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HUMAN RIGHTS COMMITTEE
Forty-third session

DECISIONS

Communication No. 401/1990

Submitted by :	J.P.K. (represented by counsel)
Alleged victim :	The author
State party :	The Netherlands
Date of communication :	11 April 1990 (date of initial letter)
Documentation references :	Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 30 July 1990 (not issued in document form)
Date of present decision :	7 November 1991

Decision on admissibility

[Annex]

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respect and observe its confidential nature.

DEC401.43

- ANNEX */

Decision of the Human Rights Committee under the Optional Protocol to
the International Covenant on Civil and Political Rights
- Forty-third session -

concerning

Communication No. 401/1990

Submitted by : J.P.K. (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 J.P.K., a Dutch citizen born on 28 August 1966, residing in Leiden, 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.

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

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 grounds that he objected to military service and substitute public service as a consequence of his pacifist conviction. On 21 May 1987, he was court-martialled 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 The Public Prosecutor appealed to the Supreme Military Court (Hoog Militair Gerechtshof) which, on 9 September 1987, found the author guilty of violating articles 23 and 114 of the Military Penal Code and sentenced him to twelve months' imprisonment and dismissal from military service. On 17 May 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, among other, 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 Charter of the International Military Tribunal for the Far East in Tokyo;

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

- the U.N. Charter;

- the Convention on the Rights and Duties of Neutral States and Persons in Times of War on Land;

- Resolution 95 (I) of the U.N. General Assembly of 11 December 1946;

- Appendix 2 in conjunction with article 107 of the Treaty establishing a European Defense Community;

- Resolution 3314 of the U.N. General Assembly of 14 December 1974;

- the 1977 Geneva Protocols;

- the so-called "de Martens" clause;

- 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 liable 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 to 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 NATO strategies of "flexible response" and "forwarded 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, it is "common knowledge" that the flexible response doctrine targets civilian centres which are held hostage for the eventuality that a conventional attack cannot be contained with conventional weapons. Moreover, if the "flexible response doctrine" is meant to be a credible deterrent, it must imply
that political and military leaders are prepared to use nuclear weapons in an armed conflict. The author states that recourse to nuclear weapons is a "completely integrated part" of the military-operation plans based on NATO strategy.

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, in 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.

3.5 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 two thirds 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. In the author's understanding, those with "a chip on their shoulders should not partake (...) the trial of a political adversary".

3.6 The author terms the appointment of the civilian members of the Supreme Military Court "a farce", pointing out that the two "civilian" members of the Supreme Military Court who had been appointed in accordance with the rules of procedure were in fact a rear-admiral and a general during their professional careers who 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. In 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 were heard and rejected by both the Supreme Military Court and the Supreme Court of the Netherlands. He argues, therefore, that the requirement to exhaust domestic remedies has been fully complied with.

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[1] See European Court of Human Rights, Series A, Vol. 22, p. 37, para. 89.

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 1988-89 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. The Committee finds 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 could 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 recalls in this connection 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].

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