Communication No. 402/1990, Henricus Antonius Godefriedus Maria Brinkhof v. the Netherlands (views adopted on 27 July 1993, forty-eighth session)

Submitted by: Henricus Antonius Godefriedus Maria Brinkhof (represented by counsel)

Alleged victim: The author

State party: The Netherlands

Date of communication: 11 April 1990 (initial submission)

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

Meeting on 27 July 1993,

Having concluded its consideration of communication No. 402/1990, submitted to the Human Rights Committee by Mr. H. A. G. M. Brinkhof 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, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Henricus A. G. M. Brinkhof, a citizen of the Netherlands, born on 1 January 1962, residing at Erichem, 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, 8, 14, 18 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

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 21 May 1987, he was found guilty of violating articles 23 and 114 of the Military Penal Code (Wetboek van Militair Strafrecht) and article 27 of the Penal Code (Wetboek van 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 26 August 1987, found the author guilty of violating articles 23 and 114 of the Military Penal Code

and sentenced him to 12 months' imprisonment and dismissal from military service. On 17 May 1988, the Supreme Court (Hoge Raad) rejected the author's appeal.

Complaint

3.1 The author contends that whereas article 114 of the Military Penal Code, on which his conviction was based, applies to disobedient soldiers, it does not apply to conscientious objectors, as they cannot be considered to be soldiers. He claims, therefore, that his refusal to obey military orders was not punishable by law.

3.2 The Supreme Military Court rejected the author's argument and, noting that article 114 of the Military Penal Code did not differentiate between conscientious objections and other objections to military service, considered article 114 applicable.

3.3 The author also alleges a violation of article 26 of the Covenant, on the grounds that while conscientious objectors may be prosecuted under the Military Penal Code, Jehovah's Witnesses may not.

3.4 The Supreme Military Court dismissed this argument, stating that Jehovah's Witnesses, unlike conscientious objectors, are not required to do military service, and thus cannot commit offences under the Military Penal Code. The Supreme Military Court further considered that it was not competent to examine the draft policy of the Netherlands Government.

3.5 The author further alleges that the proceedings before the courts suffered from various procedural defects, notably that the courts did not correctly apply international law.

3.6 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 the crime 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 strategies of the North Atlantic Treaty Organization (NATO) 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.

3.7 According to the author, if the NATO strategy is meant to be a credible deterrent, it must imply that political and military leaders are prepared to use nuclear weapons in armed conflict. The author states that the use of nuclear weapons is unlawful.

3.8 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, in the view of the Court, not concern 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.

3.9 The author further alleges that the Supreme Military Court was not impartial within the meaning of article 14, paragraph 1, of the Covenant. He explains that the majority of the members of the Supreme Military Court were high-ranking members of the armed forces who, given their professional background, could not be expected to hand down an impartial verdict. Furthermore, the civilian members of the Supreme Military Court had served in the highest ranks of the armed forces during their professional careers.

3.10 The author also invoked the defence of force majeure, because, as a conscientious objector to any form of violence, he could not act in any other way than he did. By prosecuting him, the State party has violated his right to freedom of conscience.

3.11 The Supreme Military Court rejected this defence by referring to the Act on Conscientious Objection to Military Service, under which the author could have applied for substitute civilian service. According to the author, however, his conscience prevents him from filing a request under the Act on Conscientious Objection to Military Service.

3.12 Finally, the author alleges another violation of article 26 of the Covenant, on the ground that the Military Penal Code, unlike the Penal Code, makes no provisions for an appeal against the summons. According to the author, it is inconceivable that civilians who become soldiers should be discriminated vis-a-vis other civilians.

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 State party states that Jehovah's Witnesses have been exempted from military service since 1974. Amendments to the Conscription Act, which are being prepared in order to make provision for the hearing of "total objectors", continue to provide for the exemption of Jehovah's Witnesses. In the view of the Government, membership of Jehovah's Witnesses constitutes strong evidence that the objections to military service are based on genuine religious convictions. Therefore, they automatically qualify for exemption. However, this does not exclude the possibility for other individuals to invoke the Act on Conscientious Objection to Military Service.

4.3 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:

(a) 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;

(b) The military members of the Supreme Military Court are appointed by the Crown. They are discharged after reaching 70 years of age;

(c) 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;

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

(e) 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;

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

4.4 The State party points out that national and international judgements 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 a/ and to the judgement of the Supreme Court of the Netherlands of 17 May 1988.

4.5 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.

4.6 With regard to the alleged violation concerning the absence of a right to appeal against the initial summons, the Government refers to the decision on admissibility by the Human Rights Committee in respect of communications Nos. 267/1987 and 245/1987, which raised the same issue. The Government therefore submits that this part of the present communication should be deemed inadmissible.

4.7 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

substitute 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 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.

5.3 With regard to the State party's proposed amendments to the Conscription Act, the author claims that they are to be withdrawn.

5.4 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).

Committee's decision on admissibility

6.1 During its forty-fourth session the Committee considered the admissibility of the communication. It considered that, since the author had been convicted for his refusal to obey military orders and his appeal against his conviction had been dismissed by the Supreme Court of the Netherlands, the communication met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 The Committee considered that the author's contention that the Court had misinterpreted the law and wrongly convicted him, as well as his claims under articles 6 and 7 were inadmissible under article 3 of the Optional Protocol. As regards the author's claim that his rights under article 26 of the Covenant were violated since the Military Penal Code, unlike the Penal Code, made no provisions for an appeal against the summons, the Committee referred to its jurisprudence in case Nos. 245/1987 and 267/1987, b/ and considered that the scope of article 26 could not be extended to cover situations such as the one encountered by the author; this part of the communication was therefore declared inadmissible under article 2 of the Optional Protocol.

6.3 The Committee decided that the author's allegation regarding the differentiation in treatment between Jehovah's Witnesses and conscientious objectors to military and substitute service in general should be examined on the merits.

6.4 The Committee considered that the author's other claims were not substantiated, for purposes of admissibility, and therefore inadmissible under article 2 of the Optional Protocol.

6.5 Accordingly, on 25 March 1992, the Committee declared the communication admissible in so far as the differentiation in treatment between Jehovah's Witnesses and conscientious objectors in general might raise issues under article 26 of the Covenant.

State party's submission on the merits and author's comments

7.1 In its submission, dated 20 November 1992, the State party argues that the distinction between Jehovah's Witnesses and other conscientious objectors to military service is based on objective and reasonable criteria.

7.2 The State party explains that, according to the relevant legal regulations, postponement of initial training can be granted in specific cases where special circumstances exist. A Jehovah's Witness who is eligible for military service is as a rule granted postponement of initial training if his community provides the assurance that he is a baptized member. The State party submits that this postponement is withdrawn if the community informs the Ministry of Defence that the individual concerned no longer is a full member of the community. If the grounds for granting postponement continue to apply, his eligibility for military service will expire when the individual reaches the age of 35.

7.3 To explain the special treatment for Jehovah's Witnesses, the State party states that baptized members form a closed group of people who are obliged, on penalty of expulsion, to observe strict rules of behaviour, applicable to many aspects of their daily life and subject to strict informal social control. According to the State party, one of these rules prohibits the participation in any kind of military or substitute service, while another obliges members to be permanently available for the purpose of spreading the faith.

7.4 The State party concludes that the different treatment of Jehovah's Witnesses does not constitute discrimination against the author, since it is based on reasonable and objective criteria. In this connection, it refers to the case law of the European Commission on Human Rights. c/ The State party moreover argues that the author has not substantiated that he is in a situation comparable to that of Jehovah's Witnesses.

8. In his comments, dated 25 January 1993, on the State party's submission, the author argues that, while the State party accepts membership of Jehovah's Witnesses as sufficient evidence that their objection to military and substitute service is sincere, it does not recognize the unsurmountable objections of other persons which are based on equally strong and genuine convictions. The author argues that the State party, by exempting Jehovah's Witnesses from military and substitute service, protects them against punishment by their own organization, while it sends other total objectors to prison. He further argues that the preparedness of total objectors to go to prison constitutes sufficient evidence of the sincerity of their objections and contends that the differentiation in treatment between Jehovah's Witnesses and other conscientious objectors amounts to discrimination under article 26 of the Covenant.

Examination of merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The issue before the Committee is whether the differentiation in treatment as regards exemption from military service between Jehovah's Witnesses and other conscientious objectors amounts to prohibited discrimination under article 26 of the Covenant. The Committee has noted the State party's argument that the differentiation is based on reasonable and objective criteria, since Jehovah's Witnesses form a closely-knit social group with strict rules of behaviour, membership of which is said to constitute strong evidence that the objections to military and substitute service are based on genuine religious convictions. The Committee notes that there is no legal possibility for other conscientious objectors to be exempted from the service altogether; they are required to do substitute service; when they refuse to do this for reasons of conscience, they are prosecuted and, if convicted, sentenced to imprisonment.

9.3 The Committee considers that the exemption of only one group of conscientious objectors and the inapplicability of exemption for all others cannot be considered reasonable. In this context, the Committee refers to its General Comment on article 18 and emphasizes that, when a right of conscientious objection to military service is recognized by a State party, no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs. However, in the instant case, the Committee considers that the author has not shown that his convictions as a pacifist are incompatible with the system of substitute service in the Netherlands or that the privileged treatment accorded to Jehovah's Witnesses adversely affected his rights as a conscientious objector against military service. The Committee therefore finds that Mr. Brinkhof is not a victim of a violation of article 26 of the Covenant.

9.4 The Committee, however, is of the opinion that the State party should give equal treatment to all persons holding equally strong objections to military and substitute service, and it recommends that the State party review its relevant regulations and practice with a view to removing any discrimination in this respect.

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

Notes

a/ Publications of the European Court of Human Rights, Series A: Judgements and Decisions, vol. 22, p. 37, para. 89.

b/ R. T. Z. v. the Netherlands, declared inadmissible on 5 November 1987, and M. J. G. v. the Netherlands, declared inadmissible on 24 March 1988.

c/ European Commission on Human Rights, case No. 10410/83, Norenius v. Sweden, decision of 11 October 1984, and case No. 14215/88, Brinkhof v. the Netherlands, decision of 13 December 1989.