

HUMAN RIGHTS COMMITTEE

Westerman v. Netherlands

Communication No. 682/1996

16 October 1997

CCPR/C/61/D/682/1996 */

ADMISSIBILITY

Submitted by: Paul Westerman [represented by a Dutch law firm]

Victim: The author

State party: The Netherlands

Date of communication: 22 November 1995 (initial submission)

Documentation references: List - CCPR/C/CL/R.63/Add.1 Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 14 March 1996 (not issued in document form)

Date of present decision: 16 October 1997

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

Decision on admissibility

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 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 continued to refuse 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 refusal of military orders is a criminal offence, punishable by a maximum of one year and nine months' imprisonment, to be doubled in case of repeated refusal. The proceedings were adjourned for an indefinite period of time.

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 total refusal of military service is a criminal offence, punishable by a maximum of two years' imprisonment.

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, the total refusal of any military service was criminalized 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 take the author's conscientious objections against military service into account, is said to constitute a violation of article 18 of the Covenant.

Issues and proceedings before the Committee

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

5.1 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.

5.2 The Committee notes that no obstacles to admissibility exist and considers that the issues raised by the communication should be considered on its merits.

6. The Human Rights Committee therefore decides:

(a) that the communication is admissible;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any that may have been taken by it;

(c) that any explanations or statements received from the State party shall be communicated by the Secretary General under rule 93, paragraph 3, of the rules of procedure to the author's counsel, with the request that any comments which he may wish to make should reach the Human Rights Committee, in care of the Office of the High Commissioner for Human rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(d) that this decision shall be communicated to the State party and to the author's counsel.

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

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