HUMAN RIGHTS COMMITTEE

T.W.M.B. v. The Netherlands

Communication No. 403/1990

7 November 1991

CCPR/C/43/D/403/1990*

ADMISSIBILITY

Submitted by: T.W.M.B (name deleted)

Alleged victim: The author

State party: The Netherlands

Date of communication: 11 April 1990 (date of initial letter)

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

Meeting on 7 November 1991,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial submission dated 11 April 1990 and subsequent correspondence) is T.W.M.B., a Dutch citizen born on 29 June 1965, residing in Hengelo, the Netherlands. He is a conscientious objector to both military service and substitute civilian service and claims to be the victim of a violation by the Government of the Netherlands of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author:

2.1 The author did not report for his military service on a specified day. He was arrested and brought to the military barracks, where he refused to obey orders to accept a military uniform and equipment on the ground that he objected to military service and substitute

public service as a consequence of his pacifist convictions. On 2 February 1987, he was courtmartialled and found guilty of violating articles 23 and 114 of the Military Penal Code (**Wetboek van Militair Strafrecht**) by the Arnhem Military Court (**Arrondissementskrijgsraad**) and sentenced to six months' imprisonment and dismissal from military service.

2.2 Both the author and the Public Prosecutor appealed to the Supreme Military Court (**Hoog Militair Gerechtshof**) which, on 6 May 1987, found the author guilty of violating articles 23, 114 and 150 of the Military Penal Code and article 57 of the Penal Code and sentenced him to twelve months' imprisonment and dismissal from military service. On 9 February 1988, the Supreme Court (**Hoge Raad**) rejected the author's appeal.

The complaint:

3.1 The author alleges that the proceedings before the courts suffered from various procedural defects, notably that the courts did not correctly apply international law and did not consider the following conventions and general principles:

-the International Covenant on Civil and Political Rights;

-the European Convention on Human Rights and Fundamental Freedoms;

-the Convention on the Prevention and Punishment of the Crime of Genocide;

-the Hague Convention (IV) on the Laws and Customs of War on Land;

-the 1925 Geneva Protocol on the Prohibition of the Use of Toxic Gases and Bacteriological Weapons;

-the London Charter of the International Military Tribunal at Nuremberg;

-the 1949 Geneva Convention (IV) on the Protection of Civilian Persons in Times of War;

-the principle that civilian populations may never be targeted during military operations;

-the principle that a distinction between civilian populations and combatants and between civilian and military targets be observed at all times;

-the principle of proportionality;

-the principle that violence which is likely to cause unnecessary suffering is to be avoided.

3.2 The author's defence was based on the argument that by performing military service, he would become an accessory to the commission of crimes against peace and of genocide, as he would be forced to participate in the preparation for the use of nuclear weapons. In this context, the author regards the NATO strategies of "flexible response" and "forward

defence", as well as the military operational plans based on them, which envisage resort to nuclear weapons in armed conflict, as a conspiracy to commit a crime against peace and/or the crime of genocide.

3.3 According to the author, the Dutch army, integrated as it is in the NATO structures, is preparing a nuclear war, which should be considered illegal in the light of international law.

3.4 The Supreme Military Court rejected the author's line of defence. It held that the question of the author's participation in a conspiracy to commit genocide or a crime against peace, did not arise, as the international rules and principles invoked by the author do not concern, in the view of the Court, the issue of the deployment of nuclear weapons and likewise the conspiracy does not occur, since the NATO doctrine does not automatically imply use without further consultations.

3.5 The author further alleges that the Supreme Military Court was not impartial within the meaning of article 14, paragraph 1, of the Covenant or article 6 of the European Convention on Human Rights. He explains that the majority of the members of the Supreme Military Court were highranking members of the armed forces, who given their professional background, could not be expected to hand down an impartial verdict.

3.6 The author terms the appointment of the civilian members of the Supreme Military Court "a joke" pointing out that the "civilian" members of the Supreme Military Court who had been appointed in accordance with the rules of procedure used to serve in the highest ranks of the armed forces during their professional careers and upon retirement became the "civilian" members of the Supreme Military Court.

The State party's observations and author's clarifications:

4.1 The State party notes that a State's right to require its citizens to perform military service, or substitute service in the case of conscientious objectors whose grounds for objection are recognized by the State, is, as such, not contested. Reference is made to article 8, paragraph 3, c (ii) of the Covenant.

4.2 The Government takes the view that the independence and impartiality of the Supreme Military Court in the Netherlands is guaranteed by the following procedures and provisions:

The president and the member jurist of the Supreme Military Court are judges in the Court of Appeal (**Gerechtshof**) in The Hague, and remain president and member jurist as long as they are members of the Court of Appeal.

The military members of the Supreme Military Court are appointed by the Crown. They are discharged after reaching the age of seventy.

The military members of the Supreme Military Court do not hold any function in the military hierarchy. Their salaries are paid by the Ministry of Justice.

The president and the members of the Supreme Military Court have to take an oath before they can take up their appointment. They swear or vow to act in a fair and impartial way.

The president and the members of the Supreme Military Court do not owe any obedience nor are they accountable to any one regarding their decisions.

As a rule the sessions of the Supreme Military Court are public.

4.3 The State party points out that national and international judgments have confirmed the impartiality and independence of the military courts in the Netherlands. Reference is made to the **Engel Case** of the European Court of Human Rights [1] and to the judgment of the Supreme Court of the Netherlands of 17 May 1988.

4.4 With regard to the exhaustion of domestic remedies the State party claims that the Act on Conscientious Objection to Military Service (**Wet Gewetensbezwaren Militaire Dienst)** is an effective remedy to insuperable objections to military service. The State party contends that as the author has not invoked the Act, he has thus failed to exhaust domestic remedies.

4.5 The State party contends that the other elements of the applicant's communication are unsubstantiated. It concludes that the author has no claim under article 2 of the Optional Protocol and that his communication should accordingly be declared inadmissible.

5.1 In his reply to the State party's observations the author claims that the Conscientious Objection Act has a limited scope and that it may be invoked only by conscripts who meet the requirements of Section 2 of the Act. The author rejects the assertion that Section 2 is sufficiently broad to cover the objections maintained by "total objectors" to conscription and alternate civilian service. He argues that the question is not whether the author should have invoked the Conscientious Objection Act, but whether the State party has the right to force the author to become an accomplice to a crime against peace by requiring him to do military service.

5.2 The author contends that the State party cannot claim that the European Court of Human Rights has confirmed the impartiality and independence of the Netherlands court martial procedure (Military Court).

5.3 With regard to the exhaustion of domestic remedies the author explains that he was convicted by the court of first instance and that his appeals to the Supreme Military Court and the Supreme Court of the Netherlands were rejected. He argues, therefore, that the requirement to exhaust domestic remedies has been fully complied with.

Issues and proceedings before the Committee:

6.1 Before considering any claims 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 Article 5, paragraph 2(a) of the Optional Protocol precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. The Committee has ascertained that the case is not under examination elsewhere. The Committee has found that the same matter was considered in 198889 by the European Commission of Human Rights; this does not, however, preclude the Committee's competence, as the State party has made no reservation to that effect.

6.3 With regard to article 5, paragraph 2(b), of the Optional Protocol, the State party claims that, as the author failed to apply for substitute civilian service by invoking the Act on Conscientious Objection to Military Service, he has thus failed to exhaust domestic remedies. The Committee is unable to conclude that this Act can be construed as an effective remedy for an individual who objects not only to military service, but also to substitute civilian service. The author has been convicted twice and has appealed to the Supreme Court of the Netherlands and the Committee observes that, in the circumstances, there are no effective remedies within the meaning of article 5, paragraph 2(b) of the Optional Protocol, which the author should still pursue.

6.4 The author has contested the independence and impartiality of the Supreme Military Court. Taking into account the State party's observations, the Committee finds that the author has failed to sufficiently substantiate his contention, for purposes of admissibility, and that this part of the complaint does not constitute a claim under article 2 of the Optional Protocol.

6.5 With regard to the author's objection to the power of the State to require him to do military or substitute national service, the Committee observes that the Covenant does not preclude the institution of compulsory military service by States parties, and refers in this connection to the pertinent provision in article 8, paragraph 3(c)(ii). Consequently, by reference to the requirement to do military service or, for that matter substitute service, the author cannot claim to be a victim of a violation of articles 6 and 7 of the Covenant. Therefore, this part of the communication is inadmissible under article 3 of the Optional Protocol as incompatible with the provisions of the Covenant.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

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

[Done in English, French, Russian 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/ See European Court of Human Rights, Series A. Vol. 22, p. 37, para. 89.