Caso Duinhof y Duijf contra Holanda, de 22/05/1984 [ENG]

Notice Judgment (Merits and just Questions of procedure re A79 42K 9626/81 ; 9736/82 In the case of Duinhof and Duijf,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court (*), as a Chamber composed of the following judges:

(*) Note by the registry: The revised Rules of Court, which entered into force on 1 January 1983, are applicable to the present case.

Mr. R. Ryssdal, President, Mr. G. Wiarda, Mr. J. Cremona, Mrs. D. Bindschedler-Robert, Mr. F. Gölcüklü, Mr. L.-E. Pettiti, Mr. B. Walsh,

and also Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar,

Having deliberated in private on 24 November 1983 and on 4 May 1984,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 October 1983 and on the following day by the Government of the Kingdom of the Netherlands ("the Government"), within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47) of the Convention. The case originated in two applications (nos. 9626/81 and 9736/82) against that State lodged with the Commission in December 1981 and February 1982 by Mr. Bernard Joost Duinhof and Mr. Robert Duijf, Dutch nationals, under Article 25 (art. 25).

2. The Commission's request and the Government's application referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Kingdom of the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of both the request and the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 § 3 (art. 5-3).

3. In response to the inquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to participate in the proceedings pending before the Court and designated the lawyer who would represent them (Rule 30).

4. The Vice-President of the Court, acting as President of the Court, directed on 14 October 1983 that, in the interests of the proper administration of justice, the instant case should be referred to the single Chamber constituted on 24 March 1983 for the consideration of the case of de Jong, Baljet and van den Brink and the case of van der Sluijs, Zuiderveld and Klappe (Rule 21 § 6). This Chamber included, as ex officio members, Mr. G. Wiarda, the elected judge of Dutch nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the Vice-President of the Court (Rule 21 § 3

(b)), the five other members chosen by lot being Mrs. D. Bindschedler-Robert, Mr. F. Gölcüklü, Mr. L.-E. Pettiti, Mr. B. Walsh and Mr. R. Bernhardt (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Mr. J. Cremona, substitute judge, subsequently replaced Mr. Bernhardt who was prevented from taking further part in the consideration of the case (Rules 22 § 1 and 24 § 1).

5. Mr. Ryssdal, who had assumed the office of President of the Chamber (Rule 21 § 5), ascertained, through the Registrar, the views of the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants as to the procedure to be followed. Having particular regard to their concurring statements, he decided on 14 November that there was no need for written pleadings to be filed (Rule 37 § 1). On the same occasion, he directed that the oral proceedings should open on 22 November (Rule 38).

6. On 17 November, he granted the lawyer for the applicants leave to use the Dutch language in the procedure (Rule 27 § 3).

7. The hearings were held in public on 22 November at the Human Rights Building, Strasbourg. The previous day, the Chamber had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mrs. F.Y. van der Wal, Assistant Legal Adviser to the Ministry of Foreign Affairs, Agent,

Mr. E.A. Droogleever Fortuijn, Landsadvocaat, Counsel,

Mr. W. Breukelaar, Official at the Ministry of Justice,

Mr. J.A. Wiarda, Official at the Ministry of Defence, Advisers;

- for the Commission

Mr. J. Frowein, Delegate;

- for the applicants

Mr. E. Hummels, advocaat, Counsel.

The Court heard addresses by Mr. Droogleever Fortuijn for the Government, by Mr. Frowein for the Commission and by Mr. Hummels for the applicants, as well as their replies to its questions.

8. On 24 November, the Commission supplied the Registrar with two documents whose production the Court had requested.

On 12 and 20 December respectively, the Registrar received from the applicants and from the Agent of the Government their replies to certain of the questions and to the requests for documents put by the Court at the hearings.

9. On 21 December, the President of the Chamber granted each applicant legal aid with effect from 22 November, after having received the written comments of the Agent of the Government and the Delegate of the Commission in this connection (Rule 4 of the Addendum to the Rules of Court).

AS TO THE FACTS

10. Mr. Duinhof and Mr. Duijf, who were born in 1962 and 1958 respectively, reside in the Netherlands. In 1981 and 1982, after being forcibly drafted as conscript soldiers in the Netherlands Armed Forces, they each refused, on account of their beliefs as conscientious objectors, to obey specific orders deriving from their obligation to perform military service. They were placed in detention by the competent military officers for suspected offences against the Military Penal Code (Wetboek van Militair Strafrecht). They were kept in custody and referred for trial before a military court.

I. RELEVANT DOMESTIC LAW

A. Conscientious objection

11. Exemption may be obtained from compulsory military service on the ground of conscientious objection, both before and after active military service has begun. The procedure for requesting such exemption from the Minister of Defence is laid down in the Conscientious Objection to Military Service Act (Wet Gewetensbezwaren Militaire Dienst) and a Ministerial Decree of 31 July 1970.

In the present case, neither applicant ever submitted a request to the Minister of Defence to be granted the status of conscientious objector (see paragraphs 21-28 below).

B. Military criminal procedure

12. Criminal procedure for the military land and air forces, including in particular the matter of arrest and detention on remand, is governed by the Army and Air Force Code of Procedure (Rechtspleging bij de Land-en Luchtmacht - "the Military Code"), as last amended on 24 November 1978. Offences under military criminal law, which applies equally to conscript servicemen such as the applicants and to volunteers, are tried at first instance before a Military Court (Krijgsraad). There may be an appeal to the Supreme Military Court (Hoog Militair Gerechtshof) and ultimately a (cassation) appeal on points of law to the Supreme Court (Hoge Raad) of the Netherlands.

1. Detention prior to referral for trial

13. Every officer and non-commissioned officer is empowered to arrest military personnel of lower rank suspected of a serious offence provided the circumstances require immediate deprivation of liberty (Article 4 of the Military Code). The resultant detention is not to exceed twenty-four hours (Article 5).

The commanding officer may order a suspected serviceman to be placed or kept in custody on remand if (a) there is a serious risk of absconding or (b) there are important reasons of public safety requiring immediate deprivation of liberty or (c) this is necessary in connection with the maintenance of military discipline among other servicemen (Article 7, second paragraph). Such a detention order may be made against a serviceman suspected of any offence set out in the Military Penal Code or any offence in respect of which detention on remand is permitted under the civilian Code of Criminal Procedure, with the exception of those offences of which the Military Court takes no cognisance (Article 7, fourth paragraph). An order may not be issued if the suspect is unlikely to be penalised by unconditional imprisonment or by any other measure restricting his freedom, or is likely to be given a sentence of shorter duration than that of the detention on remand (ibid.). Detention must be terminated once the grounds for it cease to exist (Article 7, fifth paragraph). All cases of detention exceeding four days shall be reported by the commanding officer to the commanding general (Article 7, sixth paragraph).

Where detention has lasted fourteen days, the suspected serviceman may petition the competent Military Court to fix a term (liable to extension) within which the commanding general must either decide whether the case is to be referred to a Military Court or else terminate the detention. The Military Court has to rule on the petition without delay, after hearing the authority empowered to refer the case, the auditeur-militair (see paragraph 18 below) and the suspected serviceman, who may have the assistance of an adviser (Article 13).

14. If, after receiving the advice of the auditeur-militair and, "if possible" ("zo mogelijk"), after the suspected serviceman has been heard, the commanding general or a senior officer (hoofd officier) designated by him to act on his behalf considers that the case should be tried by the Military Court, the serviceman shall be referred for trial before that Court (Article 11). On the other hand, the commanding general or the designated officer may in appropriate circumstances leave the case to be dealt with as a disciplinary

matter (Article 12). Regulation No. 27/7 of the Ministry of Defence explained the effect of these provisions in the following terms (translation from Dutch):

"In military penal procedure, as distinct from civilian procedure, the decision to prosecute in a case is not taken separately by the prosecuting authority, the auditeur-militair, but by a military authority. That authority is the commanding general or the senior officer he has appointed to act on his behalf, i.e. the referring officer ... Thus, the auditeur-militair is merely an advisory body at this stage, although the obtaining of his advice and the giving of that advice by him are mandatory."

Any decision to refer for trial must be in writing and state whether the suspected serviceman is to be released or kept in custody; the grounds for detention set out in the second and fourth paragraphs of Article 7 (see paragraph 13 above) apply pari passu (Article 14). If, against the advice of the auditeur-militair, the commanding general or designated senior officer chooses not to refer a suspected serviceman for trial, the auditeur-militair may take the matter to the Supreme Military Court (Article 15). No appeal is provided for in the contrary case.

According to the Government, it has now become standard procedure to apply the above provisions of the Military Code in the following manner. Where detention on remand has been ordered, the suspected serviceman is always heard by the auditeur-militair and any referral to the Military Court takes place shortly thereafter, on average four to five days after the arrest. In view of the requirements of Article 14 of the Military Code the auditeur-militair's assessment of the circumstances and his advice to the commanding general or designated senior officer cover not only referral for trial but also the question whether the conditions for detention on remand set out in Article 7 are fulfilled. Thus, the standard written form used by the auditeur-militair for the purposes of transmitting his advice to the referring officer contains, inter alia, a paragraph as to whether the suspect should "be released or be placed or kept in custody". Practice has evolved to the point where the advice of the auditeur-militair is invariably followed and generally regarded as binding.

2. Detention subsequent to referral for trial

15. Detention maintained or ordered in the decision referring the serviceman for trial may not exceed fourteen days unless extended, by terms of thirty days, by the Military Court at the request of the auditeur-militair (Article 31). Every accused detained by virtue of the referral decision must be heard by the officier-commissaris (see paragraph 19 below) as speedily as possible and in any event within four days of referral; in this connection, the accused may be assisted by an adviser (Article 33, first paragraph). Before extending detention, the Military Court must give the accused or his adviser the opportunity to submit argument (Article 33, second paragraph).

As soon as the grounds for the detention cease to exist, release must be ordered (Article 34, first paragraph). In the period between referral and commencement of the trial, power to order release is exercisable by the auditeur-militair, or by the Military Court at the request of either the officier-commissaris or the detained serviceman himself (Article 34, second paragraph). The Military Court, in deciding on such requests, will hear the auditeur-militair and also the detained serviceman or his adviser where the serviceman is requesting release for the first time (Article 34, third paragraph).

16. If the accused is in custody at the first hearing, the Military Court will decide, after being addressed by the auditeur-militair, whether or not the nature and circumstances of the case require his continued detention during the trial (Article 151). The Court may direct the accused's release from detention on remand at any later stage

in the proceedings, either of its own motion or at the request of the auditeur-militair or the accused himself (Article 156).

17. A serviceman in custody may request release or suspension of his detention under Article 219 of the Military Code in proceedings before the Supreme Military Court pending the decision on his appeal.

3. The auditeur-militair, the officier-commissaris and the Military Court

18. The auditeur-militair has the function of prosecuting authority before the Military Court (Article 126, first paragraph). No serving member of the Armed Forces may appear as auditeur-militair or substitute auditeur-militair (Article 126, third paragraph). The auditeur-militair and his substitute may be replaced by an acting auditeur-militair (plaatsvervanger - Article 126, second paragraph) who may be a military officer, but such replacement was said by the Government to occur only in exceptional circumstances. Auditeurs-militair (including substitutes and acting ones) are appointed, and dismissed, by the Crown on a joint proposal from the Ministers of Justice and Defence; they must possess a law degree (Article 126, fourth and sixth paragraphs). Under the terms of Article 276, second paragraph, of the Military Code, they are obliged to comply with instructions given to them in their official capacity by the Minister of Justice. However, according to the Government, this latter provision serves as no more than the legal authority for issuing general guidelines on prosecution policy and, at least in recent years, no Minister of Justice has acted or interfered in a concrete case on the basis of Article 276.

The auditeur-militair is bound by his oath to act honestly and impartially (Articles 368 and 370). He must attend the hearings of the Military Court (Article 290) but he does not take part in the Court's deliberations. He is under a general duty to assist the Military Court, as well as the commanding general, with reports, observations and advice in relation to military justice when required to do so (Article 278). He is not under the supervision of the Military Court or the Supreme Military Court in the discharge of his duties, save that the Supreme Military Court has the power to reprimand him should he fail strictly to observe statutory time-limits (Article 297).

19. Attached to each Military Court is at least one officier-commissaris who is in charge of the preliminary investigation of cases (Article 29). An officier-commissaris is an officer or former officer of the Armed Forces with the rank of captain or higher and is appointed for a fixed term of at least one year by the commanding general (ibid.). While he may at the same time be a member of the Military Court, this is not usually the case. His task of preliminary investigation involves gathering the facts and hearing witnesses and the accused when necessary (Articles 29, 48 and 78). A hearing by the officier-commissaris has the same force as a hearing by the Military Court (Article 161). During his enquiries, he is under a duty to apply himself equally to discovering the accused's innocence and to obtaining proof or admission of guilt (Article 62). Like the auditeur-militair, he is bound by his oath to act honestly and impartially (Articles 368 and 370).

20. The Military Court sits with a president and two military members (Article 120).

The latter are military officers appointed by the commanding general; during their term of office, which is for one year at least, they may not be dismissed; they must be at least twenty-five years of age and be commissioned officers (Article 120). In practice, the rank most commonly possessed is that of captain or major. There is no requirement that the military members be legally qualified. According to the Government, although they retain the status of military officers, they are independent in their capacity as judges and

no order can be given to them by anyone. Like the president, the military members are bound by oath to act honestly and impartially (Articles 368 and 369).

The president is a civilian who must be the holder of a university law degree; he is appointed for life by the Crown on the joint recommendation of the Ministers of Justice and Defence (Article 121).

The deliberations of the Military Court are secret and its members are not allowed to make public their personal opinions or those of their colleagues (Article 135).

II. ARREST AND DETENTION OF THE APPLICANTS

A. Mr. Duinhof

21. Mr. Duinhof was arrested on 18 November 1981 on a charge of having failed to register in due time as a conscript serviceman (Article 150 of the Military Penal Code). He was transferred to military barracks where he refused to submit to a medical examination. He was then further accused of persistent insubordination (Article 114 of the Military Penal Code). On 19 November, the commanding officer confirmed the detention, the ground relied on being the need to maintain discipline amongst other servicemen (Article 7 of the Military Code - see paragraph 13 above).

On 20 November, he was brought before the auditeur-militair. On 23 November, in accordance with the advice of the auditeur-militair, the designated senior officer referred the applicant for trial before the Military Court, while deciding that he should be kept in custody on the same ground as before (Articles 11, 14 and 7, second paragraph, of the Military Code - see paragraph 14 above).

22. On 24 November, the applicant was heard by the officier-commissaris (Article 33, first paragraph, of the Military Code - see paragraph 15 above).

On 26 November, the Military Court examined a request made by the applicant on 24 November for release from custody (Article 34 of the Military Code - see paragraph 15 above). At this hearing, the applicant submitted, inter alia, that the requirements of Article 5 § 3 (art. 5-3) of the Convention had not been complied with. The Court held that the lapse of time between the applicant's arrest and his appearance before the officier-commissaris, a judicial officer, was "considerable" but nonetheless "acceptable", having regard both to the fact that this period comprised a week-end and to the geographical distance between the various intervening authorities. Accordingly, considering that the grounds for detention were still prevailing, the Court dismissed his request.

Subsequently, his detention was regularly prolonged by the Military Court.

23. On 28 January 1982, Mr. Duinhof was convicted of insubordination and sentenced by the Military Court to eighteen months' imprisonment, the time spent in custody on remand to be deducted therefrom.

24. He then appealed to the Supreme Military Court.

On 29 January, pending the examination of his appeal, the applicant lodged with the Supreme Military Court a request for the detention to be terminated having particular regard to Article 5 § 3 (art. 5-3) of the Convention or, alternatively, for the detention to be suspended (Article 219 of the Military Code - see paragraph 17 above).

On 17 March, the Supreme Military Court rejected the first part of his request. However, on the same day, it acceded with immediate effect to the second part subject to a number of conditions, inter alia, that he accepted - which he did - to perform substitute civilian service over a minimum period of fifteen months and to submit to a medical examination. Criminal proceedings were likewise suspended by the Court under the same conditions.

The Supreme Military Court subsequently sentenced Mr. Duinhof to 101 days' imprisonment, the time spent in custody on remand, which likewise totalled 101 days, to be deducted therefrom.

B. Mr. Duijf

25. Mr. Duijf was arrested on 15 January 1982 on a charge of having failed to register in due time as a conscript serviceman (Article 150 of the Military Penal Code). He was transferred to a military house of detention where he refused to take receipt of a military uniform and weapon. He was then further accused of persistent insubordination (Article 114 of the Military Penal Code). The commanding officer confirmed the detention, the grounds relied on being a serious risk of his absconding and the need to maintain discipline amongst other servicemen (Article 7 of the Military Code - see paragraph 13 above).

On 18 January, in accordance with the verbal advice of the auditeur-militair, the designated senior officer referred the applicant for trial before the Military Court, while deciding that he should be kept in custody on the same grounds as before (Articles 11, 14 and 7, second paragraph, of the Military Code - see paragraph 14 above).

26. On 19 January, the applicant was heard both by the officier-commissaris (Article 33, first paragraph, of the Military Code - see paragraph 15 above) and by the auditeur-militair.

On 27 January, the Military Court examined a request made by the auditeur-militair on 22 January for the detention to be maintained (Article 31 of the Military Code - see paragraph 15 above). At this hearing, the applicant submitted, inter alia, that Article 5 § 3 (art. 5-3) of the Convention had not been complied with. The Court rejected his various arguments and, considering that the grounds for keeping him in custody were still prevailing, prolonged the detention by a thirty-day term.

Subsequently, his detention was regularly prolonged by the Military Court.

27. On 15 April, the applicant was convicted of insubordination and sentenced by the Military Court to eighteen months' imprisonment, the time spent in custody on remand to be deducted therefrom.

28. The applicant then appealed to the Supreme Military Court.

On 16 April and 2 June, the applicant lodged with the Supreme Military Court requests to have his detention terminated, alleging, inter alia, breach of Article 5 §§ 3 and 4 (art. 5-3, art. 5-4) of the Convention (Article 219 of the Military Code - see paragraph 17 above).

The Supreme Military Court rejected these requests on 23 June.

On 7 September, the Supreme Military Court, substituting its own judgment for that of the trial court, upheld both the conviction and the sentence imposed.

PROCEEDINGS BEFORE THE COMMISSION

29. The application by Mr. Duinhof (no. 9626/81) was lodged with the Commission on 8 December 1981 and that of Mr. Duijf (no. 9736/82) on 16 February 1982. Both applicants claimed that, contrary to Article 5 § 3 (art. 5-3) of the Convention, they had not been brought promptly before a judge or other officer authorised by law to exercise judicial power. In particular, they contended that neither the auditeur-militair nor the officier-commissaris could be regarded as such an "officer".

The Commission ordered the joinder of the two applications on 4 May 1982 and declared them admissible on 9 December 1982. In its report adopted on 13 July 1983 (Article 31) (art. 31), the Commission unanimously expressed the opinion that there had been a breach of Article 5 § 3 (art. 5-3).

The full text of the Commission's opinion is reproduced as an annex to the present judgment.

AS TO THE LAW

I. PRELIMINARY QUESTION

30. The Government, as they confirmed at the hearing before the Court on 22 November 1983, raised no preliminary objections in the instant case. They did however submit that the Commission was obliged to inquire ex officio into exhaustion of domestic remedies and that, consequently, the question should also be considered by the Court in relation to Mr. Duinhof and Mr. Duijf.

Quite apart from considerations of estoppel or failure to comply with Rule 47 of the Rules of Court, the Court rejects this argument (see the Deweer judgment of 27 February 1980, Series A no. 35, p. 15, § 26 in fine; the Foti and Others judgment of 10 December 1982, Series A no. 56, pp. 16 and 17, §§ 46 and 48; and the de Jong, Baljet and van den Brink judgment of today's date, Series A no. 77, p. 18, § 36).

II. THE MERITS

A. Alleged violation of Article 5 § 3 (art. 5-3)

31. The applicants alleged breach of the first part of paragraph 3 of Article 5 (art. 5-3), which reads:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...".

32. The Court had the occasion in its Schiesser judgment of 4 December 1979 to interpret in detail the expression "officer authorised by law to exercise judicial power" (Series A no. 34, pp. 12-14, §§ 27-31). It suffices here to recall the salient principles enunciated in that judgment. In particular, having regard to the object and purpose of Article 5 § 3 (art. 5-3) (as to which, see paragraph 36 below), it was held that the "officer"/"magistrat" referred to - who may be either a judge sitting in court or an official in the public prosecutor's department (du siège ou du parquet - ibid., p. 12, § 28) - "must ... offer guarantees befitting the 'judicial' power conferred on him by law" (ibid., p. 13, § 30). The Court summed up its conclusions as follows (ibid., § 31):

"... [T]he 'officer' is not identical with the 'judge' but must nevertheless have some of the latter's attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested.

The first of such conditions is independence of the executive and of the parties. ... This does not mean that the 'officer' may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence.

In addition, under Article 5 § 3 (art. 5-3), there is both a procedural and a substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him ...; the substantive requirement imposes on him the obligation of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons ..."

As far as the last-mentioned substantive requirement is concerned, the Court had already held in the earlier case of Ireland v. the United Kingdom that an advisory committee on internment did not constitute an authority complying with the provisions of Article 5 § 3 (art. 5-3) since it did not have power to order release (judgment of 18 January 1978, Series A no. 25, p. 76, § 199).

1. Hearing of Mr. Duinhof by the auditeur-militair prior to referral for trial

33. Mr. Duinhof contended that the auditeur-militair, the first authority before whom he appeared following his arrest (see paragraph 21 above), could not be regarded as a judicial "officer" for the purposes of Article 5 § 3 (art. 5-3). The Government disputed this. They further submitted that Mr. Duinhof had been brought "promptly" before the auditeur-militair, that is after two days.

34. According to the literal terms of the relevant national law, prior to referral for trial the auditeur-militair had no power to order Mr. Duinhof's release: Article 11 of the Military Code conferred on the auditeur-militair only an investigatory and advisory role which was, moreoever, confined to the sole question of referral for trial (see paragraph 14, first sub-paragraph, above). In the Government's submission, however, this apparent limitation in the law has to be read in the light of the actual practice followed whereby the advice also extended to the issue of detention and was invariably followed by the referring officer (see paragraph 14, final sub-paragraph, above). This "standard procedure" meant, so it was argued, that the auditeur-militair in fact decided since his advice as to whether to detain or not was treated as a "binding recommendation" by the officer who had the formal power of decision. In sum, the Government maintained that "the substance should prevail over the form".

The Court notes the Government's declaration that this "standard procedure" has been introduced in order to comply with the Convention pending a total revision of the Military Code. Nonetheless, the Court, like the Commission (see paragraph 83 of the report), is unable to accept the Government's reasoning. Admittedly, in determining Convention rights one must frequently look beyond the appearances and the language used and concentrate on the realities of the situation (see, for example, in relation to Article 5 § 1 (art. 5-1), the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, p. 20, § 38). However, formal, visible requirements stated in the "law" are especially important for the identification of the judicial authority empowered to decide on the liberty of the individual in view of the confidence which that authority must inspire in the public in a democratic society (see, mutatis mutandis, the Piersack judgment of 1 October 1982, Series A no. 53, p. 14, § 30 (a)). There was no official directive or even policy instruction to auditeurs-militair and referring officers to interpret the Military Code in this way, only a purely internal practice of no binding force that could at any moment lawfully be departed from. That is not sufficient to constitute authority given by "law" to exercise the requisite "judicial power" contemplated by Article 5 § 3 (art. 5-3) (see the final part of the passage from the Schiesser judgment cited above at paragraph 32).

35. Accordingly, the procedure followed in Mr. Duinhof's case before the auditeur-militair prior to referral for trial did not provide the guarantees required by Article 5 § 3 (art. 5-3).

2. Referral of both applicants for trial before the Military Court

36. The applicants were referred for trial before the Military Court five days and three days respectively after their arrest (see paragraphs 21 and 25 above). In the applicants' submission, the Military Court did not possess the necessary independence of a judicial authority for the purposes of Article 5 § 3 (art. 5-3). The Court need not decide this point in the present context since, in any event, the fact that the detained person has access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3 (art. 5-3). This text is aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of paragraph 1 (c) (art. 5-1-c). The language of paragraph 3 (art. 5-3) ("shall be brought promptly before"), read in the light of its object and purpose, makes evident its inherent "procedural

requirement": the "judge" or judicial "officer" must actually hear the detained person and take the appropriate decision (see the extract from the Schiesser judgment quoted above at paragraph 32).

Accordingly, the referral of the applicants for trial did not in itself assure them the guarantees provided for under Article 5 § 3 (art. 5-3).

3. Hearing of Mr. Duijf by the auditeur-militair subsequent to referral for trial

37. Mr. Duijf was heard by the auditeur-militair four days after his arrest and one day after his referral for trial (see paragraph 26 above). Without apparently formally issuing a decision not to release, the auditeur-militair, three days after Mr. Duijf's appearance before him, asked the Military Court to extend the detention beyond the fourteen-day limit provided for under Article 31 of the Military Code (see paragraphs 15 and 26 above).

The Government submitted that the auditeur-militair, when he heard Mr. Duijf at this stage, was vested with the full powers of a judicial "officer" and decided in accordance with the requirements of Article 5 § 3 (art. 5-3).

38. Whilst it is true that the "substantive requirement" stated in the Schiesser judgment may have been satisfied by the auditeur-militair's competence to direct release (see the extract from that judgment quoted at paragraph 32 above), the question remains whether the auditeur-militair enjoyed the necessary independence, having regard to the particular purpose for which the "judicial power" referred to in Article 5 § 3 (art. 5-3) is to be exercised.

It was contested between the Government and the applicants whether the auditeur-militair could be regarded as independent of the military authorities in view of the wording of Article 276 of the Military Code (see paragraph 18 above). In the Court's opinion, however, even accepting the Government's submissions on this, the auditeur-militair could not, following the referral of Mr. Duijf for trial, fulfil the very specific judicial function contemplated by Article 5 § 3 (art. 5-3) since he at the same time performed the function of prosecuting authority before the Military Court (Article 126, first paragraph - ibid.). The auditeur-militair was thus a committed party to the criminal proceedings being conducted against the detained serviceman on whose possible release he was empowered to decide. In sum, the auditeur-militair could not be "independent of the parties" (see the extract from the Schiesser judgment quoted above at paragraph 32) precisely because he was one of the parties.

Consequently, the procedure followed before the auditeur-militair in Mr. Duijf's case did not satisfy the requirements of Article 5 § 3 (art. 5-3).

4. Hearing of both applicants by the officier-commissaris

39. In the submission of the applicants, the officier-commissaris, who was responsible for the preliminary investigation of their cases and before whom they appeared subsequent to their referral for trial (Articles 29 and 33 of the Military Code - see paragraphs 15, 19, 22 and 26 above), could not be regarded as an "officer authorised by law to exercise judicial power".

The Government disputed this. They explained that, when hearing a detained serviceman, the officier-commissaris, like the auditeur-militair is under a duty to examine independently and impartially the lawfulness of the detention. Thereafter, so the argument continued, the officier-commissaris can in appropriate instances be instrumental in securing the release of the detainee by addressing a request to that effect to the Military Court under Article 34 of the Military Code (see paragraph 15 above). The Government further maintained that in the circumstances the applicants had been brought "promptly" before him following their arrest, that is after six days in the case of Mr. Duinhof and after four days in the case of Mr. Duijf (see paragraphs 21-22 and 25-26 above).

40. Without underestimating the value of the safeguard provided by the officier-commissaris in this respect, the Court cannot uphold the Government's submissions. As was pointed out by the Commission (at paragraph 90 of the report) and by the applicants, the officier-commissaris is not authorised by law to exercise the requisite "judicial power" referred to in Article 5 § 3 (art. 5-3), notably the power to decide on the justification for the detention and to order release if there is none (see the final part of the passage from the Schiesser judgment cited above at paragraph 32). The procedure before the officier-commissaris was thus lacking one of the fundamental guarantees implicit in Article 5 § 3 (art. 5-3).

5. Hearing before the Military Court

41. It remains to be determined whether the subsequent procedure followed before the Military Court satisfied the various conditions of this provision.

The Military Court did not hold a hearing on the issue of detention and give a decision thereon until eight days after Mr. Duinhof's arrest and twelve days after Mr. Duijf's arrest (see paragraphs 21-22 and 25-26 above). Whilst the question of promptness must admittedly be assessed in each case according to its special features (see, mutatis mutandis, the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 24, § 10), intervals as long as these are far in excess of the limits laid down by Article 5 § 3 (art. 5-3), even taking due account of the exigencies of military life and military justice (see the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 23, § 54). The Court agrees with the Commission on this point (see paragraphs 95 and 97 of the report), which, moreover, was not contested by the Government.

42. In the light of the foregoing conclusion, the Court does not consider it necessary to inquire into the applicants' allegation that the Military Court lacked the requisite independence on account of its composition, the two military members appointed by the commanding general outnumbering the one civilian president appointed by the Crown (see paragraph 20 above).

6. Conclusion

43. To sum up, each applicant was the victim of a violation of Article 5 § 3 (art. 5-3).

B. Application of Article 50 (art. 50)

44. Article 50 (art. 50) of the Convention reads as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

At the hearing before the Court on 22 November 1983, counsel for the applicants stated, without giving any details, that his clients' claims for just satisfaction were similar to those put forward in the case of van der Sluijs, Zuiderveld and Klappe (see the judgment of today's date in that case, Series A no. 78, § 50). The allegations there were that prejudice had been sustained in various forms during and because of the detention in question, including psychological and emotional injury, denial of sufficient possibilities for cultural and educational development, invasion of privacy and loss of employment opportunities and social reputation. Counsel specified however that, as in the other case, the question of financial reparation had never been a priority for his clients and that they simply asked the Court to award appropriate satisfaction.

The Government argued that any prejudice suffered by either Mr. Duinhof or Mr. Duijf had been compensated by the deduction of the custody on remand from the term of

imprisonment (see paragraphs 24 and 27-28 above) and that this constituted sufficient satisfaction for any violation of the Convention.

45. The sole violation of the Convention alleged and found in the present case is of the first part of Article 5 § 3 (art. 5-3). It cannot be said on the evidence that the applicants would probably have been released from custody on remand had they received the benefit of the guarantees contained in this provision (cf. the Artico judgment of 13 May 1980, Series A no. 37, p. 20, § 42). At the very least, each applicant did however forfeit the opportunity of a "prompt" judicial control of his detention. The applicants must have suffered, by reason of the absence of the relevant guarantees, some non-material prejudice not wholly compensated by the findings of violation or even by the deduction of the period spent in custody on remand from the sentence of imprisonment ultimately imposed (see, mutatis mutandis, the Van Droogenbroeck judgment of 25 April 1983, Series A no. 63, p. 7, § 13). Having regard to the modest nature of the claims made, the Court awards each applicant a lump sum of 300 Dutch Guilders by way of just satisfaction under Article 50 (art. 50).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 5 § 3 (art. 5-3) in respect of each applicant;

2. Holds that the respondent State is to pay to each applicant the sum of three hundred (300) Dutch Guilders under Article 50 (art. 50).

Done in English and in French, at the Human Rights Building, Strasbourg, this twenty-second day of May, one thousand nine hundred and eighty-four.

Signed: Rolv RYSSDAL President

Signed: Marc-André EISSEN Registrar