Caso Van der Sluijs, Zuiderveld y Klappe contra Holanda, de 4/5/1994 [ENG]

In the case of van der Sluijs, Zuiderveld and Klappe,

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 15 March 1983, 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 three applications (nos. 9362/81, 9363/81 and 9387/81) against the Kingdom of the Netherlands lodged with the Commission in 1981 by Mr. Jan Christian Martinus van der Sluijs, Mr. Harm Pieter Zuiderveld and Mr. Albertus Laurentius Klappe, Dutch nationals, under Article 25 (art. 25).

2. The Commission's request 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 the request 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) of the Convention.

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 24 March 1983 that, in the interests of the proper administration of justice, both the instant case and the case of de Jong, Baljet and van den Brink should be heard by a single Chamber (Rule 21 § 6). The Chamber of seven judges to be constituted 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)). On 24 March 1983, Mr. Wiarda, in his capacity as President of the Court, drew by lot,

in the presence of the Registrar, the names of the five other members, namely 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), consulted, through the Registrar, the Agent of the Government of the Netherlands ("the Government"), the Delegate of the Commission and the lawyer for the applicants as to the procedure to be followed. On 7 July, the President of the Chamber directed that the Agent should have until 2 October 1983 to file a memorial and that the Delegate should be entitled to reply in writing within one month from the date of the transmission of the Government's memorial to him by the Registrar (Rule 37 § 1). The lawyer for the applicants had stated that his clients, as far as their interests were concerned, did not feel it necessary to submit written pleadings. On the same occasion, the President of the Chamber further directed that the oral proceedings should open on 22 November (Rule 38).

6. On 26 September, the Government filed a statement raising various preliminary objections pursuant to Rule 47 and, for the rest, waived their right to present a memorial. By letter received on 10 November, the Deputy Secretary to the Commission informed the Registrar that the Delegate would be replying to these objections in his submissions at the hearings.

7. On 26 July, 3 November and 7 November, in response to an earlier request made by the Registrar on the instructions of the President of the Chamber, the lawyer for the applicants submitted, on behalf of Mr. van der Sluijs, Mr. Zuiderveld and Mr. Klappe, their respective written claims for just satisfaction under Article 50 (art. 50) of the Convention.

8. On 16 November, the Commission supplied various documents whose production the Registrar had asked for on the instructions of the President of the Chamber.

9. On 17 November, the President of the Chamber granted the lawyer for the applicants leave to use the Dutch language in the procedure (Rule 27 § 3).

10. 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.

11. On 12 and 20 December respectively, the Registrar received from the lawyer for 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.

AS TO THE FACTS

12. Mr. van der Sluijs, Mr. Zuiderveld and Mr. Klappe, who were born in 1960, 1956 and 1955 respectively, reside in the Netherlands. In 1981, 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

13. 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 is laid down in the Conscientious Objection to Military Service Act (Wet Gewetensbezwaren Militaire Dienst) and a Ministerial Decree of 31 July 1970. In particular, where military criminal proceedings are in progress against a conscript serviceman who has applied for the status of conscientious objector, they may be stayed before, and must be stayed once, the Advisory Board on Conscientious Objectors has commenced its enquiries (section 4 sub-section 3 of the Act). After the Advisory Board has stated its opinion, the Minister of Defence may grant recognition as a conscientious objector (section 7). The entitlement to conduct criminal proceedings for failure to obey orders or military regulations or for failure to report for enlistment lapses automatically upon recognition of the accused's conscientious objection (section 10).

In the present case, Mr. van der Sluijs requested to be granted the status of conscientious objector only in the final stages of his appeal before the Supreme Military Court (see paragraph 25 below), whereas Mr. Zuiderveld and Mr. Klappe never at any moment did so (see paragraphs 26-34 below).

B. Military criminal procedure

14. 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

15. 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 20 below) and the suspected serviceman, who may have the assistance of an adviser (Article 13).

16. 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 as follows (translation from the 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 15 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

17. 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 21 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).

18. 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).

19. 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, and under section 5 of the Military Cassation Act (Militaire Cassatiewet) in proceedings before the Supreme Court pending the decision on his appeal on points of law.

3. The auditeur-militair and the officier-commissaris

20. 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).

21. 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).

II. ARREST AND DETENTION OF THE APPLICANTS

A. Mr. van der Sluijs

22. Following his failure to register in due time as a conscript serviceman, Mr. van der Sluijs was arrested on 13 March 1981 and transferred to a military house of detention. Upon his arrival, he refused to put on a military uniform and to take receipt of a weapon. He persisted in his refusal although his hierarchical superior pointed out to him that in doing so he committed the criminal offence of insubordination (Article 114 of the Military Penal Code). The commanding officer then confirmed the arrest, the grounds relied on being a serious risk of his absconding and the need to maintain discipline among other servicemen (Article 7 of the Military Code - see paragraph 15 above).

On 16 March, he appeared before the auditeur-militair. On 18 March, 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 grounds as before (Articles 11, 14 and 7, second paragraph, of the Military Code - see paragraph 16 above).

23. On 19 March, the auditeur-militair addressed a request to the Military Court that the applicant be kept in detention upon expiry on 1 April of the fourteen-day maximum period allowed for under the law (Article 31 of the Military Code - see paragraph 17 above) as the grounds prevailing on 18 March were still valid in his view.

On 20 March, the applicant was heard by the officier-commissaris (Article 33, first paragraph, of the Military Code - ibid.).

On 25 March, he appeared before the Military Court. Counsel for Mr. van der Sluijs submitted that his client's detention was unlawful since the requirements of Article 5 § 3 (art. 5-3) of the Convention had not been complied with, in particular because the officier-commissaris was not vested with autonomous power to decide on the accused's detention. The Military Court rejected the applicant's arguments and prolonged the detention by a thirty-day term. Thereafter his detention was regularly prolonged by the Military Court.

24. The trial took place before the Military Court on 21 May. On 3 June, the applicant was convicted of acts of insubordination and sentenced to eighteen months' imprisonment, the time spent in custody on remand to be deducted therefrom.

25. Mr. van der Sluijs then appealed to the Supreme Military Court. Pending his appeal, he sought suspension of his sentence for a period of two weeks for personal reasons (Article 219 of the Military Code - see paragraph 19 above). The Supreme Military Court rejected that request on 1 July.

On 30 July, he requested the Supreme Military Court to suspend criminal proceedings and order his release in view of his application to be recognised as a conscientious objector (section 4 of the Conscientious Objection to Military Service Act -

see paragraph 13 above). Such an application was in fact introduced with the Ministry of Defence on 4 August. On 12 August, he was heard by the Supreme Military Court, which, two days later, suspended criminal proceedings and, conditionally, the detention. Subsequently, upon recognition by the Minister of Defence of his conscientious objection, criminal proceedings lapsed and his release became final (section 10 of the above-mentioned Act - ibid.).

B. Mr. Zuiderveld

26. Mr. Zuiderveld was arrested on 14 February 1981 on a charge of failing to register in due time as a conscript serviceman (Article 150 of the Military Penal Code) and was transferred to a military house of detention. On 16 February, he refused to put on a military uniform and to take receipt of a weapon. He persisted in his refusal although his hierarchical superior pointed out to him that he was thereby committing the criminal offence of insubordination (Article 114 of the Military Penal Code). The commanding officer then confirmed the arrest, 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 15 above).

On 17 February, the applicant was heard by the auditeur-militair. Later that day, in accordance with the advice of the auditeur-militair, the designated senior officer referred him 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 16 above).

27. On 18 February, he was heard by the officier-commissaris (Article 33, first paragraph, of the Military Code - see paragraph 17 above).

On 25 February, on request by the auditeur-militair, the Military Court prolonged the applicant's detention by thirty days upon expiry on 2 March of the fourteen-day maximum period allowed for under the law (Article 31 of the Military Code - ibid.). Neither Mr. Zuiderveld nor his lawyer availed himself of the opportunity to submit argument (Article 33, second paragraph - ibid.).

On 25 March, the Military Court examined a further request by the auditeur-militair for prolongation of the detention. At this hearing, counsel for Mr. Zuiderveld submitted that his client's detention was unlawful since the requirements of Article 5 § 3 (art. 5-3) of the Convention had not been complied with, in particular because the officier-commissaris was not vested with autonomous power to decide officier-commissaris was not vested with the autonomous power to decide on the accused's detention. The Military Court rejected the applicant's arguments and prolonged the detention by a further thirty-day term.

Thereafter his detention was regularly prolonged by the Military Court.

28. Trial hearings took place before the Military Court on 27 and 29 May. The applicant once more submitted, inter alia, that his detention was unlawful for failure to comply with Article 5 § 3 (art. 5-3) of the Convention. The Court, on 29 May, rejected his arguments and maintained his detention.

On 11 June, Mr. Zuiderveld was acquitted of the charge of failure to register for military service but convicted of acts of insubordination. He was sentenced to eighteen months' imprisonment, the time spent on remand to be deducted therefrom.

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

On 16 September, the Supreme Military Court quashed, for a procedural defect, the Military Court's decision of 29 May prolonging the detention. Holding that the detention

had accordingly been unlawful from 1 June onwards, the Supreme Military Court ordered Mr. Zuiderveld's release.

On the same day, the Minister of Defence suspended the remainder of the sentence.

On 2 December, the Supreme Military Court reversed the judgment of the lower court with reference to its reasoning; the Supreme Military Court also found the applicant guilty, but reduced the sentence to one of fourteen months' imprisonment, the time spent in custody on remand between 14 February and 1 June to be deducted therefrom.

30. The applicant entered an appeal on points of law with the Supreme Court. On 22 June 1982, the Supreme Court set aside the sentence of the Supreme Military Court and referred the case back to that Court (Nederlandse Jurisprudentie, 1983, no. 413).

On 29 September, the Supreme Military Court sentenced Mr. Zuiderveld to 214 days' imprisonment, the time spent in custody on remand, which also totalled 214 days, to be deducted therefrom.

C. Mr. Klappe

31. Mr. Klappe was arrested on 28 January 1981 on a charge of failing to register in due time as a conscript serviceman (Article 150 of the Military Penal Code) and transferred to a military house of detention. On 29 January, he refused to put on a military uniform and to take receipt of a weapon. He persisted in his refusal although his hierarchical superior pointed out to him that in doing so he committed the criminal offence of insubordination (Article 114 of the Military Penal Code). The commanding officer then confirmed the arrest, 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 15 above).

On 30 January, the applicant appeared before the auditeur-militair. Later that day, the designated senior officer referred him 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 16 above).

32. The applicant was also heard by the officier-commissaris on 30 January (Article 33, first paragraph, of the Military Code - see paragraph 17 above).

On 11 February, following a request by the auditeur-militair for extension of the detention (Article 31 of the Military Code - ibid.), the applicant appeared before the Military Court. Counsel for Mr. Klappe submitted that his client's detention was unlawful since the requirements of Article 5 § 3 (art. 5-3) of the Convention had not been complied with, in particular because the officier-commissaris could not be regarded as a judicial officer for the purposes of that provision. The Military Court rejected the applicant's arguments and prolonged the detention by a thirty-day term.

On a further request by the auditeur-militair, this decision was renewed by the Military Court on 11 March.

33. The trial took place before the Military Court on 26 March. On 8 April, the applicant was convicted of insubordination and failure to register for military service and sentenced to eighteen months' imprisonment, the time spent in custody on remand to be deducted therefrom.

34. The applicant appealed to the Supreme Military Court. On 27 April, he requested the suspension of his sentence for one day in order to address a political meeting on 1 May (Article 219 of the Military Code - see paragraph 19 above). The Supreme Military Court acceded to this request on 28 April.

At a hearing on 17 June, the applicant once more requested his release, invoking Article 5 § 3 (art. 5-3) of the Convention.

The Supreme Military Court delivered judgment on 1 July. It rejected the applicant's request for release, holding that a decision on the alleged breach of Article 5 § 3 (art. 5-3) of the Convention was not within its competence. On the other hand, the Supreme Military Court reversed the judgment of the lower court with reference to its reasoning, but, also finding the applicant guilty, imposed an identical sentence of eighteen months' imprisonment subject to deduction of the time spent in custody on remand.

PROCEEDINGS BEFORE THE COMMISSION

35. The applications of Mr. van der Sluijs (no. 9362/81), Mr. Zuiderveld (no. 9363/81) and Mr. Klappe (no. 9387/81) were lodged with the Commission on 1 April, 31 March and 19 February 1981, respectively. All three 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 applications on 6 May 1981 and declared them admissible on 4 May 1982. In its report adopted on 13 October 1982 (Article 31) (art. 31), the Commission expressed the opinion, by fourteen votes to one, 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 OBJECTIONS

A. Objection that Mr. Zuiderveld and Mr. Klappe could not be regarded as "victims"

36. The Government objected that Mr. Zuiderveld and Mr. Klappe could not claim to be "victims" of a breach of Article 5 § 3 (art. 5-3) of the Convention for the purposes of Article 25 (art. 25), since the time each one spent in custody on remand was deducted in its entirety from the sentence ultimately imposed on him (see paragraphs 30 and 34 above). In the Government's contention, any period during which either applicant may have been "unlawfully" detained was thereby converted into lawful imprisonment, so that he had suffered no detriment.

37. The word "victim" in Article 25 (art. 25) denotes the person directly affected by the act or omission in issue, the existence of a violation being conceivable even in the absence of detriment; detriment is relevant only in the context of Article 50 (art. 50) (see, as the most recent authority, the Corigliano judgment of 10 December 1982, Series A no. 57, p. 12, § 31). Consequently, the relevant deduction from sentence does not in principle deprive the individual concerned of his status as an alleged "victim", within the meaning of Article 25 (art. 25), of a breach of Article 5 § 3 (art. 5-3); it is a matter to be taken into consideration solely for the purpose of assessing the extent of any prejudice he may have suffered (see, mutatis mutandis, the Eckle judgment of 15 July 1982, Series A no. 51, p. 30, § 66, and the authorities cited there). The position might be otherwise if the deduction from sentence had been based upon an acknowledgement by the national courts of a violation of the Convention (ibid.). In the present case, however, the Netherlands courts rejected the applicants' arguments on the Convention (see paragraphs 27-30 and 32-34 above).

Accordingly, since Mr. Zuiderveld and Mr. Klappe were directly affected by the matters which they alleged to be in breach of Article 5 § 3 (art. 5-3), they can each claim to be a "victim" within the meaning of Article 25 (art. 25).

B. Objection as to non-exhaustion of domestic remedies

38. In their statement filed with the registry on 26 September 1983 (see paragraph 6 above), the Government raised the objection that all three applicants had failed to exhaust their domestic remedies as required by Article 26 (art. 26) of the Convention; the Government referred back to their arguments before the Commission. The grounds put forward at that time for their objection were that suspension of the detention could have been requested under Article 219 of the Military Code by each applicant in the appeal proceedings before the Supreme Military Court and under section 5 of the Military Cassation Act by Mr. Zuiderveld in the cassation proceedings before the Supreme Court (see paragraphs 19, 25, 29, 30 and 34 above).

This plea was not mentioned by the Government in their "preliminary" submissions at the hearing before the Court on 22 November 1983. The Delegate of the Commission, when opening his address in reply, inferred from this that the Government were apparently no longer pleading non-exhaustion of domestic remedies, with the result that this particular objection ceased to be in issue before the Court. The Government did not subsequently dispute, or even refer to, this analysis.

39. The Court interprets the Government's attitude at the hearing as amounting to a withdrawal of their objection of non-exhaustion of domestic remedies (see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 31, § 55). The Court takes formal note of this withdrawal.

II. THE MERITS

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

40. The applicants alleged breach of the first part of Article 5 § 3 (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 ...".

41. 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 46 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., pp. 13-14, § 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 by the auditeur-militair

42. The applicants contended that the auditeur-militair, the first authority before whom they appeared following their arrest (see paragraphs 22, 26 and 31 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 the applicants had been brought "promptly" before the auditeur-militair, that is after three days in the case of Mr. van der Sluijs and Mr. Zuiderveld, and after two days in the case of Mr. Klappe.

43. According to the literal terms of the relevant national law, prior to referral for trial the auditeur-militair had no power to order the applicants' release: Article 11 of the Military Code conferred on him only an investigatory and advisory role which was, moreoever, confined in terms to the sole question of referral for trial (see paragraph 16, 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 16, 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 63 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 41).

44. In addition, the auditeur-militair did not enjoy the kind of independence demanded by Article 5 § 3 (art. 5-3). Although independent of the military authorities, the same auditeur-militair could be called upon to perform the function of prosecuting authority after referral of the case to the Military Court (Article 126, first paragraph, of the Military Code - see paragraph 20, first sub-paragraph, above). He would thereby become a committed party to any criminal proceedings subsequently brought against the serviceman on whose detention he was advising at the stage prior to referral for trial. In

sum, the auditeur-militair could not be "independent of the parties" (see the extract from the Schiesser judgment quoted above at paragraph 41) at this preliminary stage precisely because he was liable to become one of the parties at the next stage of the procedure (see the judgment of today's date in the case of Duinhof and Duijf, Series A no. 79, § 38).

45. Consequently, the procedure followed in the applicants' cases before the auditeur-militair did not provide the guarantees required by Article 5 § 3 (art. 5-3).

2. Referral for trial before the Military Court

46. The three applicants were referred for trial before the Military Court five days, three days and two days respectively after their arrest (see paragraphs 22, 26 and 31 above). It has not been disputed in the present proceedings that the Military Court possessed the attributes of a judicial authority. However, 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 paragraph 69 of the Commission's report and the extract from the Schiesser judgment quoted above at paragraph 41).

Accordingly, the referral of each applicant for trial did not in itself assure him the guarantee provided for under Article 5 § 3 (art. 5-3).

3. Hearing by the officier-commissaris

47. 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 17, 21, 23, 27 and 32 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 17 above). The Government further maintained that in the circumstances the applicants had been brought "promptly" before the officier-commissaris following their arrest, that is after seven days in the case of Mr. van der Sluijs, after four days in the case of Mr. Zuiderveld and after two days in the case of Mr. Klappe (see paragraphs 22-23, 26-27 and 31-32 above).

48. 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 66 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 41). The procedure before the officier-commissaris was thus lacking one of the fundamental guarantees implicit in Article 5 § 3 (art. 5-3).

4. Hearing before the Military Court

49. 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 twelve days after Mr. van der Sluijs's arrest, eleven days after Mr. Zuiderveld's arrest and fourteen days after Mr. Klappe's arrest (see paragraphs 22-23, 26-27 and 31-32 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 paragraph 70 of the report), which, moreover, was not contested by the Government.

5. Conclusion

50. 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)

51. 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."

In their written submissions, all three applicants alleged that, as a consequence of the violation of the Convention, they had sustained prejudice in various forms during and because of their detention, including, depending upon the case, psychological and emotional injury, denial of sufficient possibilities for cultural and educational development, invasion of privacy and loss of employment opportunities and social reputation. At the hearing before the Court, counsel for the applicants specified that the question of financial reparation had never been a priority for his clients and that they would welcome such just satisfaction as the Court should decide to award.

The Government submitted that, as far as Mr. Zuiderveld and Mr. Klappe were concerned, any prejudice sustained had been compensated by the deduction of the custody on remand from the term of imprisonment (see paragraphs 30 and 34 above) and that this constituted sufficient satisfaction for any violation of the Convention.

52. 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, in the case of Mr. Zuiderveld and Mr. Klappe, 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). In the circumstances and in view of the modest nature of the claims made, the Court sees no reason to draw a distinction between the three applicants. 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. Rejects the objection that Mr. Zuiderveld and Mr. Klappe could not be regarded as victims within the meaning of Article 25 (art. 25);

2. Takes formal note of the withdrawal by the Government of the objection pleading non-exhaustion of domestic remedies;

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

4. Holds that the respondent State is to pay 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