HUMAN RIGHTS COMMITTEE

Westerman v. The Netherlands

Communication No 682/1996

3 November 1999

CCPR/C/67/D/682/1996

VIEWS

Submitted by: Paul Westerman(represented by E. Th. Hummels, legal counsel)

Alleged victim: The author

State party: The Netherlands

Date of communication: 22 November 1995

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

Meeting on 3 November 1999

Having concluded its consideration of communication No.682/1996 submitted to the Human Rights Committee on behalf of Paul Westerman, 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 author of the communication, his counsel and the State party,

Adopts the following:

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

1. The author of the communication is Paul Westerman, a Dutch citizen, born on 25 January 1961. He claims to be a victim of a violation by the Netherlands of articles 15 and 18 of the Covenant. He is represented by Mr. E. Th. Hummels, legal counsel.

Facts as submitted

2.1 The author states that he has conscientious objections to military service, but that his application to be recognized as a conscientious objector under the Wet Gewetensbezwaarden Militaire Dienst (Military Service (Conscientious Objections) Act) was refused by the Dutch authorities. The author's appeals against the refusal were dismissed by the Minister of Defence, and subsequently the Raad van State (Council of State). As a result, the author became eligible for military service.

2.2 In the beginning of his military service, on 29 October 1990, the author was told by a military officer to put on a uniform, which he refused. The author stated that he refused any sort of military service because of his conscientious objections. Although the officer reminded him that insubordination is a criminal offence, the author persisted in refusing any military orders.

2.3 On 22 November 1990 the case was considered by the Arrondissementskrijgsraad (military tribunal) of Arnhem on the basis of article 114 of the Wetboek van Militaire Strafrecht (Military Penal Code) which stated that

> "The military who refuses or intentionally fails to obey any official order, or who on his own initiative oversteps such an order, will be punished with a sentence of imprisonment of maximum one year and nine months, for being guilty of intentional disobedience.
>
> "... the maximum of the punishment will be doubled if:
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> 1. the perpetrator intentionally persists in his disobedience, after a superior has pointed out that his behaviour is punishable.
>
> 2. ...."

2.4 On 1 January 1991, new legislation concerning military administration of justice entered into force. The new article 139 of the Military Penal Code states that

> "1. The military who refuses or intentionally fails to perform any duty, of whatever nature, will be punished with a prison sentence of maximum two years or a fine in the fourth category.
>
> "2. ..."

2.5 Upon summons by the Prosecutor and in accordance with the new legislation, the author was then tried for having refused military service in breach of article 139 of the Military Penal Code by the District Court of Arnhem. On 19 March 1991 the District Court of Arnhem declared the case against the author inadmissible, on the grounds that article 139 entered into force only after the refusal to serve by the author, and that there was no equivalent legal provision before that date criminalizing the refusal of all military service.

2.6 On appeal filed by the prosecutor, the Court of Appeal (Gerechtshof) of Arnhem, by judgment of 14 August 1991, found that, at the time of the incident in October 1990, the total refusal of any military service was made a criminal offence by the former article 114 of the Military Penal Code. The Court of Appeal pointed out that the different formulation of the new article 139 of the Military

Penal Code was not based on a changed view of the criminality of the conduct in question. The Court of Appeal further stated that the conscientious objections of the author were no reason for acquittal, noting that his objections had already been considered in the procedures concerning his application for recognition as a conscientious objector and rejected. The Court sentenced the author to nine months of imprisonment.

2.7 The author filed an appeal in cassation to the Hoge Raad (Supreme Court). On 24 November 1992, the Supreme Court confirmed the judgment of the Court of Appeal and rejected the author's appeal in cassation. With this, it is submitted, all domestic remedies have been exhausted.

The complaint

3.1 The author's conviction is said to constitute a violation of articles 15 and 18 of the Covenant. In this context, counsel argues that the Government's note of explanation, when introducing the new article 139 in Parliament, shows that the main purpose of the new article was to criminalize the attitude of the "total objector", not the mere fact of not following an order. Counsel explains that prior to the introduction of the (new) article 139, the fact that someone refused all military service could only be considered in the severity of the sentence, but that with the (new) article 139 the total refusal of military service has become a material element of the offence.

3.2 The author further states that he is of the opinion that the nature of the military is in conflict with the moral destination of man. The failure of the courts to treat the author's conscientious objections against military service as a justification for his refusal to perform military service, and to acquit the author, is said to constitute a violation of article 18 of the Covenant.

The Committee's admissibility decision

4. On 9 May 1996, the State party informed the Committee that it had no objection to the admissibility of the communication.

5. On 16 October 1997, the Committee noted that no obstacles to admissibility existed and considered that the issues raised by the communication should be considered on its merits.

State party's observations

6.1 By submission of 12 May 1998, the State party recalls the facts of the case and cites the conclusions by the Supreme Court when dismissing the author's appeal in cassation:

> "The Appeal Court expressed its opinion that the act at issue -the refusal to wear military uniform as an expression of a general refusal to do military service -was an offence, at the time it was committed, under article 114 of the old Military Criminal Code, just as it is an offence under current law as defined in article 139 of the new Military Criminal Code. It cannot be said that in so doing the Appeal court took an incorrect view of article 1 of the Criminal Code [1] or that its judgement was not furnished with sufficient reasons."
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> ..."The statement of grounds for appeal overlooks the obstacle to a defence claiming

immunity from criminal liability on grounds of conscientious objections against any form of military service, namely that the procedure for recognition of such objections is fully regulated in the Military Service (Conscientious Objectors) Act."

6.2 The State party argues that there has been no violation of article 15 in the author's case. It observes that the nulla poena principle implies that a person knows in advance that the act he is about to commit is an offence under statute law. The author knew or could have known that refusal to put on a military uniform as expression of a refusal to perform military service was an offence under the Military Criminal Code.

6.3 Secondly, the State party points out that the legislative amendment at issue in this case was not inspired by a changed view as to whether the act in question merited punishment. It recalls that article 114 of the old Military Criminal Code criminalized failure to obey military orders, and that article 139 of the new code criminalizes refusal or deliberate failure to perform any military duty whatsoever. It explains that this amendment formed part of a series of legislative amendments aimed at drawing a sharp distinction between criminal and disciplinary military law. Under the new legislation, the only acts defined as criminal offences are those representing contraventions of the primary purpose of the armed forces. All other contraventions have been brought within the compass of disciplinary law. Accordingly, criminal law is no longer applicable to the simple failure to perform a duty. Total refusal to perform military service, however, continued to be a criminal offence and is now covered by article 139. According to the State party, the new article was thus designed for technical legislative reasons, since the previous catch-all provision had lapsed, and did not create a new offence. Transitional law allowed for the changing of charges drawn up under the old law in order to conform with the new law. The State party observes that the maximum sentence under the new provision is lighter than the one under the old provision.

6.4 With regard to the author's claim under article 18, the State party refers to the Committee's jurisprudence, that the Covenant does not preclude the institution of compulsory military service. Under the Covenant, the question of whether States parties recognise conscientious objections to military service is expressly left to the States themselves. Thus, according to the State party, the requirement to do military service cannot render the author a victim of a violation of article 18.

6.5 With regard to the author's claim that his conscientious objections were not taken into account by the Courts, the State party notes that under Dutch law, those who have conscientious objections to performing military service, may request recognition of these objections under the Military Service (Conscientious Objections) Act. Under the Act, conscientious objections are defined as: "insurmountable objections of conscience to performing military service in person, because of the use of violent means in which one might become involved while serving in the Dutch armed forces". The author's request was denied by the Minister of Defence by decision of 25 January 1989, on the ground that the objection advanced by the author -that he would not be able to take decisions for himself in the armed forces -did not constitute sufficient grounds for recognition under the Act, since it was mainly concerned with the hierarchical structure of the army and not necessarily related to the use of violence. The highest administrative court rejected the author's appeal against the Minister's decision. Since the author's objections against military service were assessed by the highest administrative court, which found that they did not constitute conscientious objections under the Military Service (Conscientious Objections) Act, they could not be assessed again by the

Criminal Courts. The State party argues that no violation of article 18 occurred in the author's case.

Counsel's comments

7.1 On 30 August 1998, counsel informs the Committee that the author has been imprisoned on 8 August 1998, in order to serve the prison sentence which was imposed on him by the judgement of 14 August 1991.

7.2 With regard to the State party's observations, counsel states that on 29 October 1990, the author knew that it was an offence under article 114 of the MCC to refuse to put on a military uniform. However, this article was abolished on 1 January 1991, and the author was tried after 1 January 1991. Counsel reiterates that the aim of introducing the new article 139 was to criminalize the attitude of the total objector, something that had not been punishable before. He therefore maintains that the offence created by article 139 was a new offence and not the same as the offence previously punishable by article 114.

7.3 Counsel further argues that in a country where a regulation for conscientious objections exists, the articles of the Covenant are still applicable. Counsel points out that the fact that the author's objections were not recognised as conscientious objections within the meaning of the Act, does not signify that his objections were not objections of conscience. The failure of the Criminal Courts to take his objections into account and dismiss the case against him, therefore constitutes a violation of article 18 of the Covenant, since the author has been prosecuted for reasons of conscience.

Further State party's submission

8. On 9 September 1998, the State party forwards a copy of a letter by the Minister of Justice to the author, dated 7 September 1998. From the letter, it appears that the author had failed to report after having been called to begin serving his sentence on 16 May 1994, and that he was arrested and detained on 8 August 1998. After his arrest, the author filed an application for clemency and requested his release pending the decision. In the letter, the Minister rejects his immediate release, but states that he will be provisionally released from detention after three months if the decision on clemency has not yet been taken.

Issues and proceedings before the Committee

9.1 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.

9.2 The Committee notes that at the time when the author refused to obey an order and persisted in his refusal to carry out military orders, these acts constituted an offence under the Military Criminal Code, for which he was charged. Subsequently, and before the author was convicted, the Code was amended and the amended Code was applied to the author. Under the new Code, the author's refusal to obey military orders still constituted a criminal offence. The Committee has noted the author's argument that the nature of the offence in the new Code is different from the one in the old Code, in that it is constituted by total refusal, an attitude, rather than a single refusal of orders. The

Committee notes that the acts which constituted the offence under the new Code were that the author refused to perform *any* military duty. Those acts were an offence at the time they were committed, under the old Code, and were then punishable by 21 months' imprisonment (for a single act) or by 42 months' imprisonment (for repeated acts). The sentence of 9 months imposed on the author was not heavier than that applicable at the time of the offence. Consequently, the Committee finds that the facts of the case do not reveal a violation of article 15 of the Covenant.

9.3 With regard to the author's claim that his conviction was in violation of article 18 of the Covenant, the Committee observes that the right to freedom of conscience does not as such imply the right to refuse all obligations imposed by law, nor does it provide immunity from criminal liability in respect of every such refusal. Nevertheless, the Committee in its General Comment has expressed the view that the right to conscientious objection to military service can be derived from article 18 [General Comment 22, article 18, 48th session, 1993]. In its General Comment on article 18 the Committee considered that "the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief." The Committee notes that under Dutch law, there is a procedure for the recognition of conscientious objections against military service on the ground of insurmountable objection of conscience to military service because of the use of violent means (para 6.5 above).

9.4 The author sought recognition as a conscientious objector. The Minister of Defence held that his objection that he would not be able to take decisions for himself did not constitute grounds for recognition under Dutch law. In his appeal to the Council of State (dated 13 February 1989) against the failure to recognize him as a conscientious objector, the author stated:

> "Under no condition appellant will obey the legal duty to do military service in the Dutch armed forces, because the nature of the armed forces is contrary to the destination of (wo)man. The armed forces ask namely of their participants to give away the most fundamental and inalienable right that they have as a human being, namely the right to act according to their moral destination or essential being. The 'participator' is forced to give away the right of say and to become an instrument in the hands of other people, an instrument that ultimately is directed to kill a fellow human being when these other people consider such necessary.
>
> "This instrument (or armed forces) can only function well, when the moral capacities or moral intuition of the participators are destructed. Every human being who knows to open himself, to listen to his moral destination will agree that elimination of the armed forces out of our society is of the utmost importance. An importance that transcends the possible consequences of a protest according to the Penal law."

The Administrative Disputes Division of the Council of State declared his appeal unfounded on 12 February 1990. As a consequence of the rejection of his claim for recognition as a conscientious objector the author's refusal to perform military duty made him liable to be charged with a criminal offence.

9.5 The question for the Committee is whether the imposition of sanctions to enforce the performance of military duty was, in the case of the author, an infringement of his right to freedom

of conscience. The Committee observes that the authorities of the State party evaluated the facts and arguments advanced by the author in support of his claim for exemption as a conscientious objector in the light of its legal provisions in regard to conscientious objection and that these legal provisions are compatible with the provisions of article 18.[2] The Committee observes that the author failed to satisfy the authorities of the State party that he had an "insurmountable objection of conscience to military service.. because of the use of violent means" (para. 5). There is nothing in the circumstances of the case which requires the Committee to substitute its own evaluation of this issue for that of the national authorities.

10. 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 do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

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*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

**The text of two dissenting individual opinions, signed by six Committee members is appended to the present 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.]

Notes:

1/ Article 1 of the Criminal Code prohibits the retroactive application of criminal law.

2/ See General Comment 22 (48), paragraph 11 dealing with the right to conscientious objection.

Appendix

Individual opinion (dissenting) by Committee members P. Bhagwati, L. Henkin, C. Medina Quiroga, F. Pocar and M. Scheinin

In our opinion the author's reasons for conscientious objection to military service, as reproduced in paragraph 9.4 of the Views of the Committee, show that his objection constituted a legitimate manifestation of his freedom of thought, conscience or religion under article 18 of the Covenant. The

State party's arguments presented to justify the denial of conscientious objector status in the author's case, reflected in paragraphs 6.4 and 6.5 of the Views, may suffice to explain why the author's reasons did not constitute conscientious objections under the State party's domestic law. However, we find that the State party has failed to provide justification for its decision to interfere with the author's right under article 18 of the Covenant in the form of denial of conscientious objector's status and imposing a term of imprisonment. As was stated by the Committee in paragraph 11 of its General Comment 22 [48], there should be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs. We find that the author is the victim of a violation of article 18.

P. Bhagwati (signed)

L. Henkin (signed)

C. Medina Quiroga (signed)

F. Pocar (signed)

M. Scheinin (signed)

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

Individual opinion (dissenting) by Committee member H. Solari Yrigoyen

In my opinion, the Committee's decision should have read as follows:

9.2 The Committee notes that from the moment he first contacted his country's military authorities concerning his military service, the author stated that he was a conscientious objector, and that the relevant authorities - the Minister of Defence and the Council of State - refused to accord him that status and declared him eligible for military service.

At the start of his military service, on 29 October 1990, the author again stated that by virtue of his status as a "total" conscientious objector he was prevented from performing any sort of military service, and refused to put on a uniform when ordered to do so by an officer. In the eyes of the State party the author committed the crimes of insubordination and refusal to perform any type of military service, punishable under article 114 of the Military Penal Code then in force. In the author's view his refusal to perform military service and to obey the order to put on a uniform was the consequence of his being a conscientious objector. The Court of Appeal of Arnhem sentenced the author to nine months' imprisonment, a judgement that was confirmed by the Supreme Court. Those decisions rejected the defence of conscientious objection repeatedly invoked by the author.

The State party's legislation accords limited recognition to conscientious objection to performing military service, when these objections constitute an insurmountable obstacle to performing military

service “because of the use of violent means in which one might become involved while serving Y”, as stated in paragraph 6.5. Consequently, the status of “total objector” invoked by the author to explain the incompatibility of his objections with military service, its regulations and its orders, could not be squared with the restrictive limits laid down by the Netherlands law, and would be very difficult to establish in times of peace when “violent means” were not used. Nonetheless, even in peacetime, military service is connected with war.

As for the author's contention that his case reveals a violation of article 15 of the Covenant, the Committee notes that the sentence was based on the legislation in force at the time of the acts, and not on the legislation subsequently enacted. Consequently the Committee considers that there has been no violation of article 15.

9.3 The author further argues that the sentence he received involves a violation of article 18 of the Covenant. It is thus for the Committee to decide whether or not that article was violated. The positions of the parties reveal a conflict of values, in which the State's position has prevailed up until now, given the compulsory rather than voluntary nature of military service. Conscientious objection is based on a pluralistic conception of society in which acceptance rather than coercion is the decisive factor.

The Committee considers that conscientious objection to performing military service is a clear manifestation of the freedom of thought, conscience and religion recognized by article 18 of the Universal Declaration of Human Rights, protected by article 18 of the International Covenant on Civil and Political Rights, and supported by a growing tendency for legislation to accept this fundamental right, without prejudice to provision, in cases such as the present one, for alternative service whose nature is such as to recognize equality before the law. One example of this tendency is Commission on Human Rights draft resolution E/CN.4/1998/L.93, concerning conscientious objection to military service, sponsored by the State party and 11 other European States.

10. In view of the fact that the sentence imposed on the author was a direct consequence of the rejection of conscientious objection repeatedly invoked by the author, the Committee is of the opinion that article 18 of the Covenant has been violated in the present case.

The above is my dissenting opinion.

Hipólito Solari Yrigoyen (signed)

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