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HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10 - 28 July 2006

DECISION

Communication No. 1440/2005

Submitted by:	Gerardus Aalbersberg and 2,084 other Dutch citizens (represented by counsel, N.M.P. Steijnen)
Alleged victim:	The authors
State party:	The Netherlands
Date of communication:	2 August 2005 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 1 December 2005
Date of decision:	12 July 2006

* Made public by decision of the Human Rights Committee.

Subject matter: potential use of nuclear weapons by NATO alliance

Procedural issue: notion of "victim"

Substantive issue: right to life

Article of the Covenant: 6

Articles of the Optional Protocol: 1, 5(2)(a)

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-seventh session

concerning

Communication No. 1440/2005[*]

Submitted by:	Aalbersberg and 2,084 other Dutch citizens (represented by counsel, N.M.P. Steijnen)
Alleged victim:	The authors
State party:	The Netherlands
Date of communication:	2 August 2005 (initial submission)

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

Meeting on 12 July 2006

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The authors of this communication, dated 2 August 2005, are 2,084 Dutch citizens. They claim to be victims of a violation by the Netherlands of article 6 of the Covenant. The Optional Protocol entered into force for the Netherlands on 11 March 1979. They are represented by counsel, N.M.P. Steijnen.

1.2 On 3 February 2006, the Special Rapporteur for New Communications, on behalf of the Committee, determined that the admissibility of this case should be considered separately from the merits.

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 The Association of Lawyers for Peace and the authors filed a complaint in the District Court of The Hague, claiming that the potential use of nuclear weapons by the NATO alliance amounts to violations of the principles of humanitarian law, namely the prohibition to make civilians the target of a military attack, the prohibition to direct attacks against military targets which would cause excessive collateral damage to civilians and the principle of distinction between combatants and non-combatants. They sought a declaration of law to the effect that it is prohibited for the Dutch Government to cooperate in the actual deployment of nuclear weapons in general, to make available Dutch facilities for delivery for the actual use of nuclear weapons, to execute nuclear bombardments with Dutch war planes or any other means, to assist or endorse the use of nuclear weapons against residential areas, to employ nuclear weapons against military targets in populated areas and to give orders to military servicemen/women to use nuclear weapons.

2.2 By interim judgment dated 28 April 1993, in reply to the State party's plea of inadmissibility, the District Court decided that the claim could be declared admissible only if the principles of humanitarian law create direct rights for civilians. It then ordered an appearance of the parties in order to discuss the possible need for an expert report. By judgement of 13 December 1995, the District Court appointed three experts who would determine, *inter alia*, whether civilians can directly invoke the principles of humanitarian law at issue in the present case.

2.3 The Association of Lawyers for Peace and the authors appealed the decision and requested that the State party be ordered to cancel the NATO plans on the use of nuclear weapons and to serve notice of this cancellation to its allies. On 20 May 1999, the Court of Appeal of The Hague dismissed the appeal. It confirmed that the principles of humanitarian law must create direct rights for civilians in order for the claim to be declared admissible. It added that admissibility also required that there be a sufficiently specific interest. In the present case, the Court required that there be a realistic and specific threat of use of nuclear weapons by the State party. Such a threat had not been demonstrated by the authors. The Court found that the authors had no sufficient specific interest and that their claims had not been described in a sufficiently specific way.

2.4 The Association of Lawyers for Peace and the authors appealed to the Dutch Supreme Court. On 21 December 2001, the Supreme Court noted that, in order to decide whether the case was admissible, the alleged illegality of the acts complained of had to be considered to some extent. For this purpose, it invoked the Advisory Opinion of the International Court of Justice of 8 July 1996 which failed to declare the use of nuclear weapons illegal under all circumstances. The Supreme Court considered that it was not the task of a civil court, but that of State authorities, to make political decisions in the field of foreign policy and defence. It also considered that there was "no specific and current interest at stake", in the sense that there was no realistic threat that nuclear weapons will be used, and dismissed the appeal.

The complaint

3.1 The authors claim to be victims of a violation of article 6 of the Covenant, because the legal position adopted by the State party which recognises the lawfulness of potential use of nuclear weapons puts many lives at risk, including their own.

3.2 The authors invoke General Comment no.14/23 on article 6 of 2 November 1984, where the Committee stated that "the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today" and that "the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity". They argue that these clear statements should not remain without any legal impact on individual complaints submitted under the Optional Protocol. Indeed, they recall that the Committee is not a political organ, but a judicial body whose statements are supposed to be legal statements which must have a legal impact.

3.3 The authors submit that their communication must be distinguished from two earlier decisions of the Committee related to the potential use of nuclear weapons.[1] They argue that these decisions were, respectively, about the *deployment* of nuclear weapons in the Netherlands and the *testing* of nuclear weapons in French Polynesia. The present communication does not concern the deployment or testing of nuclear weapons.

3.4 With regard to article 6 of the Covenant, the authors note that the State party is officially prepared to use nuclear weapons and to cooperate with such use. They argue that this position is in clear contradiction with article 6 and General Comment no.14/23. They argue further that article 6 creates positive obligations upon State parties to protect against imminent threats to the right to life posed by nuclear weapons. They also invoke General Comment no.6/16 of 27 July 1982 on article 6 in which the Committee stated that "the protection of [the] right [to life] requires that States adopt positive measures". In the present case, they claim that the State party completely and expressly denies authors any active measures of protection against the actual use of nuclear weapons. They argue that the State party has deliberately misinterpreted the Advisory Opinion delivered by the International Court of Justice of 8 July 1996.

State party's observations on admissibility of the communication

4.1 By note verbale of 17 January 2006, the State party challenges the admissibility of the communication. As a preliminary point, it recalls that the Association of Lawyers for Peace and the authors have already received a decision by the European Court of Human Rights which found that the facts did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention on Human Rights or its Protocols (application no.23698/02).

4.2 The present case is not a new situation: the authors effectively request the Committee to review two of its previous decisions.[2] The State party recalls that the authors claim that the judgement of the Supreme Court of the Netherlands of 21 December 2001 created a new situation, as compared to the situation prevailing at the time the two decisions were made by the Committee in 1993. They also claim that these two decisions exclusively address the

[1] See Communication No. 429/1990, *E.W. et al. v. The Netherlands*, decision on inadmissibility adopted on 8 April 1993; and Communication no. 645/1995, *Bordes and Temeharo v. France*, decision on inadmissibility adopted on 22 July 1996.

[2] See Communication No. 429/1990, *E.W. et al. v. The Netherlands*, decision on inadmissibility adopted on 8 April 1993; and Communication No. 524/1992, *E.C.W. v. The Netherlands*, decision on inadmissibility adopted on 3 November 1993.

stationing of nuclear weapons, whereas the present communication deals with the imminent use of nuclear weapons threatening their right to life. The State party refutes these claims: the Supreme Court merely refused to state that the use of nuclear weapons was a violation of humanitarian law in all cases. It argues that the ruling of the Supreme Court did not grant any greater authority to the Government with regard to the actual use of nuclear weapons, nor did it result in any greater readiness on the part of the Government to use nuclear weapons. It concludes that the ruling of the Supreme Court has not, therefore, created a new situation regarding the authors' right to life as compared to the two previous communications.

4.3 The State party rejects the authors' argument that the present communication must be distinguished from previous ones to the extent that it addresses, for the first time, the (imminent) use of nuclear weapons, rather than the stationing of nuclear weapons. There is no basis for the assertion that it has considered or is considering any imminent use of nuclear weapons. The State party recalls that, on the contrary, it put great effort into the conclusion of the Comprehensive Test Ban Treaty, repeatedly called on nuclear powers to enter into disarmament agreements, and on many occasions expressed the hope of achieving a nuclear weapon free world. It adds that the time lapsed between the judgement of the Supreme Court in 2001 and the original submission of the present communication in 2004 contradicts the authors' allegation that the use of nuclear weapons was rendered imminent by the judgement of the Supreme Court.

4.4 Secondly, the State party argues that the authors in the present communication cannot claim to be victims of a violation of article 6 of the Covenant. It invokes previous Committee decisions where it was stated that a victim has to be actually affected by the law or practice deemed to be contrary to the Covenant.[3] In the present case, it thus has to be determined whether the alleged acts or omissions committed by the State party present the authors with an existing or imminent violation of their right to life, specific to each of them. According to the State party, the authors have failed to substantiate their claims in this respect since there is no actual or imminent violation of their right to life. As to the ruling of the Supreme Court, it did not authorise the actual use of nuclear weapons in a specific case involving the rights of the authors, but merely refused to state that the use of nuclear weapons would under all circumstances be illegal under international law. The State party finds no connection between the judgement of the Supreme Court and the rights of the authors under article 6 of the Covenant. In any case, it argues that there is no basis for any allegation that it had or currently has or would ever have a policy authorising the use of nuclear weapons against its own citizens within its own territory. Consequently, the authors cannot claim to be victims, within the meaning of article 1 of the Optional Protocol, whose right to life is violated or is under any imminent prospect of violation.

4.5 Finally, the State party argues that the present communication is an attempt to use the procedure under the Optional Protocol to conduct a public debate over matters of public policy, such as support for disarmament, and that this is contrary to the Committee's jurisprudence on such use of its procedure. It notes that several of the authors are active and

[3] See Communication No. 35/1978, *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Views adopted on 9 April 1981, para.9.1; Communication No. 318/1988, *E.P. et al. v. Colombia*, decision on inadmissibility adopted on 25 July 1990, para.8.2; and Communication No. 429/1990, *E.W. et al. v. The Netherlands*, decision on inadmissibility adopted on 8 April 1993, para.6.4.

outspoken opponents of nuclear weapons, of military forces and weapons in general, and have sought to use national judicial fora as venues for public political debate. While it in no way seeks to limit the rights of the authors to express their opinion in a manner consistent with articles 18 and 19 of the Covenant, the State party shares the Committee's view that the procedure under the Optional Protocol is not the appropriate forum for such a debate.[4]

Authors' comments

5.1 By letter dated 17 April 2006, the authors argue that the present communication is not the same as filed with the European Court of Human Rights. They claim that the State party misrepresented their position to the extent that they did not seek a ruling that the use of nuclear weapons was *in all instances* a violation of humanitarian law. Instead, they wanted to submit a range of modalities of actual use of nuclear weapons to a test of legality. They insist that the legality of only concrete and realistic nuclear plans was challenged in court. They recall that the Supreme Court ruled that the use of nuclear weapons in certain categories of situations cannot be said to be always illegal. They insist that this ruling gives the State party much more scope to resort to nuclear weapons. They add that it may lead tribunals in other States to reach the same conclusions and that the Committee must prevent this. They add that this ruling challenges the integrity of the Advisory Opinion of the International Court of Justice of 8 July 1996 concerning the legality of the threat or use of nuclear weapons and that "the Committee should seek to protect the Court's ruling".

5.2 With regard to the State party's argument that there is no imminent threat of actual use of nuclear weapons, the authors argue that discussing the imminence in connection with the actual use of nuclear weapons is of a completely different order than discussing imminence in connection with any other subject. They also recall that the International Court of Justice stated that there is an imminent threat that nuclear weapons will be used. They urge the Committee to review its position about the issue of individual complaints against imminent prospect of nuclear destruction, especially since article 6 requires State parties to adopt positive measures for the protection of the right to life.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As required by article 5, paragraph 2(a), of the Optional Protocol, the Committee has ascertained that a similar complaint submitted by the authors was declared inadmissible by the European Court for Human Rights on 5 September 2002 (application No. 23698/02) because it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Article 5, paragraph 2(a), however, does not preclude the Committee from examining the present communication as the issue is no longer being examined by the European Court and the State party has formulated no reservation under article 5, paragraph 2(a) of the Optional Protocol.

[4] See Communication No. 524/1992, *E.C.W. v. The Netherlands*, decision on inadmissibility adopted on 3 November 1993, para.4.2.

6.3 The Committee then must consider whether the authors are "victims" within the meaning of article 1 of the Optional Protocol. For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice. The issue in this case is whether the State's stance on the use of nuclear weapons presented the authors with an existing or imminent violation of their right to life, specific to each of them. The Committee finds that the arguments presented by the authors do not demonstrate that they are victims whose right to life is violated or under any imminent prospect of being violated. Accordingly, the Committee concludes that the authors cannot claim to be "victims" within the meaning of article 1 of the Optional Protocol.[5]

7. Accordingly, the Committee decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol;

(b) that this decision be transmitted to the State party, to the authors and to their 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 Committee's annual report to the General Assembly.]

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[5] See Communication No. 429/1990, *E.W. et al. v. The Netherlands*, decision on inadmissibility adopted on 8 April 1993, para.6.4; and Communication no. 645/1995, *Bordes and Temeharo v France*, decision on inadmissibility adopted on 22 July 1996, para.5.5.