government of New Zealand continues to refuse to take up their cause.

7.4 In this context, the authors explain that in Japanese camps, military service personnel and civilians were detained together and that no distinction was necessarily made between prisoner-of-war camps and concentration camps. Japanese treatment of prisoners breached the relevant international norms and conventions, as recognized by the judgement of the International Military Tribunal for the Far East. The authors argue that substantive criteria must be used to justify distinctions between classes of people, and that the State party has not advanced any, but relied only on the place of detention (Germany or Japan), instead of on the circumstances of detention (equally in violation of human rights).

Issues and proceedings before the Committee

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 Part of the authors' communication relates to the claim that New Zealand, in entering into the 1952 Peace Treaty with Japan, waived their right to compensation other than as provided for in the Treaty. In this connection, the Committee recalls its established jurisprudence that it is precluded from examining a communication when the alleged violations occurred before the entry into force of the Covenant. In the present case, the authors have not shown that there were any acts done by New Zealand in affirmation of the Peace Treaty after the entry into force of the Covenant that had effects that in themselves would constitute violations of the Covenant by New Zealand after that date. Further, the Committee observes that the alleged failure by New Zealand to protect the authors' right to obtain compensation from Japan cannot be regarded ratione materiae as a violation of a Covenant right. This part of the authors' communication is therefore inadmissible.

8.3 As regards the authors' claim that they are victims of discrimination because ex-service personnel who had been incarcerated in German concentration camps during the Second World War received an ex gratia payment by New Zealand in 1988, whereas the authors (civilian and ex-service) did not, the Committee notes that, although the Covenant entered into force for New Zealand in 1979, the Optional Protocol entered into force only in 1989. Having taken note of the State party's objection ratione temporis against the admissibility of this claim based on the prior jurisprudence of the Committee, the Committee considers that it is precluded from examining the authors' claim on the merits. This part of the communication is therefore inadmissible.

8.4 The authors claim that the failure of New Zealand to provide a remedy for the injustices suffered by them during their incarceration by Japan, and for their residual disabilities and incapacities, violates article 26 of the Covenant. This claim relates to the distinction said to have been made between civilian and war veterans, and between military personnel who were prisoners of the Japanese and those who were prisoners of the Germans. The authors and the groups of whom they are representatives include both civilians and war veterans.

8.5 As regards the claim that the exclusion of civilian detainees from entitlements under the War Pensions Act is discriminatory, the Committee notes from the information before it that the purpose of the Act is specifically to provide pension entitlements for disability and death of those who were in the service of New Zealand in wartime overseas, not to provide compensation for incarceration or for human rights violations. In other words if disability arises from war service it is irrelevant to the entitlement to a pension whether the person suffered imprisonment or cruel treatment by captors. Keeping in mind the Committee's prior jurisprudence[10] according to which a distinction based on objective and reasonable criteria does not constitute discrimination within the meaning of article 26 of the Covenant, the Committee considers that the authors' claim is incompatible with the provisions of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

8.6 The authors have further claimed that those who were in war service are victims of a violation of article 26 of the Covenant because of the narrow class of disability for which pensions are made available under the War Pensions Act. The Committee notes that the authors have failed to provide information as to how this affects their personal situation. The authors have thus failed to substantiate their claim, for purposes of admissibility, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party, to the authors and to the authors' counsel.

[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 annual report to the General Assembly.]

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*/ Made public by decision of the Human Rights Committee.

1/ The State party refers to the decisions of the Committee in communications Nos. 268/1987 (M.G.B. and S.P. v. Trinidad and Tobago) and 343, 344 and 345/1988 (R.A.V.N. et al. v. Argentina).

2/ General Comment No. 18, para. 6.

3/ Committee's Views in communication No. 172/1984 (Broeks v. The Netherlands), para. 12.4.

4/ The State party refers to the Committee's decisions concerning communications Nos. 343, 344 and 345/1988 (R.A.V.N. et al. v. Argentina), 117/1984 (M.A. v. Italy) and 174/1984 (J.K. v. Canada).

5/ Committee's decisions concerning communications Nos. 196/1985 (Gueye v. France) and R.6/24 (Lovelace v. Canada).

6/ Committee's Views in communication No. 167/1984 (Ominayak v. Canada).

7/ According to the State party £NZ 2,943 0s 2d and £531 12s 0d was received and distributed among 114 respectively 110 ex-prisoner-of-war service personnel.

8/ Of the more than 80 applicants, only 24 were in fact selected to receive compensation and amounts ranging from $5,000 to $13,000 were awarded to each of these.

9/ £15 each to 214 persons, not taking into account individual circumstances.

10/ See, inter alia, the Committee's Views concerning communications Nos. 172/1984 (Broeks v. The Netherlands), para. 13; 180/1984 (Danning v. The Netherlands), para. 13; 182/1984 (Zwaan-de Vries v. The Netherlands), para. 13; 415/1990 (Pauger v. Austria), para. 7.3; and 425/1990 (Neefs v. The Netherlands), para. 7.2. See also the Committee's General Comment No. 18 (Non-discrimination), para. 13.