L. Communication No. 295/1988, Aapo Järvinen v. Finland (views adopted on 25 July 1990, at the thirty-ninth session)

Submitted by: Aapo Järvinen (represented by counsel)

Alleged victim: The author

State party concerned: Finland

Date of communication: 16 March 1988 (date of initial letter)

Date of decision on admissibility: 23 March 1989

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

Meeting on 25 July 1990,

Having concluded its consideration of communication No. 295/1988 submitted to the Committee by Mr. Aapo Järvinen 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 and by the State party,

Adopts the following:

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

1. The author of the communication, dated 16 March 1988, is Aapo Järvinen, a Finnish citizen born in February 1965, who claims to be the victim of a violation of article 26 of the International Covenant on Civil and Political Rights by Finland. He is represented by counsel.

The background

2.1 In Finland, until the end of 1986, applications for exemption from military service were dealt with under the Act on Unarmed and Civilian Service. Under this legislation, conscripts whose religious or ethical convictions did not allow them to perform their compulsory military service as armed service in accordance with the Conscription Act could be exempted from such service in times of peace and be assigned to unarmed or to civilian service. The duration of military service is eight months. The duration of unarmed service was 11 months, to be performed in the Defence Forces in duties not involving the carrying of arms. Civilian service lasted 12 months, to be performed in government civilian service, in the municipalities or in hospitals.

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* Individual opinions submitted (a) by Messrs. Francisco Aguilar Urbina and Fausto Pocar and (b) by Mr. Bertil Wennergren, respectively, are appended.

2.2 Under the law in force until the end of 1986, a written application as well as the genuineness of an applicant's religious or ethical convictions were examined by a particular examination board. At the end of 1986 this procedure was abolished by Act No. 647/85, the Act on the Temporary Amendment to the Act on Unarmed and Civilian Service and applicants are now assigned to civilian service solely on the basis of their own declarations. The duration of civilian service was set at 16 months. The ratio legis for the amendment reads as follows:

> "As the convictions of conscripts applying for civilian service will no longer be examined, the existence of these convictions should be ascertained in a different manner so as not to let the new procedure encourage conscripts to seek an exemption from armed service purely for reasons of personal benefit or convenience. Accordingly, an adequate prolongation of the term of such service has been deemed the most appropriate indicator of a conscript's convictions".

2.3 On 9 June 1986, the author, who had been called upon to report for military service, submitted a written statement to the competent authorities stating that his ethical convictions did not permit him to perform armed or unarmed service in the Finnish Defence Forces. The headquarters of the military district of Tampere transmitted the author's statement to the Investigation Board on 8 December 1986. The Board failed to take a decision before the expiration of its mandate on 31 December 1986, and the documents were returned to the headquarters, from where the matter was referred to the Commander of the military district for consideration under the implementation order of Act No. 647/85.

2.4 In January 1987, the author submitted a new application for exemption from military service; this was accepted in February 1987. On 9 June 1987, the author started alternative civilian service. Under the new provisions referred to above, the term of civilian service is determined in accordance with the provisions in force at the time of the service order. Accordingly, Mr. Järvinen's term of service was 16 months, because he did not receive the order assigning him to alternative civilian service until the amendment became effective. In reply to a complaint of discrimination filed by the author, the Parliamentary Ombudsman of Finland, on 17 February 1988, concluded that there had been no evidence of any intention on the part of the authorities deliberately to prolong the procedure in Mr. Järvinen's case; had his case been considered in the course of 1986, his ethical convictions would have had to have been considered, with the possibility of failing to persuade the authorities of their genuineness.

2.5 Certain categories of individuals are exempt from military or alternative service in Finland. An Act on the Exemption of Jehovah's Witnesses from Military Service has been in force since the beginning of 1987. Under this Act, the service of a conscript who adheres to the religious community of Jehovah's Witnesses may be deferred until his twenty-eighth birthday; after that he may be exempted from military service in times of peace. This means that, in practice, Jehovah's Witnesses do not have to perform any type of military or alternative service.

The author's allegations

3.1 The author considers that he has been the victim of discrimination, since individuals who choose alternative service are required to serve for 16 months, whereas the term of military service is only eight months. While he concedes that the previous term of 12 months for alternative service was not necessarily

discriminatory within the meaning of article 26 of the Covenant, he argues that a prolongation from 12 to 16 months is not justified and constitutes discrimination. A period of 16 months is disproportionately longer than that applicable to military conscripts, being twice as long. In the author's opinion, the Finnish Government has failed to adduce valid arguments to establish the proposition that increasing the period of alternative service to 16 months is a reasonable, non-discriminatory measure, proportionate to the stated objective; moreover, the determination of the new term of alternative service was not based on any empirical research but was selected arbitrarily. To the author, the stated ratio legis of the legislative amendment, Act No. 647/85, is indicative of the Government's intention to introduce some punitive element in the prolongation of alternative service.

3.2 It is pointed out that the earlier term of alternative civilian service, 12 months, was in fact based on an argument of proportionality. The author refers in this context to government bill No. 136 on unarmed and civilian service, which had been presented to Parliament in 1967. Under the initial proposal, civilian service would have lasted six months longer than military service, i.e., a total of 14 months. The parliamentary Defence Matters Committee shortened the term of civilian service to 12 months, considering that the proposed term for alternative service was "unreasonably long", and that it was inappropriate to treat conscripts who had opted for unarmed or civilian service in a considerably more disadvantageous way than others. Accordingly, the Committee proposed to set the duration for unarmed service at 11 months and for civilian service at 12 months.

3.3 The author adds that if one were to compare the situation of conscientious objectors in Finland with that of conscientious objectors in other Western European countries, it would be apparent that a term of civilian service twice as long as that of armed military service is disproportionate to the aim of the measure, as in all those countries except one, civilian service usually lasts as long or only somewhat longer (up to 50 per cent longer) than military service. This is true not only of Western Europe but also of Poland and Hungary, which recently passed legislation governing civilian service.

3.4 In respect of the State party's argument that the simple abolition of the examination procedure for conscientious objectors might encourage conscripts to seek exemption from armed service on grounds of personal benefit and convenience, the author submits that the criteria for any differentiation in the term(s) of service are neither reasonable nor objective, as the prolongation of the term of service is applied to all groups of conscientious objectors except for one specific group, Jehovah's Witnesses, who are exempt from all forms of service. Under the current system, serious religious or ethical objectors are punished by an excessive prolongation of their service, while some seeking personal benefit or convenience opt for the shortest possible term of armed service, eight months. In the author's opinion, such criteria of differentiation cannot be considered reasonable and objective, as the entire burden is placed on those objectors whose genuineness of convictions has never been at issue. Further, for such objectors the matter is not one of choice but is inherent in their philosophy.

The State party's comments and observations

4.1 Referring to the Committee's decision in communication No. 185/1984, a/ the State party argues that inasmuch as States parties do not have any obligation to provide for alternative service, they may, whenever they do provide for such alternative service, determine its conditions as they see fit, provided that these conditions do not per se constitute a violation of the Covenant.

4.2 Invoking the ratio legis of Act No. 647/85, the State party contends that the duration of civilian service, although admittedly longer than that of armed conscripts, does not indicate any intention of, or actual, discrimination vis-à-vis civilian servicemen within the meaning of article 26 of the Covenant. Inasmuch as the specific circumstances of the author's case and the examination of his application of June 1986 are concerned, the State party considers that on the basis of the facts, and in the light of the opinion of the Parliamentary Ombudsman of 17 February 1988, the determination of his term of civilian service took place in accordance with Finnish law and with article 26 of the Covenant.

4.3 In respect of the general exemption of Jehovah's Witnesses from any form of service, the State party points out that the Act on the Exemption of Jehovah's Witnesses from Military Service was passed in accordance with section 67 of the Parliament Act, which lays down the procedural requirements for the enactment of constitutional legislation, and affirms that the Act cannot be regarded as discriminatory within the meaning of article 26 of the Covenant.

Issues and proceedings before the Committee

5.1 On the basis of the information before it, the Committee concluded that all conditions for declaring the communication admissible had been met, and that, in particular, it was agreed between the parties that available domestic remedies had been exhausted, pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

5.2 On 23 March 1989, the Human Rights Committee declared the communication admissible.

6.1 Article 8 of the Covenant makes clear that "service of military character" or "national service required by law of conscientious objectors" is not to be regarded as forced or compulsory labour. The Committee notes that the new arrangements, whereby applicants are now assigned to civilian service solely on the basis of their own declarations, effectively allows a choice as to service and departs from the previous pattern of an alternative civilian service for proven conscientious objectors. Accordingly, any issue of alleged discrimination falls under article 26 rather than under article 2, paragraph 1, in relation to article 8.

6.2 Thus, the main issue before the Committee is whether the specific conditions under which alternative service must be performed by the author constitute a violation of article 26 of the Covenant. That the Covenant itself does not provide a right to conscientious objection does not change this finding. Indeed, the prohibition of discrimination under article 26 is not limited to those rights which are provided for in the Covenant.

6.3 Article 26 of the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment. Any differentiation, as the Committee has had the opportunity to state repeatedly, must however, be based on reasonable and objective criteria. b/

6.4 In determining whether the prolongation of the term for alternative service from twelve to sixteen months by Act No. 647/85, which was applied to Mr. Järvinen, was based on reasonable and objective criteria, the Committee has considered in particular the ratio legis of the Act (see para. 2.2 above) and has found that the new arrangements were designed to facilitate the administration of alternative service. The legislation was based on practical considerations and had no discriminatory purpose.

6.5 The Committee is, however, aware that the impact of the legislative differentiation, works to the detriment of genuine conscientious objectors, whose philosophy will necessarily require them to accept civilian service. At the same time, the new arrangements were not merely for the convenience of the State alone. They removed from conscientious objectors the often difficult task of convincing the examination board of the genuineness of their beliefs; and they allowed a broader range of individuals potentially to opt for the possibility of alternative service.

6.6 In all the circumstances, the extended length of alternative service is neither unreasonable nor punitive.

6.7 Although the author has made certain references to the exemption of Jehovah's Witnesses from alternative or military service in Finland, their situation is not at issue in the present communication.

7. 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 terms of alternative service imposed on Mr. Järvinen by Act No. 647/85 do not disclose a violation of article 26 of the Covenant.

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

Notes

a/ See communication No. 185/1984 (L. T. K. v. Finland), inadmissibility decision adopted on 9 July 1985; in this decision, the Committee held that the Covenant "does not provide for the right to conscientious objection", para. 5.2; Selected Decisions of the Human Rights Committee, volume 2, p. 62 of the English version.

b/ See communication No. 196/1985 (Gueye et al. v. France), final views adopted on 3 April 1989, para. 9.4; Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40, annex X, sect. B).

APPENDIX I

Individual opinion submitted by Messrs. Francisco Aguilar Urbina and Fausto Pocar, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 295/1988, Järvinen v. Finland

We share the view expressed by the majority of the Committee that the present case is to be considered under article 26 of the Covenant, as well as the view that the same article does not prohibit all differences of treatment, provided that a differentiation be based on reasonable and objective criteria. However, we do not share the view that reasonable and objective criteria exist in the present case.

A consideration of the ratio legis of the Finnish Act 647/85 discloses that the difference of duration between military and civilian service is not based on objective criteria, such as a more severe type of service or the need for a special training required in order to accomplish the longer service. The ratio of the law is rather to replace the earlier method of testing the sincerity of an applicant's conscientious objection with a procedure based on administrative convenience, whereby the longer duration of the civilian service results in a sanction against consicentious objectors. Such longer duration constitutes in our view a difference of treatment incompatible with the prohibition of discrimination on grounds of opinion enshrined in article 26 of the Covenant.

Francisco AGUILAR URBINA
Fausto POCAR

APPENDIX II

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 295/1988, Järvinen v. Finland

Article 6 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to gain his living by work which he freely chooses or accepts. The objective of article 8 of the Covenant on Civil and Political Rights is the protection against being forced to carry out work which one has not freely chosen. However, exception is made for any service of military character and, in conjunction herewith, for any national service required by law of conscientious objectors. As the national service in question is meant to replace military service, the question of equality before the law arises, as explained in paragraphs 6.1 to 6.3 of the Committee's views. I concur in the opinions expressed in these paragraphs. When considering the question of equality before the law, the natural starting-point for me is everyone's right freely to choose his work and the time to devote to it and the fact that the object of national service is a replacement of military service.

The ratio legis of Act No. 647/85 (see para. 2.2 of the views) was that by choosing to prolong service time by as much as 240 days, the effect would be to discourage applicants without sincere and truly genuine convictions. Looked upon exclusively from the point of view of deterrence of objectors without genuine convictions, this method may seem both objective and reasonable. However, from the point of view of those for whom national service had been established in place of military service, the method is inadequate and runs counter to its purpose. As the Committee observes in paragraph 6.5, the impact of the legislative differentiation works to the detriment of genuine conscientious objectors, whose philosophy will necessarily require them to accept civilian service, no matter how long it is in comparison to military service. From this finding I draw the conclusion, contrary to the Committee, that the method not only is inadequate in relation to its very purpose to provide a possibility to those who, for reasons of conscience, are unable to perform military service, to instead perform civilian service. The effect of this practice is that they will be compelled to sacrifice twice as much of their liberty in comparison to those who are able to perform military service on the basis of their belief.

In my view, this is unjust and runs counter to the requirement of equality before the law laid down in article 26 of the Covenant. The differentiation in question is, in my view, based on grounds that are neither objective nor reasonable. Nor does it in my opinion comply with the provisions of article 18, paragraph 2, which state that no one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice. Obliging conscientious objectors to perform 240 extra days of national service on account of their beliefs is to impair their freedom of religion or to hold beliefs of their choice.

I am therefore of the view that the terms for performance of national service, in place of military service, imposed on Mr. Järvinen by Act No. 647/85 disclose violations of articles 18 and 26 in conjunction with article 8 of the Covenant.

Bertil WENNERGREN