Voorstel voor het afschaffen van (gender-selective) dienstplicht als programma punt

Ik heb amendementen ingediend op art. 6.1.9 (toevoeging), 6.2.1 (toevoeging), 6.2.3 (toevoeging), 6.2.6 (toevoeging) en 6.2.7 van het conceptverkiezingsprogramma die te maken hebben met gender-selectieve dienstplicht. In de notitie hieronder leg ik uit waarom gender-selectieve dienstplicht een mensenrechtenschending is die in strijd is met het Internationaal verdrag inzaken burgerrechten en politieke rechten en het EVRM.

De notitie is gebaseerd op een document van mijn hand in het Engels opgesteld, maar ik ga ervan uit dat dit geen probleem is.

Wat ik in feite voorstel is niets meer dan uiting geven in het verkiezingsprogamma van de intentie om naleving van dit specifiek aspect van het internationaal recht te eisen van EU-landen, NAVO-lidststaten en andere landen waar Nederland mee samenwerkt.

Veel EU-landen, waaronder Duitsland, Finland, Denemarken, Estland, Letland, Litouwen, Oostenrijk, Griekenland en Cyprus schenden deze bepalingen van de betreffende verdragen in de praktijk of formeel in wetgeving. Nederland, Noorwegen en Zweden zijn de enige landen ter wereld met de dienstplicht die genderneutraal is.

Robert Ensor

Summary

This document is a proposal to include a commitment to end gender-selective conscription in the election manifesto of Groenlinks/PvdA. The document concludes that gender-selective conscription is a human-rights violation under international law and calls on Groenlinks/PvdA to campaign for its abolition throughout the world and, in particular, in EU and NATO countries. In addition, the document concludes that gender-selective conscription is a form of institutionalised gender-based violence that should be acknowledged and dealt with as such under existing policies and legislation.

1. Introduction

Conscription has been abolished in many countries in the world. In many countries, it is included as a possibility in their constitutions and in legislation, but is not implemented. Many countries are of the

view that conscription is not the best way to provide for the human resources needs of their defence forces for many reasons. Amongst these are the fact that conscripts are generally not motivated to participate in a conflict and cannot adequately be trained to use modern weaponry or for general warfare. In countries where conscription is retained as an option in their constitutions and in legislation, but is not actively practised, the reintroduction of active conscription would require a considerable investment in housing and other facilities and infrastructure, training and the like. There would also be considerable political resistance to the reactivation of conscription in many countries.

On the other hand, recent events have shown that military conflicts can develop quickly and place considerable demands on states to defend themselves by all means possible. The possibility cannot be excluded, for instance, that the conflict in Ukraine could develop into a conflict with NATO, with countries like Finland, Estonia, Lithuania and Latvia at the forefront, all of which practise gender-selective conscription. Nor can the possibility of a conflict in the South China Sea or elsewhere be excluded, which may result in such demands on the military establishments of various countries that the draft may have to be reactivated or extended. Within the situation at present, in particular in the Ukraine-Russian war, gender-selective conscription is practised by both sides of the conflict.

If states that practise conscription, either actively or potentially, become involved in the escalation of a conflict, it would not be opportune to campaign for an end to conscription or gender-selective conscription at a time of growing tension or impending crisis, let alone in the midst of a military conflict. Apart from the political pressure in such a situation, amendments to legislation and to the constitutions of states take time. For this reason, a campaign against conscription or gender-based conscription should start now.

2. International legal context

2.1 International Covenant on Civil Rights and Political Rights (ICCPR)

The International Covenant on Civil Rights and Political Rights is one of the main cornerstones of international human-rights law, in which the principles of the UN's Declaration of Human Rights are elaborated.[1] The principles regarding gender equality as a human right are set out in articles 2.1 and 26 of the ICCPR. The ICCPR, as an international treaty, is legally binding on its signatories and has precedence over domestic law.

Article 26[2] of the ICCPR requires State Parties to provide effective protection to all persons against discrimination based on any ground "such as race, colour, sex, language, religion, political or other

[1] United Nations, International Covenant on Civil and Political Rights, 116 December 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights. For the ratification status per country, see United Nations, Status of Ratification Interactive Dashboard, https://indicators.ohchr.org/.

[2] Article 26, *ibid*.
"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

opinion, national or social origin, property, birth or other status."[3] This proposal focuses on discrimination based on sex, which is understood to include gender.

Article 2.1[4] requires each State Party to ensure that all individuals are subject to the rights set out in the ICCPR without distinction based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Article 2.2[5] requires each State Party to take all necessary steps to set in motion any processes required to implement the provisions of the ICCPR in their constitutions and legislation. It should be noted that many State Parties ratified the ICCPR decades ago, but have not made the changes to their constitutions and legislation required by the ICCPR.

All State Parties are required to protect all persons against discrimination based on, for instance, sex. They are required to implement the rights contained in the ICCPR in their legislation and constitutions, and the implementation of these rights may itself not be discriminatory.

One such right is the right not to be subjected to forced labour. Article 8.3(a) states "No one shall be required to perform forced or compulsory labour". Article 8.3.(c) makes an exception to this for military service "(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:... (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors."

It can be concluded from this that while forced labour is prohibited, conscription is not considered to be forced labour, even though it is imposed on persons. The ICCPR therefore does not provide for a prohibition on conscription on the grounds that it is "forced labour". Gender-selective conscription, however, is a breach of articles 26 and 2.1 of the ICCPR, since it imposes the obligation to undergo military service on the basis of sex/gender. Such discrimination on the grounds of sex/gender is therefore a human-rights violation under the ICCPR.

The question arises as to whether State Parties may derogate from the provisions of the ICCPR at a time of national emergency. Article 4.1 allows State Parties to derogate from the rights conferred on persons in the ICCPR in the event of a national emergency that threatens the existence of the State Party, such as a war or some other disaster. An example of a right from which a State Party may derogate is article 12.2,[6] which grants all persons the right to leave any country, including their own. At a time of a national emergency that threatens the existence of the State Party, the State Party may limit the freedom of movement of persons and prevent them from leaving their own country.

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[3] The inclusion of the phrase "such as" allows for other forms of discrimination to be considered, such as discrimination based on gender.

[4] Article 2.1, *ibid*.
"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[5] Article 2.2, *ibid*.
"Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

[6] Article 12.2, *ibid*.
"Everyone shall be free to leave any country, including his own."

However, while article 4.1[7] allows for derogations from the ICCPR, it only allows for such derogations subject to conditions. Firstly, the State Party must have declared a state of emergency. Derogations in peace time or in the absence of a state of emergency or even in a state of emergency that has not been declared are breaches of the ICCPR. Furthermore, any derogations may not be based on discrimination "solely on the ground of race, colour, sex, language, religion or social origin." Taking the example of article 12.2, a State Party may, for instance, prohibit people from leaving their own country at a time of a proclaimed state of emergency, but they may not do so, for instance, on the basis of sex/gender. The ICCPR in effect establishes the right not to be discriminated against on the basis of "race, colour, sex, language, religion or social origin" as an absolute right from which derogation is not possible.

In conclusion, conscription itself is not prohibited by the ICCPR and is excluded from the concept of "forced labour". However, gender-selective conscription is discriminatory on the grounds of sex/gender. It is not possible for State Parties to derogate from the right to equal treatment by conscripting people on the basis of their sex/gender, even during a state of emergency that threatens the very existence of the State Party. While conscription itself is not a human-rights violation in terms of the ICCPR, gender-based conscription is, under all circumstances.

2.2 European Convention on Human Rights (ECHR)[8]

Article 14[9] of the ECHR prohibits discrimination based on sex/gender. As in the case of the ICCPR, conscription is excluded from the concept of "forced labour".[10] Hence opposition to conscription on the grounds that it is forced labour is not possible. Conscription itself is not deemed to be a human-rights violation in terms of the ECHR. However, discriminatory gender-selective conscription could be viewed as a violation of the prohibition on discrimination in article 14 ECHR. The question that arises is whether signatories to the ECHR are allowed to derogate from article 14 ECHR in a time of national emergency, such as war.

Article 15[11] ECHR allows signatories ("High Contracting Parties") to derogate from the provisions of the ECHR in a time of an emergency, except in relation to certain provisions of the ECHR, as set out in

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[7] Article 4.1, *ibid*.
" **In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures** are not inconsistent with their other obligations under international law **and do not involve discrimination solely on the ground of** race, colour, **sex**, language, religion or social origin."
[8] European Convention on Human Rights, https://www.echr.coe.int/documents/d/echr/convention_ENG.
[9] Article 14, https://www.echr.coe.int/documents/d/echr/convention_ENG
"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.´
[10] Article 4.3.(b), *ibid*.
"3. For the purpose of this Article the term "forced or compulsory labour" shall not include: ...(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service..."
[11] Article 15
"Derogation in time of emergency
1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the

article 15.2. These provisions do not include article 14, the prohibition on discrimination, so that it could be concluded that in a time an emergency the High Contracting Parties may discriminate on the basis, for instance, of sex/gender. This would seem to allow discrimination on the basis of sex/gender in relation to conscription in a time of war or some other major crisis. However, article 15 imposes an important condition on such derogations and the measures resulting from them, namely that they should not be "inconsistent with its [the High Contracting Party's] other obligations under international law". In this regard, compliance with the ICCPR is such another obligation under international law. Since the ICCPR prohibits discrimination based on sex/gender under all circumstances, including a state of emergency, it may be concluded that article 15 ECHR does not permit a derogation from article 14, the prohibition on discrimination, even in a time of an emergency. After all, if a High Contracting Party were to derogate from article 14 in a time of emergency by introducing or activating gender-selective conscription, it would contravene article 4.1 ICCPR and consequently article 15 ECHR. Gender-selective conscription is consequently a breach of the ECHR under all circumstances, even in time of an emergency.

3. Gender-selective conscription as a form of gender-based violence

The European Commission defines gender-based violence as "... violence directed against a person because of that person's gender or violence that affects persons of a particular gender disproportionately."[12]

Gender-selective conscription involves selecting people solely on the basis of their sex/gender to participate in, train for or in other ways to prepare for participation, directly or indirectly, in violent acts of war. Whether the person in question is compelled to perpetrate acts of war or agression, or falls victim to them, acts of war and the violence of war can result in death, physical injury, lifelong disability and psychological trauma. It can undermine the person's ability to function in society long after the conflict has ended. Since the sole basis for selection is gender/sex, gender-selective conscription must be considered a form of gender-based violence against the group, usually men, which is selected for it.

As gender-selective conscription is enforced by law, it may be regarded as institutionalised gender-based violence. The effects of this gender-based violence continue not only long after the conflict or experience of conscription has ended and start long before it commences. The gender roles associated with conscription and the psychological preparation for them are inculcated as part of gender socialisation from an early age. The psychological preparation for the institutionalised gender-based violence of gender-selective conscription from an early age through a wide variety of

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exigencies of the situation, **provided that such measures are not inconsistent with its other obligations under international law**."

[12] European Commission, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/what-gender-based-violence_en#:~:text=gender%2Dbased%20violence-,Gender%2Dbased%20violence%20(GBV)%20by%20definition,of%20a%20particular%20gender%20disproportionately.

cultural and other forms should also be considered to be part of the extended process involved in the gender-based violence of gender-selective conscription.

Since gender-selective conscription is overwhelmingly imposed on men, and disproportionally affects men due to their gender, it should be regarded as a form of institutionalised gender-based violence against men that subjects men to the violence of war, whether as victims or perpetrators, solely on the basis of their gender/sex. Where it is practised, whether actually or potentially, it establishes a link between gender (masculinity) and violence that impacts on the lives of men throughout their lives.

4. Effects of gender-selective conscription on gender-related rights

Gender-selective conscription requires the institutionalisation of gender identities. After all, if persons of a particular gender are to be conscripted, it is necessary for a state to be able to determine unambiguously, legally and administratively who belongs to the gender group to be conscripted.

In most cases, this requires clarity on who is “male” and by implication who is “non-male”. The result of this is often the enforcement of a binary distinction between “male” and “female”, or “male” and “non-male”.

Gender self-identification and gender transitioning pose challenges for countries that make provision for gender-selective conscription or practise it. If their citizens can self-identity, the state loses the ability to decide who belongs to the group of potential or actual conscriptees. Citizens may self-identify as belonging to a non-conscriptable gender because they do not identify with the gender role that the state imposes or intends to impose on them in relation to conscription. To obviate this, states often revert to the sex/gender assigned at birth, resulting in misgendering of people who have transitioned.

The abolition of gender-selective conscription would therefore remove one of the factors that cause some states to consider it necessary to institutionalise and regulate gender identity and its registration.

5. Conclusion

Gender-selective conscription, which usually involves conscription of men, is discriminatory, institutionalised gender-based violence, usually affecting men, that subjects people to the violence of war solely on the basis of their gender. It perpetuates and institutionalises a link between gender identity and violence, overwhelmingly between masculinity and violence.

As a practice based on gender/sex discrimination, gender-selective conscription is a human-rights violation in terms of the ICCPR, even in a time of emergency, war or any any other circumstance that threatens the very existence of a state or nation. The obligation to prohibit discrimination under the ICCPR is an international obligation, so that it is not possible to derogate from the non-discrimination

provisions of the ECHR even during an emergency. Gender-selective conscription is therefore also a human-rights violation under the ECHR, even in a time of war or any other emergency.

States that do not actively practise gender-selective conscription, but have provisions for it in national legislation and/or their constitutions, are in breach of the ICCPR and international human-rights law, since they have not implemented the non-discrimination provisions of the ICCPR in national law, as required by article 2.2 ICCPR.

Addendum: specific examples

This addendum contains a number of specific examples of breaches of the ICCPR and ECHR. These are included to illustrate the points raised above and in no way to suggest that these are the most serious or the only breaches of human-rights law in relation to (gender-selective) conscription.

(a) United States of America

The United States signed the ICCPR in 1977 and ratified it in 1992. Although the USA does not practise active conscription, the Selective Service System[13] requires only men to register for the draft, subject to penalties which include a fine of up to USD 250,000 and/or 5 years' imprisonment. This legal requirement discriminates on the basis of sex/gender and is therefore a human-rights violation under the ICCPR. The USA has also failed to comply with article 2.2 of the ICCPR, since it has not taken steps to implement the non-discriminatory provisions of the ICCPR in legislation regarding the draft.

The requirement that only men register for the draft means that there has to be a legal definition of "male" which can be distinguished unambiguously from "non-male". This requirement results inevitably in a discriminatory binary definition of gender. Included in the category of "men" are "U.S. citizens (U.S. born, dual citizens, and naturalized), U.S. citizens who live outside of the country, immigrants (legal permanent residents and undocumented immigrants), refugees and asylum seekers, transgender people who were assigned male gender at birth, people with disabilities".

Transgender people are misgendered by law and are required to register for the draft on the basis of their sex assigned at birth. Handicapped men are considered to be more able to contribute to the nation's defence than fit athletic women.

(b) Germany

Germany signed the ICCPR in 1968 and acceded in 1973. Germany also does not practise active conscription in any form. The non-discriminatory provisions with regard to sex/gender of the ICCPR are implemented, for instance, in article 3[14] of the German Basic Law. However, the ICCPR has not been implemented in article 12a[15] of the German Basic Law, which provides

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[13] Selective Service Program, https://www.usa.gov/register-selective-service

[14] Article 3, Basic Law for the Federal Republic of Germany, https://www.bundestag.de/gg
"Article 3
(1) All people are equal before the law.
(2) Men and women have equal rights. The state promotes the actual implementation of equal rights for women and men and works towards eliminating existing disadvantages.
(3) No one may be disadvantaged or given preferential treatment because of their sex, their descent, their race, their language, their homeland and origin, their faith, or their religious or political views. Nobody may be disadvantaged because of his disability."

[15] Article 12a, *ibid*.
"Article 12a
(1) Men may be obliged to serve in the armed forces, in the Federal Border Police or in a civil protection association from the age of eighteen."

for gender-selective, male-only conscription. This is a human-rights violation under the ICCPR, as it discriminates against men, potentially compelling only men to undergo either military service or compulsory alternative civilian service.

As in the case of the USA, to implement gender-selective conscription it is necessary to determine unambiguously who is a “male” and who is a “non-male”. This is the reason that transwomen under Germany’s recent proposed “self-determination law” are deemed to be male.

(c) Ukraine and Russia

Both Ukraine and Russia have imposed gender-selective conscription on their male population between certain ages. In addition, men who are eligible for conscription have been denied the right to leave their own countries.

Gender-selective conscription in both cases is a breach of the ICCPR and the ECHR. While both countries, in accordance with article 4.1, may derogate from article 12.2 ICCPR by denying persons the right to leave their own country, it is a breach of men’s human rights under the ICCPR to apply this derogation only to men and not to women. In accordance with the ICCPR (and therefore the ECHR) everyone should be allowed to leave their country, or no one should be allowed to do so, and gender/sex should not be the deciding factor.