COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF DE JONG, BALJET AND VAN DEN BRINK v. THE NETHERLANDS

(Application no. 8805/79; 8806/79; 9242/81)

JUDGMENT

STRASBOURG

22 May 1984

In the case of de Jong, Baljet and van den Brink,

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:

Mr. R. RYSSDAL, *President*,
Mr. G. WIARDA,
Mr. J. CREMONA,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. F. GÖLCÜCKLÜ,
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 23 and 24 November 1983 and on 3 and 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 para. 1 and 47 (art. 32-1, art. 47) of the Convention. The case originated in three applications (nos. 8805/79, 8806/79 and 9242/81) against the Kingdom of the Netherlands lodged with the Commission in 1979 and 1980 by Mr. Tjeerd de Jong, Mr. Jan Harmen Henricus Baljet and Mr. Gerrit van den Brink, 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 or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 5, 13, 14 and 18 (art. 5, art. 13, art. 14, art. 18).

3. In response to the inquiry made in accordance with Rule 33 para. 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).

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

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 van der Sluijs, Zuiderveld and Klappe should be heard by a single Chamber (Rule 21 para. 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 para. 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 para. 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 para. 1 and 24 para. 1).

5. Mr. Ryssdal, who had assumed the office of President of the Chamber (Rule 21 para. 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 30 September 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 para. 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 further directed that the oral hearings 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 October, the President of the Chamber granted the lawyer for the applicants leave to use the Dutch language at the forthcoming hearings (Rule 27 para. 3).

8. On 15 November, the said lawyer, in response to an earlier request made by the Registrar on the instructions of the President of the Chamber, communicated his clients’ claims for just satisfaction under Article 50 (art. 50) of the Convention.

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

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. P.T. HUISMAN, advocaat, *Counsel*.

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

11. On 15 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. de Jong, Mr. Baljet and Mr. van den Brink, who were born in 1958, 1953 and 1960 respectively, reside in the Netherlands. In 1979, after being drafted as conscript servicemen 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 thereupon placed under arrest by their respective commanding 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. The procedure for obtaining exemption from military service on the ground of conscientious objection is laid down in the Conscientious Objection to Military Service Act (Wet Gewetensbezwaren Militaire Dienst) and a Ministerial Decree of 31 July 1970.

Under the terms of the Ministerial Decree, if a request for recognition as a conscientious objector is lodged with the Minister of Defence within thirty days of conscription the conscript will be given leave pending the decision. Where, on the other hand, active service has exceeded thirty days, leave is not automatically granted in view of the need to investigate any possible abuse of the right to rely on the Conscientious Objection to Military Service Act. In such cases, the commanding officer will first consult with the conscript service department at the Ministry of Defence.

Where military criminal proceedings have been instituted against a conscript serviceman who has applied for the status of conscientious objector, they may be stayed pending a decision by the Minister on the request (section 4 sub-section 3 of the Conscientious Objection to Military Service Act). The decision in this respect will depend upon the particular circumstances, having regard, inter alia, to the time that has elapsed between the conscription and the lodging of the request. Proceedings must, however, be stayed once the Advisory Board on Conscientious Objectors has commenced its enquiries (section 4 sub-section 3). After the Advisory Board has stated its opinion, the Minister may grant recognition as a conscientious objector (section 7). The Minister’s decision is subject to appeal (section 8). 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).

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 the suspect 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 19 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 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 20 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).

3. The auditeur-militair and the officier-commissaris

19. 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).

20. 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).

C. Possible remedies in connection with the alleged breaches of the Convention

21. By virtue of the Constitution of the Netherlands, the Convention forms part of and has primacy over domestic legislation, whether earlier or subsequent.

Under the ordinary criminal law, by virtue of Articles 89 and following of the Code of Criminal Procedure, compensation may be recovered for the consequences, both material and non-material, of wrongful detention. No comparable clauses are contained in the Military Code. On 26 June 1979, that is subsequent to the detention of Mr. de Jong and Mr. Baljet (see paragraphs 22-25 below), the Minister of Justice made an "interim provision" declaring Articles 89 and following applicable by analogy to military criminal procedure, subject to a limitation period of three months.

Before the Commission, the Government submitted that, quite apart from this, a claim in respect of matters allegedly contrary to the Convention could always be brought against the military authorities under Article 1401 of the Civil Code, which provides:

> "Any unlawful act (onrechtmatige daad)as a result of which damage has been inflicted on another person makes the person by whose fault (door wiens schuld) the damage was caused liable to pay compensation."

Before the Court, the Government stated that compensation could only be recovered under Article 1401 for material loss suffered, but they referred to the additional possibility of seeking from the civil courts a declaratory judgment against the authorities that a period of detention had been unlawful. On the basis of such a judgment, the Minister of Defence would "in all likelihood", on request by the person concerned, grant compensation for non-material damage.

The Government further explained that Article 1401 did not merely allow a litigant to sue for compensation: according to well-established case-law, the victim of an unlawful and continuing act may apply to the civil courts on the basis of Article 1401 for an injunction; in circumstances of urgency, immediate interim relief may be sought in summary proceedings

before the President of a District Court (Articles 289 and following of the Code of Civil Procedure). In cases of allegedly unlawful detention, recourse has been had to Article 1401 in summary proceedings so as to obtain a provisional court order for immediate release.

There is, however, no known case in which a serviceman held in custody on remand has relied on Article 1401 to bring either an ordinary claim for financial reparation or an application under the summary procedure for a provisional order of immediate release.

II. ARREST AND DETENTION OF THE APPLICANTS

A. Mr. de Jong and Mr. Baljet

22. In 1978, these two applicants were drafted as conscript soldiers in an infantry battalion, Mr. de Jong as from 5 July and Mr. Baljet as from 3 May. This battalion was designated in January 1979 to leave on mission within two months as part of the United Nations Peace Corps in the Lebanon. Fearing that they might be forced to use violence against other human beings, the applicants, on 17 and 18 January 1979 respectively, lodged applications with the Minister of Defence to be recognised as conscientious objectors (see paragraph 13 above). Pending examination of their requests, the applicants at first continued to perform their normal military duties. However, the Minister not having in the meantime relieved them from service by granting them leave under the Ministerial Decree of 31 July 1970 (ibid.), Mr. de Jong on 29 January and Mr. Baljet on 25 January refused to obey orders to participate in a military exercise.

23. Each applicant was thereupon placed under arrest by his commanding officer (Article 7 of the Military Code - see paragraph 15 above), accused of the offence of insubordination contrary to Article 114 of the Military Penal Code. The ground invoked for their arrest was the need to maintain discipline amongst other servicemen, having regard to their battalion’s imminent mission in the Lebanon.

On 30 January, they both appeared before the auditeur-militair. On 5 February, in accordance with the advice of the auditeur-militair, the commanding general referred the applicants for trial before the Military Court and at the same time ordered their release (Articles 11 and 14 of the Military Code - see paragraph 16 above), criminal proceedings having been stayed as a result of the Advisory Board on Conscientious Objectors having commenced its enquiries into their requests to be recognised as conscientious objectors (section 4 sub-section 3 of the Conscientious Objection to Military Service Act - see paragraph 13 above).

24. On 7 February, they appeared before the Advisory Board on Conscientious Objectors (ibid.). On the same day, the Minister of Defence

granted them the status of conscientious objectors and they were discharged from military service.

25. On 8 February, each of the applicants lodged a complaint with the divisional commander alleging unfair treatment by the commanding officer who had ordered the arrest. They submitted that the decisions taken against them under Article 7 of the Military Code were in breach of Article 5 paras. 1 (c) and 3 (art. 5-1-c, art. 5-3) of the Convention. The divisional commander dismissed both complaints on 1 March.

On 7 May, the applicants addressed a request for compensation to the Minister of Defence, relying on Article 5 para. 5 (art. 5-5) of the Convention. On 25 July, the Under Secretary of State for Defence rejected their request on the ground that there was no basis for compensation since none of the provisions of Article 5 (art. 5) of the Convention had been violated in the circumstances.

B. Mr. van den Brink

26. Mr. van den Brink was forcibly drafted as a conscript soldier on 20 November 1979 upon his failure to register in due time. On his arrival at a training centre, he was ordered by his commanding officer to take receipt of and put on a military uniform, but he persistently refused to do so. Being a "total objector" ("totaalweigeraar"), he never submitted any request to be granted the status of conscientious objector (see paragraph 13 above).

27. In view of his persistent refusal, the applicant was placed under arrest on 20 November by his commanding officer (Article 7 of the Military Code - see paragraph 15 above), accused of the offence of insubordination contrary to Article 114 of the Military Penal Code. The ground for his arrest was the need to maintain discipline amongst other servicemen, a repetition of the offence being feared. The decision to arrest him also took into account the fact that he did not wish to have recourse to the Conscientious Objection to Military Service Act.

On 22 November, Mr. van den Brink appeared before the auditeur-militair. On 26 November, in accordance with the advice of the auditeur-militair, the competent senior officer referred him 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 16 above).

28. On 28 November, the applicant was heard by the officier-commissaris (Article 33 of the Military Code - see paragraph 17 above). Acceding to a request made two days later by the auditeur-militair, the Military Court on 6 December prolonged the detention for another thirty days (Article 31 of the Military Code - ibid.). The Court rejected the applicant’s counter-arguments for immediate release grounded on Article 5 paras. 1 (c) and 3 (art. 5-1-c, art. 5-3) of the Convention.

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

29. The trial took place before the Military Court on 6 February 1980. By judgment of 20 February, the Military Court convicted Mr. van den Brink and sentenced him to eighteen months' imprisonment, the time spent in custody on remand to be deducted therefrom.

He thereupon appealed to the Supreme Military Court.

At a hearing on 7 May, he requested his release, relying on Article 5 paras. 1 (c), 3 and 4 and Article 13 (art. 5-1-c, art. 5-3, art. 5-4, art. 13) of the Convention. The Supreme Military Court rejected the request; it held, inter alia, that Article 5 para. 1 (c) (art. 5-1-c) had been complied with and that the lapse of time between his arrest on 20 November 1979 and his appearance before the officier-commissaris on 28 November 1979 came close to but did not exceed the limit drawn by Article 5 para. 3 (art. 5-3).

On 19 May, the applicant was convicted and sentenced to eighteen months' imprisonment by the Supreme Military Court.

Mr. van den Brink then entered an appeal on points of law with the Supreme Court.

By a separate application to that Court on 4 July 1980, he once more requested his release. He alleged a violation of the same Articles (art. 5-1-c, art. 5-3, art. 5-4, art. 13) of the Convention as in the court below. The Supreme Court dismissed the request on 15 August 1980 (Nederlandse Jurisprudentie, 1981, no. 228).

30. Mr. van den Brink was released on 12 November 1980, after having served two-thirds of his sentence.

PROCEEDINGS BEFORE THE COMMISSION

31. The applications of Mr. de Jong (no. 8805/79) and Mr. Baljet (no. 8806/79) were both lodged with the Commission on 3 August 1979, the application of Mr. van den Brink (no. 9242/81) on 17 December 1980. The Commission ordered the joinder of the first two applications on 6 May 1980 and the joinder of the third application to the other two on 11 October 1982. All three applicants claimed that, contrary to Article 5 para. 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 the auditeur-militair and, as far as Mr. van den Brink was concerned, the officier-commissaris could not be regarded as such "officers". They further submitted that their arrest and detention had been incompatible with Article 5 para. 1 (art. 5-1) and that they had not been entitled, in accordance with Article 5 para. 4 (art. 5-4), to take proceedings to have the lawfulness of their detention decided speedily by a court.

Finally, they also alleged violation of Article 13 (art. 13) and, in the case of Mr. de Jong and Mr. Baljet, violations of Article 14 taken in conjunction with Article 5 (art. 14+5) and of Article 18 (art. 18) taken on its own or in conjunction with Article 5 (art. 18+5).

32. The Commission declared the first two applications admissible on 7 May 1981. The third application was accepted on 5 March 1982, save that Mr. van den Brink's complaint relating to Article 5 para. 3 (art. 5-3) in respect of the officier-commissaris was declared inadmissible for non-exhaustion of domestic remedies (Articles 26 and 27 para. 3) (art. 26, art. 27-3).

In its report adopted on 11 October 1982 (Article 31) (art. 31), the Commission expressed the opinion:

- that there had been no breach of Article 5 para. 1 (art. 5-1) or of Article 14 taken in conjunction with Article 5 (art. 14+5) (unanimously);
- that there had been a breach of paragraph 3 (art. 5-3) (thirteen votes to one) and paragraph 4 (art. 5-4) (nine votes to one, with four abstentions) of Article 5;
- that it was unnecessary in the circumstances to examine the complaints under Articles 13 and 18 (art. 13, art. 18).

The full text of the Commission's opinion and of the one separate opinion contained in the report is reproduced as an annex to the present judgment.

AS TO THE LAW

I. PRELIMINARY OBJECTIONS

A. Objection as to non-exhaustion of domestic remedies

33. The Government pleaded in general terms before the Commission that Mr. de Jong and Mr. Baljet had failed to exhaust their domestic remedies as required by Article 26 (art. 26) of the Convention, in that they had omitted to bring a claim against the State in the civil courts under Article 1401 of the Civil Code for unlawful action, invoking as the ground of the "unlawfulness" the alleged violations of the Convention (see paragraph 21, first and third sub-paragraphs, above). The Commission, in its decision of 7 May 1981 on the admissibility of applications nos. 8805/79 and 8806/79, limited its attention to the failure to sue under Article 1401 for damages for prejudice suffered.

Rule 47 para. 1 of the Rules of Court lays down that "a Party wishing to raise a preliminary objection must file a statement setting out the objection and the grounds therefore ... not later than the expiry of the time-limit laid down ... for the filing of its first memorial". In the statement filed with the registry on 26 September 1983 (see paragraph 6 above), the Government simply referred back to the terms of their objection and supporting grounds as summarised in the above-mentioned decision of 7 May 1981. However, the Government substantially supplemented their pleading in several ways at the hearing before the Court on 22 November 1983, notably by advancing fresh grounds for their objection of non-exhaustion. Firstly, they extended this objection to Mr. van den Brink. Secondly, so the Government stated, although under Article 1401 compensation was recoverable only in respect of material loss, Mr. de Jong and Mr. Baljet could have sought from the civil courts a declaratory judgment as to the unlawfulness of their detention and then, on the basis of that judgment, requested compensation for non-material prejudice from the Minister of Defence (see paragraph 21, fourth sub-paragraph, above); Mr. van den Brink, alternatively or in addition to suing for damages in the civil courts, could have asked for compensation for both material and non-material loss in the proceedings before the Military Court in accordance with the "interim provision" of 26 June 1979 making Articles 89 and following of the civilian Code of Criminal Procedure applicable to military criminal proceedings (see paragraph 21, second sub-paragraph, above). Finally, the Government pleaded "another possibility provided for by Article 1401 of the Civil Code" but "overlooked by the Commission": the applicant servicemen, whilst still in custody, could have had recourse to Article 1401 in summary proceedings before the President of a District Court in accordance with Articles 289 and following of the Code of Civil Procedure in order to obtain a provisional order of immediate release on the ground that their detention was "unlawful" by reason of the alleged violations of the Convention (see paragraph 21, fifth sub-paragraph, above).

34. The Court will take cognisance of preliminary objections of this kind if and in so far as the respondent State may already have raised them before the Commission to the extent that their character and the circumstances permitted; this should normally be done at the stage of the initial examination of admissibility. If this condition is not fulfilled, the Government are estopped from raising the objection before the Court (see, as the most recent authority, the Corigliano judgment of 10 December 1982, Series A no. 57, p. 11, para. 26).

1. Estoppel

(a) In relation to Mr. van den Brink

35. Never at any stage before the Commission did the Government argue non-exhaustion of domestic remedies in Mr. van den Brink's case. In the absence of any justifying circumstances, there is estoppel with regard to this part of the objection. This being so, there is no need for the Court to examine what consequences follow from the Government's failure to comply with Rule 47 para. 1 of the Rules of Court (see paragraph 33 above).

(b) In relation to Mr. de Jong and Mr. Baljet

36. During the examination of the admissibility of the applications of Mr. de Jong and Mr. Baljet, the Government, as they readily conceded, did not submit that the real remedy provided by Article 1401 of the Civil Code lay not so much in a claim for monetary compensation but rather in the additional possibility offered by that Article when used in conjunction with the summary procedure, namely of applying to the President of a District Court for a provisional order of immediate release. At the hearing before the Court, the Government recognised that "the scope of this Article [1401]" - in also permitting injunctions to be obtained without the need to prove actual "damage" and "fault" as specified in the text of the Article (set out at paragraph 21, third sub-paragraph, above) - "is wider than the text suggests".

When a State seeks to rely on the rule of exhaustion of domestic remedies, it falls to the State to indicate the relevant remedies that have not been utilised by those concerned (see, inter alia, the Foti and Others judgment of 10 December 1982, Series A no. 56, p. 17, para. 48). In the Court's view, claiming compensation after the event for damage caused and applying whilst still in custody for immediate release are in substance two different remedies, albeit based in Netherlands law on the same Article in the Civil Code. The Court cannot accept that, when invoking the latter remedy for the first time at the hearing on 22 November 1983, the Government were simply developing further the argument they had already put forward on Article 1401 of the Civil Code before the Commission: they were alleging failure to exhaust a remedy of a quite different nature from that considered by the Commission at the admissibility stage. Furthermore, as the Delegate of the Commission rightly pointed out, the applications having been communicated to the Government for their observations on admissibility, it was not for the Commission to ascertain of its own motion whether Article 1401 offered an additional remedy other than that which was apparent on the face of the text and which had been discussed in the pleadings (see, mutatis mutandis, the above-mentioned Foti and Others judgment, ibid.).

Accordingly, the Government are also estopped from pleading that Mr. de Jong and Mr. Baljet ought to have brought an action under the summary procedure for immediate release.

37. The possibility said to have been open to Mr. de Jong and Mr. Baljet of bringing proceedings before the civil courts to obtain a declaratory judgment, followed by a request to the Minister of Defence for a grant of compensation for non-material prejudice, was similarly not mentioned by the Government until the stage of the oral procedure before the Court. Consequently, quite apart from the non-observance of Rule 47 para. 1 of the Rules of Court (see paragraph 33 above), there is likewise estoppel with regard to this branch of the Government's preliminary objection.

38. On the other hand, the remaining part of the objection, based on an ordinary action for recovery of compensation under Article 1401 of the Civil Code, is not met by estoppel.

2. Is the remainder of the objection concerning Mr. de Jong and Mr. Baljet well-founded?

39. The only remedies which Article 26 (art. 26) of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient (see, inter alia, the Van Oosterwijck judgment of 6 November 1980, Series A no. 40, pp. 13-14, para. 27). The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, mutatis mutandis, the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, p. 30, para. 54). It falls to the respondent State to establish that these various conditions are satisfied (see the Deweer judgment of 27 February 1980, Series A no. 35, pp. 15 and 18, paras. 26 in fine and 32 in fine).

In the present case, the Netherlands Government were unable to cite a single instance in which a detained serviceman had sued for damages under Article 1401 of the Civil Code. This, together with other factors, led the applicants and the Delegate of the Commission to dispute the applicability of Article 1401, or at the very least the sufficiency of civil proceedings brought under it, in the special context of detention on remand in military criminal proceedings. It is not for the Court to give a ruling on an issue of Netherlands law which is as yet unsettled (see, mutatis mutandis, the above-mentioned Van Droogenbroeck judgment, ibid.). The absence of case-law does, however, indicate the present uncertainty of this remedy in practical terms. Furthermore, in the particular circumstances, Article 1401 would not have been capable, even in theory, of providing appropriate redress for the applicants' complaints: according to the Government, compensation could be recovered under Article 1401 only for material loss caused, yet the applicants have never claimed that they sustained material loss as a result of the alleged breaches of the Convention.

Accordingly, the Government have not shown that this action could constitute an available and sufficient remedy that the two applicants ought to have exhausted.

B. Objection that Mr. van den Brink could not be regarded as a "victim"

40. The Government objected that Mr. van den Brink could not claim to be a "victim" of breaches of Article 5 paras. 3 and 4 (art. 5-3, art. 5-4) of the Convention for the purposes of Article 25 (art. 25), since the time he spent in custody on remand was deducted in its entirety from the sentence ultimately imposed on him (see paragraph 29 above). In their contention, any period during which he may have been detained "unlawfully" was thereby converted into lawful imprisonment, so that he had suffered no detriment.

The Government had already - unsuccessfully - raised this plea at the admissibility stage before the Commission, at least in regard to paragraph 3 of Article 5 (art. 5-3). There is thus no estoppel.

41. According to the Court's well-established case-law, 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 above-mentioned Corigliano judgment, Series A no. 57, p. 12, para. 31). Consequently, the relevant deduction from sentence does not in principle deprive the applicant of his status as an alleged "victim", within the meaning of Article 25 (art. 25), of a breach of Article 5 paras. 3 and 4 (art. 5-3, art. 5-4); 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, para. 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 Military Court, the Supreme Military Court and the Supreme Court rejected Mr. van den Brink's arguments on the Convention (see paragraphs 28-29 above).

Accordingly, since Mr. van den Brink was directly affected by the matters which he alleged to be in breach of Article 5 paras. 3 and 4 (art. 5-3, art. 5-4), he can claim to be a "victim" within the meaning of Article 25 (art. 25).

II. THE MERITS

A. Alleged violation of Article 5 para. 1 (art. 5-1)

42. All three applicants contended that the deprivation of liberty resulting from their arrest and subsequent detention on remand was in breach of paragraph 1 of Article 5 (art. 5-1) of the Convention since it did not fall within any of the justifying circumstances enumerated in the various sub-paragraphs of this paragraph, and, in particular, in sub-paragraph (c) (art. 5-1-c). Article 5 para. 1 (art. 5-1), in so far as relevant, reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ..."

43. It was not disputed that each applicant was lawfully arrested and then held in custody on remand in accordance with the provisions of the Military Code (see paragraphs 23 and 27-29 above). The legal authority for their arrest was Article 7 of the Military Code, which, inter alia, empowers a commanding officer to order a serviceman suspected of an offence set out in the Military Penal Code to be placed in custody provided that such a measure is necessary in connection with the maintenance of discipline amongst other servicemen (see paragraph 15 above). The continuation of Mr. van den Brink's detention on his referral for trial before the Military Court was ordered by the competent senior officer pursuant to Article 14 of the Military Code on the same ground (see paragraphs 16 and 27 above).

The applicants have never denied that they were reasonably suspected of having committed an offence, namely insubordination contrary to Article 114 of the Military Penal Code, and that that suspicion persisted throughout the period of their detention. Their contention, however, was that the mere persistence of a suspicion does not in itself suffice, after a certain lapse of time, to warrant continued custody. In their submission, the specific ground relied on in their cases under Articles 7 and 14 of the Military Code, that is the need to maintain discipline amongst other servicemen, was one of preventive policy, not related to the suspected offender or offence. Referring to the risk of arbitrariness, they concluded that since this ground was not listed in paragraph 1 of Article 5 (art. 5-1) and in particular in sub-paragraph (c) (art. 5-1-c), their deprivation of liberty was not justified in terms of that provision.

44. The Court does not accept this reasoning. As was pointed out by the Commission (see paragraph 76 of the report), Article 5 para. 1 (c) (art. 5-1-

c) sets out three alternative circumstances in which detention may be effected for the purpose of bringing a person before the competent legal authority, among which is included reasonable suspicion of having committed an offence (see also the Lawless judgment of 1 July 1961, Series A no. 3, pp. 51-52, para. 14). In making the need to maintain discipline amongst other servicemen an additional condition, Articles 7 and 14 of the Military Code do not lay down a further instance to those listed in Article 5 para. 1 (art. 5-1) of the Convention where deprivation of liberty is permitted, but a further requirement to be satisfied under Netherlands law before a serviceman can be placed or kept in custody on suspicion of having committed an offence. Whether the mere persistence of suspicion suffices to warrant the prolongation of a lawfully ordered detention on remand is covered, not by Article 5 para. 1 (c) (art. 5-1-c) as such, but by Article 5 para. 3 (art. 5-3) (see the Stögmüller judgment of 10 November 1969, Series A no. 9, p. 40, para. 4): it is essentially the object of Article 5 para. 3 (art. 5-3), which forms a whole with paragraph 1 (c) (art. 5-1-c) (see the Schiesser judgment of 4 December 1979, Series A no. 34, p. 12, para. 29, and the authorities cited there), to require provisional release once detention ceases to be reasonable (see, for example, the above-mentioned Stögmüller judgment, p. 39, para. 3).

Finally, the Court sees no suggestion whatsoever in the evidence that the deprivation of liberty of any of the applicants was "unlawful" - and hence incompatible with Article 5 (art. 5) - in the sense of being arbitrary or not being in conformity with the purpose of the restrictions permitted by Article 5 para. 1 (c) (art. 5-1-c) (see, inter alia, the Winterwerp judgment of 24 October 1979, Series A no. 33, pp. 16, 17-18 and 19-20, paras. 37, 39 and 45).

No breach of Article 5 para. 1 (art. 5-1) has thus been established in the instant case.

B. Alleged violation of Article 5 para. 3 (art. 5-3)

45. Under the terms of paragraph 3 of Article 5 (art. 5-3),

> "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 ..."

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

46. In the submission of the applicants, the auditeur-militair, the first authority before whom they appeared following their arrest (see paragraphs 23 and 27 above), could not be regarded as a judicial "officer" for the purposes of this provision.

The Government disputed this. They further maintained that the applicants had been brought "promptly" before the auditeur-militair that is after one day in the case of Mr. de Jong, after five days in the case of Mr. Baljet and after two days in the case of Mr. van den Brink.

47. 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, paras. 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 para. 3 (art. 5-3) (see paragraphs 44 above and 51 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 si}ge ou du parquet - ibid., p. 12, para. 28) - "must ... offer guarantees befitting the 'judicial' power conferred on him by law" (ibid., p. 13, para. 30). The Court summed up its conclusions as follows (ibid., pp. 13-14, para. 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 para. 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 para. 3 (art. 5-3) since it did not have power to order release (judgment of 18 January 1978, Series A no. 25, p. 76, para. 199).

48. 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, moreover, confined 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 85 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 para. 1 (art. 5-1), the above-mentioned Van Droogenbroeck judgment, Series A no. 50, p. 20, para. 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, para. 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 para. 3 (art. 5-3) (see the final part of the passage from the Schiesser judgment cited above at paragraph 47).

49. In addition, the auditeur-militair did not enjoy the kind of independence demanded by Article 5 para. 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 19, 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 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 47) 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, para. 38).

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

2. Referral for trial and subsequent procedure

51. The three applicants were referred for trial before the Military Court seven, eleven and six days respectively after their arrest (see paragraphs 23 and 27 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 para. 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 47).

52. Mr. de Jong and Mr. Baljet were released on the day they were referred for trial (see paragraph 23 above). They were thus held in custody for seven and eleven days respectively without being brought before a judge or judicial officer. No breach of paragraph 3 of Article 5 (art. 5-3) can be found if the arrested person is released "promptly" before any judicial control of his detention would have been feasible. The issue of promptness must 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, para. 10). In the particular circumstances, 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, para. 54), the Court considers that the intervals in question cannot be regarded as consistent with the required "promptness". Mr. de Jong and Mr. Baljet were thus not assured protection of their right under Article 5 para. 3 (art. 5-3) whilst in custody.

53. The Court reaches a similar conclusion in respect of Mr. van den Brink: by the time he was referred for trial - six days after his arrest (see paragraph 27 above) -, the limits laid down by Article 5 para. 3 (art. 5-3) had already been exceeded. This being in itself decisive to establish non-compliance with Article 5 para. 3 (art. 5-3), it becomes unnecessary to examine the subsequent procedure followed in his case.

3. Conclusion

54. To sum up, each of the three applicants was a victim of a breach of Article 5 para. 3 (art. 5-3).

C. Alleged violation of Article 5 para. 4 (art. 5-4)

55. The applicants further alleged a violation of Article 5 para. 4 (art. 5-4), which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

56. In their submissions before the Court, the Government adopted the reasoning of the separate opinion to the Commission's report. This opinion argued that the safeguards of paragraphs 3 and 4 (art. 5-3, art. 5-4) do not apply concurrently: the proceedings contemplated by the latter constitute de facto a kind of appeal from those required under the former; hence the speediness of the paragraph 4 (art. 5-4) remedy has to be assessed from the moment when the person concerned was or ought to have been brought before the judge or judicial officer in accordance with paragraph 3 (art. 5-3). Thus, so it was maintained, since Mr. de Jong and Mr. van den Brink had had access to a court very shortly after this moment (see paragraphs 23 and 28 above), it was not necessary to rule on their complaint under paragraph 4 (art. 5-4).

57. The Court, for its part, is not convinced by this reasoning. The procedure followed for bringing a person before the "competent legal authority" in accordance with paragraph 3 taken in conjunction with paragraph 1 (c) (art. 5-3+5-1-c) may admittedly have a certain incidence on compliance with paragraph 4. For example, where that procedure culminates in a decision by a "court" ordering or confirming deprivation of the person's liberty, the judicial control of lawfulness required by paragraph 4 is incorporated in this initial decision (see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 40, para. 76, and the above-mentioned Van Droogenbroeck judgment, Series A no. 50, p. 23, paras. 44-45). However, the guarantee assured by paragraph 4 (art. 5-4) is of a different order from, and additional to, that provided by paragraph 3 (art. 5-3). The Court itself has on several previous occasions examined whether the same set of facts gave rise to a breach of both paragraphs 3 and 4 of Article 5 (art. 5-3, art. 5-4), without ever suggesting that the safeguards provided might not apply concurrently (see the Neumeister judgment of 27 June 1968, Series A no. 8, pp. 36-41 and 43-44, paras. 3-15 and 22-25; the Matznetter judgment of 10 November 1969, Series A no. 9, pp. 31-35, paras. 2-13; the above-mentioned Ireland v. the United Kingdom judgment, Series A no. 25, pp. 75-77, paras. 199-200). The Court sees no reason in the present case not to apply these two paragraphs concurrently.

58. The two remedies relied on by the Government in connection with paragraph 4 of Article 5 (art. 5-4) were those available under Articles 13 and 34 of the Military Code.

Article 13, which is applicable in the period prior to referral for trial, allows a suspected serviceman who has been in custody on remand for fourteen days to petition the Military Court to fix a term within which the commanding general must either decide whether the case is to be referred for trial or else terminate the detention (see paragraph 15 above). The fact

that this remedy could not be exercised until at least two weeks after the arrest prevented the applicants from being able to obtain a "speedy" decision, even having regard to the exigencies of military life and military justice (see the above-mentioned Engel and Others judgment, Series A no. 22, p. 23, para. 54).

Following referral and prior to the commencement of the trial, Article 34 permits the detained serviceman to address a request for release to the Military Court (see paragraph 17, second sub-paragraph, above). It was not disputed in the present case that the Military Court could be regarded as a "court" for the purposes of Article 5 para. 4 (art. 5-4), in the sense of enjoying the necessary independence and offering sufficient procedural safeguards appropriate to the category of deprivation of liberty being dealt with (see the above-mentioned De Wilde, Ooms and Versyp judgment, Series A no. 12, pp. 41-42, paras. 76 and 78). In addition, Article 34 of the Military Code is capable in practice of leading to a "speedy" decision, depending upon how rapidly the referral for trial occurs in the particular circumstances. Mr. de Jong was seven days, Mr. Baljet eleven days and Mr. van den Brink six days in custody before being referred for trial (see paragraphs 23 and 27 above) and hence without a remedy. In the Court’s view, even having regard to the exigencies of military life and military justice, the length of absence of access to a court was in each case such as to deprive the applicant of his entitlement to bring proceedings to obtain a "speedy" review of the lawfulness of his detention. Mr. de Jong and Mr. Baljet were in fact released on being referred for trial, and Mr. van den Brink, although maintained in detention, did not take advantage of the possibility of seeking release under Article 34 of the Military Code following his referral for trial. These circumstances, however, do not alter the above conclusion since in each case the breach of Article 5 para. 4 (art. 5-4) of the Convention had already occurred before the applicant was in the position of having access to a remedy before the Military Court.

59. In conclusion, there was a breach of Article 5 para. 4 (art. 5-4) in each case.

D. Alleged violation of Article 13 (art. 13)

60. Before the Commission, the applicants maintained that, by reason of the same facts as gave rise to a breach of Article 5 para. 4 (art. 5-4), they had lacked an effective remedy before a national authority in respect of the alleged violation of their right to liberty under Article 5 para. 1 (art. 5-1). Accordingly, there had also, in their submission, been a violation of Article 13 (art. 13), which provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The applicants did not maintain this complaint before the Court; they expressed their agreement with the Commission's opinion that there was no call to examine the case under Article 13 (art. 13) in view of the conclusion reached under the lex specialis of Article 5 para. 4 (art. 5-4).

In the light of its own conclusions on Article 5 para. 4 (art. 5-4), the Court likewise does not deem it necessary in the particular circumstances to determine whether there has also been a failure to observe the less strict requirements of Article 13 (art. 13) (see, mutatis mutandis, the above-mentioned De Wilde, Ooms and Versyp judgment, Series A no. 12, p. 46, para. 95).

E. Alleged violation of Article 14 taken in conjunction with Article 5 (art. 14+5)

61. Mr. de Jong and Mr. Baljet claimed that in the enjoyment of their rights under Article 5 (art. 5) they had been the victims of discrimination in breach of Article 14 (art. 14), which reads:

> "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."

They complained, firstly, that they had not been given leave from military service after requesting recognition as conscientious objectors - this being the factor that provoked their refusal to obey orders - and, secondly, that a long delay elapsed before the criminal proceedings then brought against them for insubordination were stayed pending the decision on their requests (see paragraphs 13, 22 and 23 above). In the applicants' submission, this treatment, which was differential in that it was contrary to the usual practice followed, was prompted by the exceptional mission for which their battalion had been designated in the Lebanon.

62. The applicants' complaint would appear to be directed more against the processing of their requests to be recognised as conscientious objectors than against their deprivation of liberty as such. Indeed, the first limb of their complaint related to the period prior to any detention. It might therefore be queried to what extent the alleged discrimination concerned enjoyment of rights under the Convention. Be that as it may, the treatment complained of was, on the applicants' own submission, prompted by the impending special mission of their battalion to the Lebanon as part of a United Nations unit. In the Court's view, even assuming that a distinction was made between the applicants and other servicemen in an otherwise comparable position, the circumstances of that impending mission provided an objective and reasonable justification (see the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 34, para. 10, and the Marckx judgment of 13 June 1979, Series A no. 31, pp. 15-16, para. 32).

There has accordingly been no breach of Article 14 taken in conjunction with Article 5 (art. 14+5).

F. Alleged violation of Article 18 (art. 18)

63. Mr. de Jong and Mr. Baljet had additionally argued before the Commission that the differential treatment complained of under Article 14 (art. 14) also gave rise, in relation to the restriction of their rights under Article 5 (art. 5), to a violation of Article 18 (art. 18), which provides:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

However, this question was not at all canvassed before the Court. The Court, like the Commission (see paragraph 107 of the report), does not consider it necessary to examine the matter.

G. Application of Article 50 (art. 50)

64. 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."

All three applicants asked for just satisfaction in the form of compensation of 100 Dutch Guilders for each day that the Court should find their detention not to have been in conformity with Article 5 (art. 5) of the Convention.

The Government, for their part, stated that, as far as Mr. de Jong and Mr. Baljet were concerned, they could "accept compensation of 100 Guilders per day of unlawful detention". With regard to Mr. van den Brink, on the other hand, they submitted that any period of "unlawful detention" had been compensated by the deduction of the custody on remand from the term of imprisonment (see paragraph 29 above) and that this constituted sufficient satisfaction for any violation of the Convention suffered.

65. The Court has held that the contested deprivation of liberty was in each case compatible with paragraph 1 of Article 5 (art. 5-1) (see paragraphs 42-44 above), but that the requirements of paragraphs 3 and 4 (art. 5-3, art. 5-4) were not met (see paragraphs 45-54 and 55-59 above). It cannot be said on the evidence that the applicants would probably have been released or released earlier from custody on remand had they received the benefit of the guarantees contained in the two latter paragraphs (cf. the

Artico judgment of 13 May 1980, Series A no. 37, p. 20, para. 42). At the very least, each applicant did however forfeit the opportunity of a "prompt" or "speedy" 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 Mr. van den Brink's case, 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, para. 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. Declares that the Government are estopped from relying on the rule of exhaustion of domestic remedies
   (a) in respect of Mr. van den Brink,
   (b) in respect of Mr. de Jong and Mr. Baljet to the extent specified in paragraphs 36 and 37 of the judgment;

2. Rejects the remainder of the objection pleading non-exhaustion of domestic remedies;

3. Rejects the objection that Mr. van den Brink could not be regarded as a victim within the meaning of Article 25 (art. 25);

4. Holds that there has been no breach of paragraph 1 of Article 5 (art. 5-1) in respect of any of the applicants;

5. Holds that each applicant has been the victim of a breach of paragraphs 3 and 4 of Article 5 (art. 5-3, art. 5-4);

6. Holds that there has been no breach of Article 14 taken in conjunction with Article 5 (art. 14+5);

7. Holds that it is not necessary also to examine the case under Article 13 or Article 18 (art. 13, art. 18);

8. 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.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar