

HUMAN RIGHTS COMMITTEE

E.W. et al. v. The Netherlands

Communication No. 429/1990

8 April 1993

CCPR/C/47/D/429/1990*

ADMISSIBILITY

Submitted by: E.W. et al. (name deleted)

Alleged victims: The authors

State party: The Netherlands

Date of communication: 19 November 1990 (initial submission)

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

Meeting on 8 April 1993,

Adopts the following:

Decision on admissibility

The background:

1. The authors of the communication are 6,588 citizens of the Netherlands who claim that their rights under article 6 of the International Covenant on Civil and Political Rights have been violated by the Netherlands, because the Netherlands Government agreed to the deployment of cruise missiles fitted with nuclear warheads on Netherlands territory. They are represented by counsel.

2.1 At a meeting in Brussels on 12 December 1979, NATO defence and foreign ministers decided to deploy, as part of a plan to upgrade NATO's nuclear capabilities, 108 Pershing II missiles and 464 cruise missiles in the United Kingdom and on the continent. On 1 June 1984, the Netherlands agreed to deploy 48 cruise missiles, to be stationed on a military base

near the town of Woensdrecht, if negotiations between the United States of America and the Soviet Union would have failed to produce an arms control agreement by 1 November 1985. A treaty concluded between the Governments of the Netherlands and the United States, on 4 November 1985, formed the legal basis for the deployment of the missiles. Construction work commenced on 26 April 1986 and was completed by November 1987.

2.2 In the mid 1980s the Soviet Union and the United States resumed their negotiations on a reduction of their nuclear arsenals. These negotiations led to the adoption of the Intermediate-Range Nuclear Forces (INF) Treaty on 8 December 1987. While cruise missiles had already been stationed in other European countries, the INF Treaty resulted in the cancellation of the stationing of the cruise missiles at the Woensdrecht base. No cruise missiles have therefore been deployed on Netherlands territory.

2.3 Cruise missiles are offensive weapons with a destructive capacity of 150 to 200 kilotons of trinitrotoluene (TNT), which were intended as so-called "counter-force weapons", entirely integrated into NATO's war-fighting capability. Basing themselves on documentation prepared by the World Health Organization and the United States Army, the authors submit that the use of only one cruise missile would cause the death, from nuclear fallout, of 55 per cent of the population in an area of 120 square kilometres, and 100 per cent fatalities in an area of 90 square kilometres.

2.4 At the beginning of the 1980s, hundreds of thousands of concerned citizens of the Netherlands staged protests and mass demonstrations against the deployment of the cruise missiles. Others, convinced that the possession and possible use of cruise missiles constituted a violation of domestic and/or international law, sought court orders against deployment. A foundation, *Stichting Verbiedt de kruisraketten* ("Ban the Cruise Missiles Foundation") was established and entrusted with the coordination of all activities relating thereto; some 20,000 individuals, the authors among them, accepted to be plaintiffs in a court case against the Government of the Netherlands.

2.5 The authors' case was first heard before the *Arrondissementsrechtbank* (District Court) of The Hague, which, on 20 May 1986, held that it had no jurisdiction to hear the case. The Court of Appeal of The Hague, in its judgement of 30 December 1987, held that it was not for the courts of the Netherlands, but for Parliament, to review treaties to which the Netherlands was a party, with a view to ascertaining whether they were compatible with the State's international obligations. Therefore, the Court of Appeal assumed that the treaty on the basis of which the missiles would be deployed, was compatible with international law, without further examining the question. The Supreme Court (*Hoge Raad*), in its decision of 10 November 1989, held that the Court of Appeal's reasoning was mistaken; however, after having examined the authors' arguments, it concluded that neither the deployment nor the possible use of cruise missiles, as provided for in the treaty, would constitute a violation of international law.

The complaint:

3.1 The authors claim that the decision of the Government of the Netherlands to deploy the

cruise missiles constitutes a violation of article 6 of the Covenant; they argue that a cruise missile base constitutes a target for any military enemy and that the authors could be placed in the position of accessory to a crime against humanity, with regard to the use of cruise missiles. In this connection, they refer to the case law of the European Commission of Human Rights under article 2 of the European Convention on Human Rights and the Human Rights Committee's case law under article 6 of the Covenant.¹ From this case law, they deduce that article 6 places an obligation on States parties actively to protect the life of their citizens and to avert threats to their life.

3.2 In particular, the authors invoke the Committee's General Comment 14[23] on article 6, adopted on 2 November 1984. In this document, 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. ... The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity". The authors argue that in actually preparing for the deployment of cruise missiles, the State party has not acted in accordance with the Committee's General Comment, and therefore has violated article 6 of the Covenant.

3.3 The authors concede that the General Comment is of a general nature and that it does not reflect the Committee's view on individual complaints submitted under the Optional Protocol. On the other hand, they consider it relevant that the Committee did not limit itself to the actual use of nuclear weapons but included also forms of preparation for such use; in the present case, it is the preparation for the deployment of nuclear weapons, and the means to keep them ready for use, that is at issue.

3.4 The authors submit that if the use of the term "crimes against humanity" in the General Comment is to have any meaning, it must imply that States parties to the Covenant have the duty to do everything possible to eliminate nuclear weapons. If they participate in the formulation of plans to deploy them, they are guilty of a crime against humanity. The authors recall the origin of this concept in the Charter of the International Military Tribunal (the "Nuremberg Charter"), which, in article 6 (c), enumerates the following crimes against humanity: murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population. Article 6 of the Charter concludes as follows: "Leaders, organizers, instigators, and accomplices, participating in the formulation or execution of a common plan of conspiracy ... are responsible for all acts performed by any persons in execution of such plan".

3.5 The authors concede that the violations of their rights ceased with the signature of the INF Treaty in December 1987. However, they argue that the Optional Protocol does not require that an alleged violation is still taking place at the moment that the communication is submitted. In this context they submit that the State party never conceded that there had been such a violation; nor did it take any steps with respect to any appropriate remedy. On the contrary, the Government of the Netherlands still allows the stationing of nuclear weapons on its territory and supports a NATO strategy which contemplates resort to nuclear weapons in the event of armed conflict.

3.6 The authors argue that the fact that in the present case thousands of individuals complain collectively about violations of their rights does not turn the communication into an *actio popularis*, since the very nature of the alleged violation affected all the authors simultaneously. In this context, they point to the Committee's Views in communication No. 167/1984,² according to which "[t]here is ... no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights".

3.7 The authors claim that the Government of the Netherlands placed them in a situation where a real risk of a violation of their right under article 6 existed; they consider this sufficient for a finding of a violation by the Committee. In this connection, they point to recent judgements of the European Court of Human Rights³ and the Supreme Court of the Netherlands,⁴ in which it was held that the fact of merely placing someone in a situation where he or she runs a real risk of being exposed to cruel, inhuman and degrading treatment or to the death penalty constitutes a violation of articles 2 and 3 of the European Convention.

3.8 The authors submit that the threat to the right to life was imposed on all of them since the day the conversion of Woensdrecht Air Base to a missile base started, and *a fortiori* after the base was ready to receive the missiles, since it is reasonable to assume that it had by then been added to the list of possible targets for nuclear attacks drawn up by the Warsaw Pact High Command.

3.9 In addition to the claim of past violations of article 6, the authors argue that they continue to be victims of similar violations in respect of the stationing or deployment of other types of nuclear weapons on Netherlands territory. These include nuclear explosives under the control of the Navy, nuclear artillery, the so-called "Lance" missiles and weaponry carried by the nuclear capable F16 war-planes. All of these arms are stationed on bases throughout the Netherlands, and the authors point out that the characteristics of these weapons are similar to those of the cruise missiles; in particular, the missiles carried by the F16 plane are designed for use against the same type of targets for which the cruise missiles would have been deployed.

3.10 Since the authors' case was adjudicated by the Supreme Court of the Netherlands, they claim to have exhausted all domestic remedies. They state that the case has not been submitted to another instance of international investigation or settlement.

State party's observations and authors' comments thereon:

4.1 By submission of 12 March 1992 the State party argues that the communication is inadmissible, as the authors cannot be considered to be victims of an alleged violation of the Covenant under article 1 of the Optional Protocol.

4.2 The State party submits that, since the cruise missiles were never actually deployed, no risk of an alleged violation of article 6 of the Covenant has occurred, and therefore the authors cannot claim to have been victims of a violation of this article. In this context, it argues that a mere decision cannot constitute a violation of human rights, if it is not

implemented: a violation cannot be claimed if the act which is alleged to be in contravention of a human right does not take place.

4.3 The State party further argues that the communication is an *actio popularis* and as such inadmissible under article 1 of the Optional Protocol. It submits that the interests which any citizen of a State has in not being exposed to the responses of an enemy in armed conflict do not in themselves make that citizen a victim of a violation of article 6 of the Covenant. Moreover, it argues that the authors' contention that they might be called upon to cooperate in some way in deploying or using the cruise missiles is to be rejected as insufficiently plausible.

4.4 The State party finally submits that during the domestic proceedings only the actual stationing of the 48 cruise missiles was at issue. It therefore argues that, as far as the authors contend that the mere decision to deploy cruise missiles was in itself a violation of article 6 of the Covenant, or that the presence of any nuclear weapons of any kind in the Netherlands would be a violation of article 6, domestic remedies have not been exhausted.

5.1 In his comments on the State party's submission counsel argues that the communication fulfils all admissibility criteria as enumerated in the Optional Protocol. He distinguishes between the claim concerning the Woensdrecht cruise missiles and the one regarding other nuclear weapons in the Netherlands. According to counsel, also the second claim should be deemed admissible, although it was not brought before the courts of the Netherlands. He argues that the Supreme Court's ruling in the Cruise Missile case was of a general nature; no different ruling can be expected with regard to the legality of other nuclear weapons, and a recourse to the courts would therefore be ineffective within the meaning of article 5, paragraph 2, of the Optional Protocol.

5.2 Counsel further emphasizes that the allegation does not concern the decision *in abstracto* to deploy cruise missiles, but the implementation of this decision, resulting in the active preparation for deployment. This was also the subject of the domestic proceedings. Even if this were not part of the domestic procedures, counsel argues that this part of the communication should still be declared admissible, since there is no reason to expect that the courts would decide differently with regard to the preparation for deployment than with regard to the deployment itself; therefore effective domestic remedies are said not to exist.

5.3 Counsel stresses that the communication was submitted on behalf of 6,588 individuals, who all claim to be victims of a violation of their human rights by the Netherlands. To consider the communication inadmissible as an *actio popularis*, because many individuals claim to be similarly affected by a violation, would render the Covenant meaningless for the consideration of largescale violations of its provisions.

5.4 As regards the State party's argument that the authors cannot be considered victims of an alleged violation, counsel argues that this question should be examined on the merits, since it regards the scope and content of the Covenant. In this connection, counsel claims that, in respect of the alleged violation of article 6 of the Covenant, there is no relevant difference between the preparation of the Woensdrecht base for the deployment of cruise

missiles and their actual deployment. Counsel submits that he can make available to the Committee statements of the authors, in which they explain how they were individually affected by the State party's cooperation with the deployment.^{5.5} Counsel reiterates that the effects of the (preparation of the) deployment of nuclear weapons are real enough to be seriously feared, because it renders the site a target for possible nuclear attacks. In this connection, counsel argues that a real risk of a treatment that would violate the Covenant, can by itself already constitute a violation of the Covenant. According to counsel, in the interpretation of article 6 of the Covenant, a difference should be made between conventional and nuclear weapons. The authors claim that they do not have to accept the risk of being exposed to the response of an enemy when this risk is created by acts which are in themselves a violation of international law, and that this risk *in casu* gives rise to a violation of article 6. In this connection, counsel cites the Committee's decision in communication No. 35/1978.⁵

5.6 In reply to the State party's argument that the authors' contention that they might be called upon to cooperate in deploying or using the cruise missiles is not plausible, counsel refers to article 97 of the Constitution of the Netherlands, under which every citizen of the Netherlands can be required to participate in maintaining the independence of the kingdom and in the defence of its territory.

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 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The authors claim that the State party's preparations for the deployment of cruise missiles in Woensdrecht and the presence in the Netherlands of other nuclear weapons violate their rights under article 6 of the Covenant. The Committee recalls in this context its second General Comment on article 6, where it observed 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".⁶ At the same time, the Committee notes that the procedure laid down in the Optional Protocol was not designed for conducting public debate over matters of public policy, such as support for disarmament and issues concerning nuclear and other weapons of mass destruction.

6.3 The Committee has considered the claim of the State party that the communication is in fact an *actio popularis*. The Committee notes that, provided each of the authors is a victim within the meaning of article 1 of the Optional Protocol, nothing precludes large numbers of persons from bringing a case under the Optional Protocol. The mere fact of large numbers of petitioners does not render their communication an *actio popularis*, and the Committee finds that the communication does not fail on this ground.

6.4 The Committee next considers whether the authors are victims within the meaning 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 preparation for the deployment or the actual deployment 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 preparations for deployment of cruise missiles between 1 June 1984 and 8 December 1987 and the continuing deployment of other nuclear weapons in the Netherlands did not, at the relevant period of time, place the authors in the position to claim to be victims whose right to life was then violated or under imminent prospect of violation. Accordingly, after careful examination of the arguments and materials before it, the Committee finds that the authors cannot claim to be victims within the meaning of article 1 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 1 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party, to the authors and to their counsel.

[Done in English, French and Spanish, the English text being the original version.]

Footnotes

*/ All persons handling this document are requested to respect and observe its confidential nature.

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

1/ Reference is made, inter alia , to the Committee's decisions in communications Nos. 84/1981 (*Dermit Barbato v. Uruguay*), Views adopted on 21 October 1982), 30/1978 (*Bleier v. Uruguay*), Views adopted on 29 March 1982), and 161/1983 (*Herrera Rubio v. Colombia*), Views adopted on 2 November 1987).

2/ *Ominayak v. Canada* , Views adopted on 26 March 1990, paragraph 32.1.

3/ *Soering v. United Kingdom* (1/1989/161/217), judgment of 7 July 1989.

4/ *Hoge Raad, S. v. the Netherlands* , judgment of 30 March 1990.

5/ *S. Aumeerruddy-Cziffra e.a. v. Mauritius* , Views adopted on 9 April 1981.

6/ General Comment 14[23], adopted on 2 November 1984.