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

COURT (PLENARY)

**CASE OF ENGEL AND OTHERS v. THE NETHERLANDS**

*(Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72)*

JUDGMENT

STRASBOURG

8 June 1976

**In the case of Engel and others,**

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

MM. H. MOSLER, *President*,
A. VERDROSS,
M. ZEKIA,
J. CREMONA,
G. WIARDA,
P. O'DONOGHUE,
Mrs. H. PEDERSEN,
MM. T. VILHJÁLMSSON,
S. PETREN,
A. BOZER,
W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
M. D. EVRIGENIS

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 30 and 31 October 1975, from 20 to 22 January and from 26 to 30 April 1976,

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

## PROCEDURE

1. The case of Engel and others was referred to the Court by the European Commission of Human Rights (hereinafter referred to as "the Commission") and by the Government of the Kingdom of the Netherlands (hereinafter referred to as "the Government"). The case originated in five applications against the Kingdom of the Netherlands which were lodged with the Commission in 1971 by Cornelis J.M. Engel, Peter van der Wiel, Gerrit Jan de Wit, Johannes C. Dona and Willem A.C. Schul, all Netherlands nationals.

2. Both the Commission's request, to which was attached the report provided for in Article 31 (art. 31) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), and the application of the Government were lodged with the registry of the Court within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47) - the former on 8 October 1974, the latter on 17 December. They 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). Their purpose is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 5, 6, 10, 11, 14, 17 and 18 (art. 5, art. 6, art. 10, art. 11, art. 14, art. 17, art. 18) of the Convention.

3. On 15 October 1974, the President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber; Mr. G.J. Wiarda, the elected judge of Netherlands nationality, and Mr. H. Mosler, Vice-President of the Court, were ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges thus designated were Mr. A. Verdross, Mr. M. Zekia, Mr. P. O'Donoghue, Mr. T. Vilhjálmsson and Mr. R. Ryssdal (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr. Mosler assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and the delegates of the Commission regarding the procedure to be followed. By an Order of 31 October 1974, he decided that the Government should file a memorial within a time-limit expiring on 14 February 1975 and that the delegates should be entitled to file a memorial in reply within two months of receipt of the Government's memorial. On 22 January 1975, he extended the time-limit granted to the Government until 1 April.

The Government's memorial was received at the registry on 1 April, that of the delegates on 30 May 1975.

5. After consulting, through the Registrar, the Agent of the Government and the delegates of the Commission, the President decided by an Order of 30 June 1975 that the oral hearings should open on 28 October.

6. At a meeting held in private on 1 October 1975 in Strasbourg, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, "considering that the case raise(d) serious questions affecting the interpretation of the Convention ...". At the same time, it took note of the intention of the Commission's delegates to be assisted during the oral procedure by Mr. van der Schans, who had represented the applicants before the Commission; it also authorised Mr. van der Schans to speak in Dutch (Rules 29 para. 1 in fine and 27 para. 3).

7. On 27 October 1975, the Court held a preparatory meeting to consider the oral stage of the procedure. At this meeting it compiled two lists of requests and questions which were communicated to the persons who were to appear before it. The documents thus requested were lodged by the Commission on the same day and by the Government on 21 November 1975.

8. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 28 and 29 October 1975.

There appeared before the Court:

- for the Government:

Mr. C.W. VAN SANTEN, Deputy Legal Adviser
at the Ministry of Foreign Affairs, *Agent*;
Mr. C.W. VAN BOETZELAER VAN ASPEREN, Permanent
Representative of the Netherlands to the Council of Europe,
*Substitute Agent*;
Mr. E. DROOGLEEVER FORTUIJN, Solicitor
for the Government,
Mr. R.J. AKKERMAN, Official
at the Ministry of Defence,
Mr. W. BREUKELAAR, Official
at the Ministry of Justice,
Mr. J.J.E. SCHUTTE, Official
at the Ministry of Justice,
Mr. A.D. BELINFANTE, Professor
at the University of Amsterdam, *Advisers*;

- for the Commission:

Mr. J.E.S. FAWCETT, *Principal Delegate*,
Mr. F. ERMACORA, *Delegate,*
Mr. E. VAN DER SCHANS, who had represented the applicants
before the Commission, assisting the delegates under Rule
29 para. 1, second sentence.

The Court heard addresses by Mr. Fawcett, Mr. Ermacora and Mr. van der Schans for the Commission and by Mr. van Santen, Mr. Droogleever Fortuijn and Mr. Belinfante for the Government, as well as their replies to questions put by the Court.

9. On 30 October, the Commission produced various documents which its representatives had mentioned during the oral hearings.

10. On the instructions of the Court, the Registrar requested the Commission, on 3 and 13 November 1975, to supply it with details on a particular point of the case; these were furnished on 4 and 14 November.

## AS TO THE FACTS

11. The facts of the case may be summarised as follows:

12. All applicants were, when submitting their applications to the Commission, conscript soldiers serving in different non-commissioned ranks in the Netherlands armed forces. On separate occasions, various penalties had been passed on them by their respective commanding officers

for offences against military discipline. The applicants had appealed to the complaints officer (beklagmeerdere) and finally to the Supreme Military Court (Hoog Militair Gerechtshof) which in substance confirmed the decisions challenged but, in two cases, reduced the punishment imposed.

## THE SYSTEM OF MILITARY DISCIPLINARY LAW IN THE NETHERLANDS

13. The disciplinary law concerning the Netherlands Army, applicable at the time of the measures complained of in this case, was set out in the Military Discipline Act of 27 April 1903 (Wet op de Krijgstucht - hereinafter referred to as "the 1903 Act"), the Regulations on Military Discipline of 31 July 1922 (Reglement betreffende de Krijgstucht), the Military Penal Code of 27 April 1903 (Wetboek van Militair Strafrecht) and the Army and Air Force Code of Procedure in its version of 9 January 1964 (Rechtspleging bij de Land-en Luchtmacht).

This system of law has evolved during the course of the years. In particular, certain provisions of the 1903 Act, applied in the present case, have been repealed or amended by an Act of 12 September 1974, which came into force on 1 November 1974.

14. Alongside disciplinary law, there exists in the Netherlands a military criminal law. Proceedings under the latter are held at first instance before a court martial (Krijgsraad) and subsequently, if appropriate, before the Supreme Military Court on appeal.

The account that follows relates solely to military disciplinary law which, like military criminal law, applies equally to conscript servicemen, such as the applicants, and to volunteers.

Military disciplinary offences

15. Offences against military discipline are defined in Article 2 of the 1903 Act as being:

> "1. all acts not included in any criminal legislation which are contrary to any official order or regulation or inconsistent with military discipline and order;
>
> 2. such criminal acts as fall within the jurisdiction of the military judge, insofar as they are inconsistent with military discipline and order but at the same time of such trivial nature that the matter can be dealt with in proceedings other than criminal proceedings."

The Regulations on Military Discipline of 31 July 1922 set out the basic principles of military discipline (Section 15 para. 2). Under Section 16 para. 1, the question whether or not the conduct of a member of the armed forces is consistent with military discipline and order must be answered by

reference to the general considerations set out in the first part of those Regulations.

Sections 17 to 26 list - by way of example, as stated in Section 16 para. 2 - offences against military discipline, such as membership of extremist organisations, non-observance of secrecy, possession and distribution of objectionable writings, showing discontentment, failure to perform military duties, absence without leave, incorrect or disorderly behaviour, disrespect for property, failure to give assistance, neglect of hygiene and cleanliness, failure to perform watch and patrol duties, etc.

Several of these acts and omissions constitute at the same time criminal offences punishable under the Military Penal Code, for example, absence without leave for one day or more (Article 96), disobedience to a military order (Article 114) and distribution of objectionable writings (Article 147).

Under Article 8 of the Army and Air Force Code of Procedure the competent officer imposes a disciplinary penalty if he considers that the person concerned is guilty of an offence that can be dealt with outside criminal proceedings.

Military disciplinary penalties and measures

16. At the relevant time, the provisions on the various penalties that could be imposed on persons having committed disciplinary offences were contained in Articles 3 to 5 of the 1903 Act.

The nature of the penalties depended on the rank of the offender. Thus, Article 3-A provided for reprimand, "light arrest (licht arrest) of at most 14 days" and "strict arrest (streng arrest) of at most 14 days" as the principal disciplinary punishments for officers. As regards non-commissioned officers, Article 4-A provided, inter alia, for reprimand, restrictions to camp during the night, "light arrest of at most 21 days", "aggravated arrest (verzwaard arrest) of at most 14 days" and "strict arrest of at most 14 days". Ordinary servicemen were, under Article 5-A, subject, broadly speaking, to the same punishments as non-commissioned officers, with the additional possibility for privates of "committal to a disciplinary unit" (plaatsing in een tuchtklasse). All ranks of servicemen could, under paragraph B of each of the above Articles, also suffer loss of wages as "supplementary punishment".

17. Under the 1903 Act the manner of execution of disciplinary punishments also varied according to rank.

18. Execution of light arrest was governed by Article 8:

> "Light arrest shall be carried out:
>
> A. By officers:
>
> 1. on land: in their dwellings, tent or barracks or, when bivouacking, in the place designated by the commanding officer;
>
> 2. ...

B. By non-commissioned officers and ordinary servicemen:

1. on land: in their barracks, base or dwellings or, when in quarters, camping or bivouacking, in the place designated by the commanding officer;

2. ...

...

Servicemen undergoing light arrest are not excluded from performing their duties."

The effect of this provision was that any serviceman under light arrest, irrespective of rank, had usually to remain in his dwelling during off-duty hours if he lived outside the barracks; otherwise he was confined to barracks.

Officers and non-commissioned officers normally lived outside, whereas ordinary servicemen were as a rule obliged to live within, the barracks. In practice, ordinary servicemen had for some time enjoyed a degree of freedom of movement in the evenings between five o'clock and midnight and at weekends. They often made use of this to stay with their families but this did not mean that they were no longer required to live in barracks.

By reason of the above, an ordinary serviceman, unlike an officer or non-commissioned officer, was in general not able to serve light arrest at home, and he thereby lost the privilege of returning to his family home during off-duty hours. Conscripts permitted to live outside the barracks were in the same situation: under Article 123 of the Rules for Internal Service in the Royal Army (Reglement op de Inwendige Dienst der Koninklijke Landmacht), the permission was suspended, inter alia, in the case of disciplinary arrest; however, this provision, deemed contrary to the 1903 Act, disappeared in 1974.

A serviceman under light arrest at the barracks was allowed visits, correspondence and the use of the telephone; he could move freely about the barracks outside duty hours, being able for instance to visit the camp cinema, canteen and other recreation facilities.

19. The execution of aggravated arrest, which applied only to non-commissioned officers and ordinary servicemen, was governed by Article 9 of the 1903 Act. Those concerned continued to perform their duties but for the rest of the time had to remain, in the company of other servicemen undergoing a similar punishment, in a specially designated but unlocked place. The offender might receive visits if he had the company commander's written permission. Unlike a person under light arrest, he could not move freely about the barracks so as to visit the cinema, canteen or recreation facilities. As far as possible, ordinary servicemen had to be separated from their fellows (afzondering) during the night.

20. The execution of strict arrest was governed by Article 10 of the 1903 Act. The period of arrest, covering both duty and off-duty hours, was served

by officers in a similar manner to light arrest, that is they usually remained at home, whereas non-commissioned officers and ordinary servicemen were locked in a cell. All ranks were excluded from the performance of their normal duties.

21. Execution of what at the time was the most severe form of disciplinary penalty, committal to a disciplinary unit (plaatsing in een tuchtklasse), which applied only to privates, was governed by Articles 18 and 19 of the 1903 Act. This punishment consisted of submitting the offender to a stricter discipline than normal by sending him to an establishment which was specially designated for that purpose (Article 18). According to Article 19, service in a disciplinary unit was imposed for a period, determined when the penalty was pronounced, of from three to six months. In this respect alone did it differ from committal to a punishment unit (plaatsing in een strafklasse), a supplementary punishment which, under Article 27 of the Military Penal Code, could be imposed on a serviceman, in the context of criminal proceedings, for a period of from three months to two years.

Committal to a disciplinary unit, when it was ordered towards the end of military service, generally delayed the individual's return to civil life. Its execution was governed by a Decree of 14 June 1971 (Besluit straf-en tuchtklassen voor de krijgsmacht) which concerned both committals to a punishment unit and, in principle (Article 57), committal to a disciplinary unit. Those undergoing such punishment were removed from their own unit and placed in a special, separate group; their movements were restricted, they carried out their military service under constant supervision and emphasis was placed on their education (Articles 17, 18 and 20).

The units were divided into three sections. Offenders as a rule passed thirty days in each of the first two, but these periods could be prolonged or shortened according to their conduct (Articles 26 and 27). As far as possible, they spent their nights separated from each other (afgezonderd - Article 28). In the first section, they were allowed to receive visits twice a month and to study during off-duty hours (Article 29). In the second, they also enjoyed a degree of freedom of movement on Saturdays and Sundays and at least twice a week could visit the canteen and/or recreation facilities in the evening after duty (Article 30). In the third, the regime was appreciably less strict (Article 31).

22. Under Article 20 of the 1903 Act, a serviceman on whom the punishment of committal to a disciplinary unit had been imposed might, on that ground, be placed under arrest after sentence had been passed and held in custody until he arrived at the establishment where the punishment was to be served. It seems that any of the three forms of arrest outlined above could be employed under the terms of this text.

No provision existed in military disciplinary law to limit or fix in advance or otherwise control the duration of this interim custody, or to

provide for the possibility of deducting the period of such custody from the time to be spent in the disciplinary unit.

23. Disciplinary penalties imposed on a serviceman could be taken into account when, for example, the question of his promotion arose. On the other hand they were not entered on his criminal record and, according to the information obtained by the Court at the hearing on 28 October 1975, had no effects in law on civil life.

24. As the result of the Act of 12 September 1974, both the range of disciplinary punishments available and the manner in which they are to be enforced have been made the same for all ranks of servicemen. Strict arrest and committal to a disciplinary unit are abolished. Even before its entry into force (1 November 1974), these punishments had ceased to be imposed in practice, following a ministerial instruction.

While reprimand, light arrest and aggravated arrest remain, the maximum period during which any arrest may be imposed is now fourteen days, and aggravated arrest is henceforth also applicable to officers (Articles 3, 8 and 9 of the 1974 Act). Aggravated arrest today constitutes the severest form of disciplinary punishment. Three further penalties have been introduced by the 1974 Act: extra duties of between one and two hours a day, compulsory presence overnight in the barracks or quarters, and a fine.

Military disciplinary procedure

25. Articles 39 to 43 of the 1903 Act state who may impose disciplinary punishments. This is normally the commanding officer of the individual's unit. He investigates the case and hears the serviceman accused (Article 46 of the 1903 Act) and questions witnesses and experts if that proves necessary.

For each offence committed the officer chooses which of the various punishments available under the law should be applied. "When determining the nature and severity of disciplinary punishments", he shall be "both just and severe", shall have "regard to the circumstances in which the offence was committed as well as to the character and customary behaviour of the accused" and shall base his decision "on his own opinion and belief" (Article 37 of the 1903 Act).

26. Article 44 of the 1903 Act provides that any superior who has sufficient indication to suppose that a subordinate has committed a severe offence against military discipline is entitled, if necessary, to give notice of his provisional arrest (voorlopig arrest); the subordinate is obliged to comply immediately with that notification. Provisional arrest is usually served in the same way as light arrest, but, if required either in the interest of the investigation or in order to prevent disorder, it is served in a similar way to aggravated or, as was the case prior to the 1974 Act, strict arrest. The serviceman concerned is as a rule excluded from performing his duty outside the place where he is confined. Article 45 stipulates that provisional arrest shall not last longer than 24 hours and Article 49 states that the

hierarchical superior of the officer imposing provisional arrest may set it aside after hearing the latter. The period of such provisional arrest may be deducted in whole or in part from the punishment imposed.

27. Under Article 61 of the 1903 Act the serviceman on whom a disciplinary penalty has been imposed may challenge before the complaints officer his punishment or the grounds thereof unless it has been imposed by a military court. The complaints officer is the hierarchical superior of the officer giving the initial decision rather than a specialist, but he is usually assisted by a colleague who is a lawyer, especially in cases (before the 1974 Act) of committal to a disciplinary unit.

The complaint must be submitted within four days; if the complainant is under arrest he may on request consult other persons named by him (maximum of three), unless the commanding officer considers their presence to be inadvisable (Article 62).

The complaints officer must examine the case as soon as possible; he questions witnesses and experts to the extent he thinks necessary and hears the complainant and the punishing officer. He then gives a decision which must be accompanied by reasons and communicated to the complainant and the punishing officer (Article 65).

28. Appeal against the decision imposing a disciplinary punishment has no suspensive effect although the Minister of Defence may defer the execution of such punishment on account of special circumstances. Article 64 of the 1903 Act provided an exception in the case of committal to a disciplinary unit; the serviceman's appeal did not, however, entail the suspension or termination of any interim custody imposed under Article 20.

29. If the punishment has not been quashed by the complaints officer, the complainant may appeal within four days to the Supreme Military Court (Article 67 of the 1903 Act).

30. The composition of this Court and its functioning are regulated by the "Provisional Instructions" on the Supreme Military Court (Provisionele Instructie voor het Hoog Militair Gerechtshof) promulgated on 20 July 1814 but since amended several times. Under Article 1 the Court shall be established at The Hague and shall be composed of six members: two civilian jurists - one of whom is the Court's President - and four military officers. A State Advocate for the Armed Forces (advocaat-fiscaal voor de Krijgsmacht) and a Registrar are attached to the Court.

The civilian members (Article 2 of the "Provisional Instructions") must be Justices of the Supreme Court (Hoog Raad) or Judges of the Court of Appeal (Gerechtshof) at The Hague and Articles 11, 12, 13 and 15 of the Judicature Act (Wet op de Rechterlijke Organisatie) of 18 April 1827, providing, inter alia, for tenure of office and grounds for discharge, are applicable to them. They are appointed by the Crown upon the joint recommendation of the Ministers of Justice and of Defence; their term of

office is equal to that of the Justices of the Supreme Court or the Judges of a Court of Appeal.

The military members of the Court (Article 2 (a) of the "Provisional Instructions"), who must be not less than 30 nor more than 70 years of age, are likewise appointed by the Crown upon the joint recommendation of the Ministers of Justice and of Defence. They may also be dismissed in a similar manner. In theory, therefore, they are removable without observance of the strict requirements and legal safeguards laid down regarding the civilian members by the Judicature Act. According to the Government, the appointment of the military members of the Court is normally the last in their service career; they are not, in their functions as judges on the Court, under the command of any higher authority and they are not under a duty to account for their acts to the service establishment.

On assuming office, all members of the Court must swear an oath that obliges them, inter alia, to be just, honest and impartial (Article 9 of the "Provisional Instructions"). It is true that the military judges on the Court remain members of the armed forces and as such bound by their oath as officers, which requires them, among other things, to obey orders from superiors. This latter oath, however, also enjoins obedience to the law, including in general the statutory provisions governing the Supreme Military Court and, in particular, the oath of impartiality taken by the judges.

31. Cases are never dealt with by a single judge but only by the Court as a body. The Court is required to examine cases as soon as possible and to hear the applicant and, if necessary, the punishing officer, the complaints officer and any witness or expert whose evidence it may wish to obtain (Article 56 of the "Provisional Instructions"). The Court reviews the decision of the complaints officer both in regard to the facts and to the law; in no case has it jurisdiction to increase the penalty (Article 58).

Whereas in criminal cases the Court's hearings are public (Article 43 of the "Provisional Instructions" and paragraph 14 above), it sits in camera in disciplinary cases. On the other hand the judgment is pronounced at a public session; it must be accompanied by reasons and is communicated to the complaints officer, the punishing officer and the appellant serviceman (Article 59).

32. At the time of the measures complained of in this case, no provision in law was made for the legal representation of the complainant. Nevertheless, as a report by the acting Registrar of the Supreme Military Court, dated 23 December 1970, explains, the Court in practice granted legal assistance in certain cases where it was expected that the person concerned would not be able himself to cope with the special legal problems raised in his appeal. This applied particularly to cases where the Convention was invoked. The assistance was, however, limited to such legal matters.

The position altered in 1973: under a ministerial instruction of 7 November 1973 (Regeling vertrouwensman - KL), a serviceman accused of a disciplinary offence may have the services of a "trusted person" (vertrouwensman) at all stages of the proceedings and even of a lawyer if the matter comes before the Supreme Military Court (Articles 1, 17 and 18 of the instruction).

## FACTS RELATING TO THE INDIVIDUAL APPLICANTS

Mr. Engel

33. In March 1971, Mr. Engel was serving as a sergeant in the Netherlands Army. He in fact lived at home during off-duty hours. The applicant was a member of the Conscript Servicemen's Association (Vereniging van Dienstplichtige Militairen - V.V.D.M.) which was created in 1966 and aims at safeguarding the interests of conscripts. It was recognised by the Government for taking part in negotiations in this field and its membership included about two-thirds of all conscripts.

Mr. Engel was a candidate for the vice-presidency of the V.V.D.M. and on 12 March he submitted a request to his company commander for leave of absence on 17 March in order to attend a general meeting in Utrecht at which the elections were to be held. He did not, however, mention his candidature.

Subsequently he became ill and stayed home under the orders of his doctor who gave him sick leave until 18 March and authorised him to leave the house on 17 March. On 16 March, the company commander had a talk with the battalion commander and it was agreed that no decision should be taken regarding the above-mentioned request pending further information from the applicant who had given no notice of his absence or return. However, on the following day a check was made at the applicant's home and it was discovered that he was not there. In fact, he had gone to the meeting of the V.V.D.M. where he had been elected vice-president.

34. On 18 March Mr. Engel returned to his unit and on the same day his company commander punished him with four days' light arrest for having been absent from his residence on the previous day.

The applicant considered this penalty a serious interference with his personal affairs in that it prevented him from properly preparing himself for his doctoral examination at the University of Utrecht which had been fixed for 24 March. According to the applicant, he had made several attempts on 18 March to speak to an officer on this point but without success. Believing that under the army regulations non-commissioned officers were allowed to serve their light arrest at home, he left the barracks in the evening and spent the night at home. However, the next day his company commander imposed

a penalty of three days' aggravated arrest on him for having disregarded his first punishment.

The applicant, who had just been informed that, with effect from 1 April 1971, he had been demoted to the rank of private, again left the barracks in the evening and went home. He was arrested on Saturday 20 March by the military police and provisionally detained in strict arrest for about two days, by virtue of Article 44 of the 1903 Act (paragraph 26 above). On Monday 22 March his company commander imposed a penalty of three days' strict arrest for having disregarded his two previous punishments.

35. The execution of these punishments was suspended by ministerial decision in order to permit the applicant to take his doctoral examination which he passed on 24 March 1971. Moreover, on 21, 22 and 25 March Mr. Engel complained to the complaints officer about the penalties imposed on him by the company commander. On 5 April the complaints officer decided, after having heard the parties, that the first punishment of four days' light arrest should be reduced to a reprimand, the second punishment of three days' aggravated arrest to three days' light arrest, and the third punishment of three days' strict arrest to two days' strict arrest. In the last two cases the decision was based on the fact that the previous punishment(s) had been reduced and that the applicant had obviously been under considerable stress owing to his forthcoming examination. The complaints officer further decided that Mr. Engel's punishment of two days' strict arrest should be deemed to have been served from 20 to 22 March, during his provisional arrest.

36. On 7 April 1971 the applicant appealed to the Supreme Military Court against the decision of the complaints officer relying, inter alia, on the Convention in general terms. The Court heard the applicant and obtained the opinion of the State Advocate for the Armed Forces. On 23 June 1971, that is about three months after the date of the disciplinary measures in dispute, the Court confirmed the contested decision. It referred to Article 5 para. 1 (b) (art. 5-1-b) of the Convention and held that the applicant's detention had been lawful and had been imposed in order to secure the fulfilment of an obligation prescribed by law. The system under the 1903 Act and the applicable Regulations required in fact that every serviceman should submit to and co-operate in maintaining military discipline. This obligation could be enforced by imposing disciplinary punishments in accordance with the procedure prescribed by the above Act. In these circumstances, the applicant's punishment of two days' strict arrest had been justified in order to secure the fulfilment of that obligation.

The applicant had not received the assistance of a legally trained person at any stage in the proceedings against him; perusal of the file in the case does not reveal if he asked for such assistance.

Mr. van der Wiel

37. Mr. van der Wiel, at the time of his application to the Commission, was serving as a corporal in the Netherlands Army. On the morning of 30 November 1970 he was about four hours late for duty. His car had broken down during his weekend leave and he had had it repaired before returning to his unit instead of taking the first train. On these grounds, the acting company commander, on the same day, imposed a penalty of four days' light arrest on the applicant. The following day he revised the above grounds to include a reference that the applicant had not previously requested the commander's leave of absence.

38. On 2 December, the applicant complained about his punishment to the complaints officer invoking, inter alia, Articles 5 and 6 (art. 5, art. 6) of the Convention. In this respect he alleged that he had been deprived of his liberty by a decision which, contrary to the requirements of Article 5 (art. 5), had not been taken by a judicial authority; that furthermore his case had not been heard by an independent and impartial tribunal (Article 6 para. 1) (art. 6-1); that he did not have adequate time and facilities for the preparation of his defence (Article 6 para. 3 (b)) (art. 6-3-b), and that he did not have legal assistance (Article 6 para. 3 (c)) (art. 6-3-c).

39. On 18 December, following the rejection by the complaints officer of his complaint on 16 December, the applicant appealed to the Supreme Military Court. On 17 March 1971, the Court heard the applicant, who was assisted by a lawyer, Sergeant Reintjes, and obtained the opinion of the State Advocate for the Armed Forces. The Court then quashed the complaints officer's decision but confirmed the punishment of four days' light arrest imposed on the applicant on the original grounds stated on 30 November 1970.

The Court first found that Article 6 (art. 6) of the Convention was not applicable in a case where neither the determination of a criminal charge nor the determination of civil rights and obligations was in question. The Court referred to the definition of military disciplinary offences contained in Article 2 of the 1903 Act (paragraph 15 above) and concluded therefrom that disciplinary proceedings clearly did not fall within the scope of Article 6 (art. 6). Nor was there any substance in the applicant's argument that, since a conscripted man had not volunteered to come within the jurisdiction of the military authorities, any disciplinary measure imposed upon him in fact had a criminal character.

As regards the complaints based on Article 5 (art. 5), the Court first held that four days' light arrest did not constitute "deprivation of liberty". In the alternative, the Court further stated that the disputed punishment was meant to "secure the fulfilment of (an) obligation prescribed by law", within the meaning of Article 5 para. 1 (b) (art. 5-1-b).

40. At first and second instance in the proceedings Mr. van der Wiel had not received any legal assistance, and during the proceedings before the Supreme Military Court the legal assistance granted to him had, in line with

the practice described above at paragraph 32, been restricted to the legal aspects of the case.

Mr. de Wit

41. Mr. de Wit, at the time of his application to the Commission, was serving as a private in the Netherlands Army. On 22 February 1971, he was sentenced to committal to a disciplinary unit for a period of three months by his company commander on the grounds that, on 11 February 1971, he had driven a jeep in an irresponsible manner over uneven territory at a speed of about 40 to 50 km. per hour; that he had not immediately carried out his mission, namely to pick up a lorry at a certain place, but that he had only done so after having been stopped, asked about his orders and summoned to execute them at once; that, in view of his repeatedly irregular behaviour and failure to observe discipline, he had previously been warned about the possibility of being committed to a disciplinary unit.

On 25 February, the applicant complained about his punishment to the complaints officer alleging, inter alia, violations of the Convention. On 5 March, the complaints officer heard the applicant who was assisted by Private Eggenkamp, a lawyer and member of the central committee of the V.V.D.M., such assistance having been granted by reason of the fact that the applicant had invoked the Convention. The complaints officer also examined six witnesses, including one, namely Private de Vos, on the applicant's behalf, and then confirmed the punishment while altering slightly the grounds stated therefore. He rejected the allegations under the Convention, referring to a judgment of the Supreme Military Court dated 13 May 1970.

On 11 March, the applicant appealed to the Supreme Military Court against that decision. In accordance with Article 64 of the 1903 Act, the applicant's successive appeals had the effect of suspending execution of his punishment (paragraph 28 above). The Court heard the applicant and his above-mentioned legal adviser and obtained the opinion of the State Advocate for the Armed Forces. On 28 April 1971, the Court, without mentioning the applicant's previous behaviour, reduced the punishment to twelve days' aggravated arrest, which sentence was executed thereafter. It considered that, in the circumstances, the committal to a disciplinary unit for three months was too heavy a penalty.

42. The applicant alleges that in his case the calling of two other witnesses on his behalf, namely Privates Knijkers and Dokestijn, was prevented at every juncture. He also complains that the legal assistance granted to him had been restricted to the legal aspects of his case.

Mr. Dona and Mr. Schul

43. Mr. Dona was serving as a private in the Netherlands Army at the time of his application to the Commission. As editor of a journal called

"Alarm", published in stencilled form by the V.V.D.M. at the General Spoor barracks at Ermelo, he had collaborated in particular in the preparation of no. 8 of that journal dated September 1971. Acting in pursuance of the "Distribution of Writings Decree", a ministerial decree of 21 December 1967, the commanding officer of the barracks provisionally prohibited the distribution of this number, whose contents he considered inconsistent with military discipline.

On 28 September, two officers met in commission on the instructions of the commanding officer in order to hold an enquiry into the appearance of the said number. The applicant, among others, was heard by the commission.

On 8 October 1971, the applicant was sentenced by his competent superior to three months' committal to a disciplinary unit for having taken part in the publication and distribution of a writing tending to undermine discipline. The decision was based on Article 2 para. 2 of the 1903 Act, read in conjunction with the first paragraph of Article 147 of the Military Penal Code which provides:

> "Any person who, by means of a signal, sign, dumb show, speech, song, writing or picture, endeavours to undermine discipline in the armed forces or who, knowing the tenor of the writing or the picture, disseminates or exhibits it, posts it up or holds stocks of it for dissemination, shall be liable to a term of imprisonment not exceeding three years."

Entitled "The law of the strongest" (Het recht van de sterkste), the article objected to in no. 8 of "Alarm" alluded to a demonstration that had taken place at Ermelo on 13 August 1971 on the initiative of the executive committee of the V.V.D.M. According to Mr. van der Schans, the demonstration was terminated almost at once since the demonstrators had promptly returned to their quarters following the promise by the commanding officer that, if they did so, no disciplinary sanctions would ensue. Nevertheless, a few soldiers were allegedly transferred soon afterwards for having participated in the incident.

The passages in the article which gave rise to the disciplinary punishment of 8 October 1971 read as follows:

> (a) "There happens to be a General Smits who writes to his 'inferiors' 'I will do everything to keep you from violating the LAW'! But this very General is responsible for the transfers of Daalhuisen and Duppen. Yet, as you know, measures are never allowed to be in the nature of a disguised punishment. How devoted to the law the General is - as long as it suits him";
>
> (b) "... in addition to ordinary punishments, the army bosses have at their disposal a complete series of other measures - of which transfer is only one - to suppress the soldiers. That does not come to an end by questions in Parliament - that makes them at most more careful. That only comes to an end when these people, who can only prove their authority by punishment and intimidation, have to look for a normal job."

44. The decision ordering the applicant's committal to a disciplinary unit referred to the extracts quoted above. Furthermore, the decision took into account some aggravating circumstances: Mr. Dona had collaborated in the publication of no. 6 of the journal, which had likewise been prohibited under the "Distribution of Writings Decree" by reason of its objectionable contents; in addition, he had taken part in the demonstrations at Ermelo and had, in particular, published in connection therewith a pamphlet, for which he received on 13 August 1971 a punishment of strict arrest.

45. Mr. Schul, a private in the Netherlands Army at the time of his application to the Commission, was also an editor of the journal "Alarm". The facts regarding his case are identical to those of Mr. Dona's except that his punishment initially amounted to four months' committal to a disciplinary unit owing to the additional aggravating circumstance of his participation in the publication of an "Information Bulletin" for new recruits the distribution of which had been prohibited by reason of its negative content.

46. As early as 8 October 1971, the two applicants announced their intention to complain about their punishment. According to them, they were then asked to refrain from any further publication while proceedings were pending against them. The Government maintain that they were only requested not to publish other articles tending to undermine military discipline. The applicants replied before the Court that they had not the slightest intention to write such articles and that they had emphasised this on 28 September 1971 before the commission of enquiry. According to the report of the latter, Mr. Dona had declared that it was not at all his aim to write articles that he expected to be prohibited, and Mr. Schul is recorded as saying: "When we produce pamphlets of this kind, it is not our intention that they should be prohibited. The intention is that they should be read. The risk of their being prohibited is great."

Be that as it may, the applicants refused to give the undertaking requested and they were thereupon both placed under aggravated arrest in accordance with Article 20 of the 1903 Act.

47. The applicants complained about their punishment to the complaints officer who on 19 October confirmed it, while in the case of Mr. Dona slightly modifying the grounds. He rejected the applicants' submissions, including those concerning Articles 5, 6 and 10 (art. 5, art. 6, art. 10) of the Convention. In connection with Articles 5 and 6 (art. 5, art. 6), he referred to a decision of the Supreme Military Court delivered on 13 May 1970. The complaints officer also specified that the applicants should remain in interim custody in accordance with Article 20 of the 1903 Act.

48. The applicants appealed to the Supreme Military Court, Mr. Schul on 21 October and Mr. Dona on the next day, invoking Articles 5, 6 and 10 (art. 5, art. 6, art. 10) of the Convention.

Pursuant to Article 64 of the 1903 Act, the successive complaints and appeals by the applicants suspended their committal to a disciplinary unit but not their interim custody (paragraph 28 above).

On 27 October 1971, the Court ordered release of the applicants after they had promised to accept the Court's judgment on the merits of the case, to comply therewith in the future and, while proceedings were pending against them, to refrain from any activity in connection with the compilation and distribution of written material the contents of which could be deemed to be at variance with military discipline. According to the applicants, this undertaking was given only in extremis as there was no legal remedy available to terminate their interim custody.

Like Mr. de Wit, the applicants had been assisted before the Court by Private Eggenkamp who was, however, able only to deal with the legal aspects of their case (paragraphs 41-42 above).

49. On 17 November 1971 the Supreme Military Court confirmed Mr. Dona's committal to a disciplinary unit for three months, reduced Mr. Schul's committal from four to three months and modified slightly the grounds for punishment in both cases. The Court rejected as being ill-founded the applicants' allegations. Making mention in both cases of their previous conduct and convictions, the Court recalled particularly that they had previously participated in the publication and distribution of writings that were prohibited on the basis of the decree of 21 December 1967 (paragraphs 44-45 above). When fixing the punishment, the Court deemed these factors to be indicative of their general behaviour.

The Court then dealt with the applicants' allegations under Articles 5, 6 and 10 (art. 5, art. 6, art. 10) of the Convention, and also rejected them.

As regards Article 5 (art. 5), the Court held that the obligation to serve in a disciplinary unit did not constitute "deprivation of liberty". In the alternative, adopting reasoning similar to that contained in its decision on Mr. Engel's appeal (paragraph 36 above), the Court found that the disputed punishments had been justified under Article 5 para. 1 (b) (art. 5-1-b).

On the issue of Article 6 para. 1 (art. 6-1), the Court considered that the disciplinary proceedings relating to the publication of the journal "Alarm" had involved the determination neither of any "civil right", such as freedom of expression, nor of any "criminal charge"; on the latter point, the Court based its decision on reasons similar to those given in the decision on Mr. van der Wiel's appeal (paragraph 39 above).

The applicants also contended that the measures taken against them interfered with their freedom of expression. In this respect, the Court relied on paragraph 2 of Article 10 (art. 10-2); in its opinion, the restrictions objected to had been necessary in a democratic society for the prevention of disorder within the field governed by Article 147 of the Military Penal Code.

Finally, the applicants maintained that their interim custody had been inconsistent with Article 5 para. 1 (c) (art. 5-1-c) of the Convention and claimed compensation on this account under Article 5 para. 5 (art. 5-5). The Court held that it had no competence to examine and decide such a claim.

50. A few days after the dismissal of their appeals, Mr. Dona and Mr. Schul were sent to the Disciplinary Barracks (Depot voor Discipline) at Nieuwersluis in order to serve their punishment. They were not allowed to leave this establishment during the first month; moreover, they were both locked up in a cell during the night.

51. Apart from the particular facts relating to Mr. Dona and Mr. Schul, there was in the background a pattern of conflict between the Government and the V.V.D.M. In mid-August 1971, for instance, there had occurred the demonstration at Ermelo mentioned above at paragraph 43. The applicants also cite the fact that prior to their punishment, and in particular between 1 January and 20 October 1971, the Minister of Defence had decreed a great number of prohibitions on publications by the V.V.D.M. Furthermore, other servicemen, as editors of sectional journals of the Association, had been punished in criminal or in disciplinary proceedings - by aggravated arrest, fines and, in one case, military detention (Article 6 para. 3 of the Military Penal Code) - for writing or distributing publications considered as likely to undermine military discipline within the meaning of Article 147 of the Military Penal Code.

Since a ministerial instruction, dated 19 November 1971, and thus subsequent to the measures presently complained of, all cases involving a possible infringement of Article 147 of the Military Penal Code have had to be submitted to the military criminal courts (paragraph 14 above) and not to the disciplinary authorities. The "Distribution of Writings Decree" of 21 December 1967, mentioned above at paragraph 43, was repealed on 26 November 1971.

## PROCEDURE BEFORE THE COMMISSION

52. The applications were lodged with the Commission on 6 July 1971 by Mr. Engel, on 31 May 1971 by Mr. van der Wiel and Mr. de Wit, on 19 December 1971 by Mr. Dona and on 29 December 1971 by Mr. Schul. On 10 February 1972, the Commission decided to join the applications in accordance with the then Rule 39 of its Rules of Procedure.

In common with each other, the applicants complained that the penalties imposed on them constituted deprivation of liberty contrary to Article 5 (art. 5) of the Convention, that the proceedings before the military authorities and the Supreme Military Court were not in conformity with the requirements of Article 6 (art. 6) and that the manner in which they were

treated was discriminatory and in breach of Article 14 read in conjunction with Articles 5 and 6 (art. 14+5, art. 14+6).

Mr. Engel also alleged a separate breach of Article 5 (art. 5) in connection with his provisional arrest and a breach of Article 11 (art. 11) on the particular facts of his case.

For their part, Mr. Dona and Mr. Schul contended that their interim custody had been in disregard of Article 5 (art. 5) and that the punishment imposed on them for having published and distributed articles deemed to undermine military discipline had contravened Articles 10, 11, 14, 17 and 18 (art. 10, art. 11, art. 14, art. 17, art. 18).

Furthermore, all five applicants claimed compensation.

The applications were declared admissible by the Commission on 17 July 1972 except that the complaint submitted by Mr. Engel under Article 11 (art. 11) was rejected as being manifestly ill-founded (Article 27 para. 2) (art. 27-2).

In answer to certain objections made by the respondent Government during the examination of the merits, the Commission decided on 29 May 1973 not to reject under Article 29 (art. 29) two heads of complaint raised by Mr. Engel, Mr. Dona and Mr. Schul on 21 June 1972 in support of their respective applications.

53. In its report of 19 July 1974 the Commission expressed the opinion:

- that the punishments of light arrest objected to by Mr. Engel and Mr. van der Wiel did not amount to deprivation of liberty within the meaning of Article 5 (art. 5) of the Convention (eleven votes, with one abstention);

- that the other disciplinary punishments complained of by Mr. Engel, Mr. de Wit, Mr. Dona and Mr. Schul had infringed Article 5 para. 1 (art. 5-1) since none of the sub-paragraphs of this provision justified them (conclusion following from a series of votes with various majorities);

- that there had also been violation of Article 5 para. 4 (art. 5-4) in that the appeals by the four above-mentioned applicants against these same punishments had not been "decided speedily" (eleven votes, with one abstention);

- that Mr. Engel's provisional arrest under Article 44 of the 1903 Act had, for its part, contravened Article 5 para. 1 (art. 5-1) since it had exceeded the period specified under Article 45 of the said Act (eleven votes, with one member being absent);

- that Article 6 (art. 6) was not applicable to any of the disciplinary proceedings concerned (ten votes against one, with one member being absent);

- that in the cases of Mr. Dona and Mr. Schul no breach either of Article 5 (art. 5) of the Convention in respect of their interim custody (Article 20 of the 1903 Act) or of Articles 10, 11, 17 or 18 (art. 10, art. 11, art. 17, art. 18) of the Convention had been established (such conclusions following from several votes with various majorities);

- that no violation of Article 14, whether read in conjunction with Articles 5, 6, 10 or 11 (art. 14+5, art. 14+6, art. 14+10, art. 14+11), had occurred in this case (conclusion following from several votes with various majorities).

The report contains five separate opinions.

## AS TO THE LAW

54. As the Government, Commission and applicants concurred in thinking, the Convention applies in principle to members of the armed forces and not only to civilians. It specifies in Articles 1 and 14 (art. 1, art. 14) that "everyone within (the) jurisdiction" of the Contracting States is to enjoy "without discrimination" the rights and freedoms set out in Section I. Article 4 para. 3 (b) (art. 4-3-b), which exempts military service from the prohibition against forced or compulsory labour, further confirms that as a general rule the guarantees of the Convention extend to servicemen. The same is true of Article 11 para. 2 (art. 11-2) in fine, which permits the States to introduce special restrictions on the exercise of the freedoms of assembly and association by members of the armed forces.

Nevertheless, when interpreting and applying the rules of the Convention in the present case, the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces.

55. Having established these preliminary points, the Court will examine successively, Article by Article, each of the complaints raised by all or certain of the five applicants.

### I. ON THE ALLEGED VIOLATIONS OF ARTICLE 5 (art. 5)

#### A. On the alleged violation of paragraph 1 of Article 5 (art. 5-1) taken alone

56. The applicants all submit that the disciplinary penalty or penalties, measure of measures pronounced against them contravened Article 5 para. 1 (art. 5-1), which provides:

> "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:
>
> (a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

*1. On the right to liberty in the context of military service*

57. During the preparation and subsequent conclusion of the Convention, the great majority of the Contracting States possessed defence forces and, in consequence, a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians. The existence of such a system, which those States have retained since then, does not in itself run counter to their obligations.

Military discipline, nonetheless, does not fall outside the scope of Article 5 para. 1 (art. 5-1). Not only must this provision be read in the light of Articles 1 and 14 (art. 1, art. 14) (paragraph 54 above), but the list of deprivations of liberty set out therein is exhaustive, as is shown by the words "save in the following cases". A disciplinary penalty or measure may in consequence constitute a breach of Article 5 para. 1 (art. 5-1). The Government, moreover, acknowledge this. 58. In proclaiming the "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (Article 2 of Protocol no. 4) (P4-2). This is clear both from the use of the terms "deprived of his liberty", "arrest" and "detention", which appear also in paragraphs 2 to 5, and from a comparison between Article 5 (art. 5) and the other normative provisions of the Convention and its Protocols.

59. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (art. 5), the starting point must be

his concrete situation. Military service, as encountered in the Contracting States, does not on its own in any way constitute a deprivation of liberty under the Convention, since it is expressly sanctioned in Article 4 para. 3 (b) (art. 4-3-b). In addition, rather wide limitations upon the freedom of movement of the members of the armed forces are entailed by reason of the specific demands of military service so that the normal restrictions accompanying it do not come within the ambit of Article 5 (art. 5) either.

Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation. The bounds that Article 5 (art. 5) requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. Nevertheless, such penalty or measure does not escape the terms of Article 5 (art. 5) when it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces of the Contracting States. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question.

*2. On the existence of deprivations of liberty in the present case*

60. It is on the basis of these premises that the Court will examine whether there has occurred in the present case one or more instances of deprivation of liberty. In the Government's main submission, the question calls for a negative reply as regards all the disputed penalties and measures (paragraphs 15-19 of the memorial, and oral arguments), whereas in the Commission's view light arrest alone raises no problem under Article 5 para. 1 (art. 5-1) (paragraphs 67-76 of the report).

61. No deprivation of liberty resulted from the three and four days' light arrest awarded respectively against Mr. Engel (paragraphs 34-36 above, second punishment) and Mr. van der Wiel (paragraphs 37-39 above). Although confined during off-duty hours to their dwellings or to military buildings or premises, as the case may be, servicemen subjected to such a penalty are not locked up and continue to perform their duties (Article 8 of the 1903 Act and paragraph 18 above). They remain, more or less, within the ordinary framework of their army life.

62. Aggravated arrest differs from light arrest on one point alone: in off-duty hours, soldiers serve the arrest in a specially designated place which they may not leave in order to visit the canteen, cinema or recreation rooms, but they are not kept under lock and key (Article 9-B of the 1903 Act and paragraph 19 above). Consequently, neither does the Court consider as a deprivation of liberty the twelve days' aggravated arrest complained of by Mr. de Wit (paragraph 41 above).

63. Strict arrest, abolished in 1974, differed from light arrest and aggravated arrest in that non-commissioned officers and ordinary servicemen served it by day and by night locked in a cell and were accordingly excluded from the performance of their normal duties (Article 10-B of the 1903 Act and paragraph 20 above). It thus involved deprivation of liberty. It follows that the provisional arrest inflicted on Mr. Engel in the form of strict arrest (Article 44 of the 1903 Act; paragraphs 26, 34 and 35 above) had the same character despite its short duration (20-22 March 1971).

64. Committal to a disciplinary unit, likewise abolished in 1974 but applied in 1971 to Mr. Dona and Mr. Schul, represented the most severe penalty under military disciplinary law in the Netherlands. Privates condemned to this penalty following disciplinary proceedings were not separated from those so sentenced by way of supplementary punishment under the criminal law, and during a month or more they were not entitled to leave the establishment. The committal lasted for a period of three to six months; this was considerably longer than the duration of the other penalties, including strict arrest which could be imposed for one to fourteen days. Furthermore, it appears that Mr. Dona and Mr. Schul spent the night locked in a cell (Articles 5, 18 and 19 of the 1903 Act, Royal Decree of 14 June 1971 and paragraphs 21 and 50 above). For these various reasons, the Court considers that in the circumstances deprivation of liberty occurred.

65. The same is not true of the measure that, from 8 October until 3 November 1971, preceded the said committal, since Mr. Dona and Mr. Schul served their interim custody in the form of aggravated arrest (Article 20 of the 1903 Act; paragraphs 22, 46, 48 and 62 above).

66. The Court thus comes to the conclusion that neither the light arrest of Mr. Engel and Mr. van der Wiel, nor the aggravated arrest of Mr. de Wit, nor the interim custody of Mr. Dona and Mr. Schul call for a more thorough examination under paragraph 1 of Article 5 (art. 5-1).

The punishment of two days' strict arrest inflicted on Mr. Engel on 7 April 1971 and confirmed by the Supreme Military Court on 23 June 1971 coincided in practice with an earlier measure: it was deemed to have been served beforehand, that is from 20 to22 March 1971, by the applicant's period of provisional arrest (paragraphs 34-36 above, third punishment).

On the other hand, the Court is required to determine whether the last-mentioned provisional arrest, as well as the committal of Mr. Dona and Mr. Schul to a disciplinary unit, complied with Article 5 para. 1 (art. 5-1).

*3. On the compatibility of the deprivations of liberty found in the present case with paragraph 1 of Article 5 (art. 5-1)*

67. The Government maintained, in the alternative, that the committal of Mr. Dona and Mr. Schul to a disciplinary unit and the provisional arrest of Mr. Engel satisfied, respectively, the requirements of sub-paragraph (a) and

of sub-paragraph (b) of Article 5 para. 1 (art. 5-1-a, art. 5-1-b) (paragraphs 21-23 of the memorial); they did not invoke sub-paragraphs (c) to (f) (art. 5-1-c, art. 5-1-d, art. 5-1-e, art. 5-1-f).

68. Sub-paragraph (a) of Article 5 para. 1 (art. 5-1-a) permits the "lawful detention of a person after conviction by a competent court".

The Court, like the Government (hearing on 29 October 1975), notes that this provision makes no distinction based on the legal character of the offence of which a person has been found guilty. It applies to any "conviction" occasioning deprivation of liberty pronounced by a "court", whether the conviction is classified as criminal or disciplinary by the internal law of the State in question.

Mr. Dona and Mr. Schul were indeed deprived of their liberty "after" their conviction by the Supreme Military Court. Article 64 of the 1903 Act conferred a suspensive effect upon their appeals against the decisions of their commanding officer (8 October 1971) and the complaints officer (19 October 1971), a fact apparently overlooked bythe Commission (paragraph 85 and Appendix IV of the report) but which the Government have rightly stressed (paragraph 21 of the memorial). Consequently, their transfer to the disciplinary barracks at Nieuwersluis occurred only by virtue of the final sentences imposed on 17 November 1971 (paragraphs 28, 48 and 50 above).

It remains to be ascertained that the said sentences were passed by a "competent court" within the meaning of Article 5 para. 1 (a) (art. 5-1-a).

The Supreme Military Court, whose jurisdiction was not at all disputed, constitutes a court from the organisational point of view. Doubtless its four military members are not irremovable in law, but like the two civilian members they enjoy the independence inherent in the Convention's notion of a "court" (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 41, para. 78, and paragraph 30 above).

Furthermore, it does not appear from the file in the case (paragraphs 31-32 and 48-49 above) that Mr. Dona and Mr. Schul failed to receive before the Supreme Military Court the benefit of adequate judicial guarantees under Article 5 para. 1 (a) (art. 5-1-a), an autonomous provision whose requirements are not always co-extensive with those of Article 6 (art. 6). The guarantees afforded to the two applicants show themselves to be "adequate" for the purposes of Article 5 para. 1 (a) (art. 5-1-a) if account is taken of "the particular nature of the circumstances" under which the proceedings took place (above-cited judgment of 18 June 1971, Series A no. 12, pp. 41-42, para. 78). As for Article 6 (art. 6), the Court considers below whether it was applicable in this case and, if so, whether it has been respected.

Finally, the penalty inflicted was imposed and then executed "lawfully" and "in accordance with a procedure prescribed by law". In short, it did not contravene Article 5 para. 1 (art. 5-1).

69. The provisional arrest of Mr. Engel for its part clearly does not come within the ambit of sub-paragraph (a) of Article 5 para. 1 (art. 5-1-a).

The Government have derived argument from sub-paragraph (b) (art. 5-1-b) insofar as the latter permits "lawful arrest or detention" intended to "secure the fulfilment of any obligation prescribed by law".

The Court considers that the words "secure the fulfilment of any obligation prescribed by law" concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration (Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34). It would justify, for example, administrative internment meant to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law.

In fact, Mr. Engel's provisional arrest was in no way designed to secure the fulfilment in the future of such an obligation. Article 44 of the 1903 Act, applicable when an officer has "sufficient indication to suppose that a subordinate has committed a serious offence against military discipline", refers to past behaviour. The measure thereby authorised is a preparatory stage of military disciplinary proceedings and is thus situated in a punitive context. Perhaps this measure also has on occasions the incidental object or effect of inducing a member of the armed forces to comply henceforth with his obligations, but only with great contrivance can it be brought under sub-paragraph (b) (art. 5-1-b). If the latter were the case, this sub-paragraph could moreover be extended to punishments stricto sensu involving deprivation of liberty on the ground of their deterrent qualities. This would deprive such punishments of the fundamental guarantees of sub-paragraph (a) (art. 5-1-a).

The said measure really more resembles that spoken of in sub- paragraph (c) of Article 5 para. 1 (art. 5-1-c) of the Convention. However in the present case it did not fulfil one of the requirements of that provision since the detention of Mr. Engel from 20 to 22 March 1971 had not been "effected for the purpose of bringing him before the competent legal authority" (paragraphs 86-88 of the report of the Commission).

Neither was Mr. Engel's provisional arrest "lawful" within the meaning of Article 5 para. 1 (art. 5-1) insofar as it exceeded - by twenty-two to thirty hours according to the information provided at the hearing on 28 October 1975 - the maximum period of twenty-four hours laid down by Article 45 of the 1903 Act.

According to the Government, the complaints officer redressed this irregularity after the event by deeming to have been served in advance, that is from 20 to 22 March 1971, the disciplinary penalty of two days' strict arrest imposed by him on the applicant on 5 April 1971 and confirmed by the Supreme Military Court on 23 June 1971. However, it is clear from the

case-law of the European Court that the reckoning of a detention on remand (Untersuchungshaft) as part of a later sentence cannot eliminate a violation of paragraph 3 of Article 5 (art. 5-3), but may have repercussions only under Article 50 (art. 50) on the basis that it limited the loss occasioned (Stögmüller judgment of 10 November 1969, Series A no. 9, pp. 27, 36 and 39-45; Ringeisen judgments of 16 July 1971 and 22 June 1972, Series A no. 13, pp. 20 and 41-45, and no. 15, p. 8, para. 21; Neumeister judgment of 7 May 1974, Series A no. 17, pp. 18-19, paras. 40-41). The Court sees no reason to resort to a different solution when assessing the compatibility of Mr. Engel's provisional arrest with paragraph 1 of Article 5 (art. 5-1).

In conclusion, the applicant's deprivation of liberty from 20 to 22 March 1971 occurred in conditions at variance with this paragraph.

### B. On the alleged violation of Articles 5 para. 1 and 14 (art. 14+5-1) taken together

70. In the submission of the applicants, the disputed penalties and measures also contravened Article 5 para. 1 read in conjunction with Article 14 (art. 14+5-1) which provides:

> "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."

71. Since certain of the said penalties and measures did not involve any deprivation of liberty (paragraphs 61, 62 and 65 above), the discrimination alleged in their connection does not give rise to any problem with regard to Article 14 (art. 14), in that it did not affect the enjoyment of the right set forth in Article 5 para. 1 (art. 5-1). The same does not apply to Mr. Engel's provisional arrest, nor to the committal of Mr. Dona and Mr. Schul to a disciplinary unit (paragraphs 63 and 64 above).

72. Mr. Engel, Mr. Dona and Mr. Schul complain in the first place of distinctions in treatment between servicemen. According to Articles 10 and 44 of the 1903 Act, provisional arrest imposed in the form of strict arrest was served by officers in their dwellings, tent or quarters whereas non-commissioned officers and ordinary servicemen were locked in a cell (paragraph 20 above). As for committal to a disciplinary unit, privates alone risked this punishment (Articles 3 to 5 of the 1903 Act and paragraphs 16 and 21 above).

A distinction based on rank may run counter to Article 14 (art. 14). The list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "notamment"). Besides, the word "status" (in French "situation") is wide enough to include rank. Furthermore, a distinction that concerns the manner of execution of a penalty or measure occasioning deprivation of liberty does not on that account fall outside the

ambit of Article 14 (art. 14), for such a distinction cannot but have repercussions upon the way in which the "enjoyment" of the right enshrined in Article 5 para. 1 (art. 5-1) is "secured". The Court, on these two points, does not subscribe to the submissions of the Government (paragraph 40, first sub-paragraph, of the Commission's report), but rather expresses its agreement with the Commission (ibid., paragraphs 133-134).

The Court is not unaware that the respective legislation of a number of Contracting States seems to be evolving, albeit in various degrees, towards greater equality in the disciplinary sphere between officers, non-commissioned officers and ordinary servicemen. The Netherlands Act of 12 September 1974 offers a striking example of this tendency. In particular, by abolishing strict arrest and committal to a disciplinary unit, this Act has henceforth put an end to the distinctions criticised by Mr. Engel, Mr. Dona and Mr. Schul.

In order to establish whether the said distinctions constituted discrimination contrary to Articles 5 and 14 (art. 14+5) taken together, regard must nevertheless be had to the moment when they were in existence. The Court will examine the question in the light of its judgment of 23 July 1968 in the "Belgian Linguistic" case (Series A no. 6, pp. 33-35, paras. 9-10).

The hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere. Such inequalities are traditionally encountered in the Contracting States and are tolerated by international humanitarian law (paragraph 140 of the Commission's report: Article 88 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War). In this respect, the European Convention allows the competent national authorities a considerable margin of appreciation.

At the time in question, the distinctions attacked by the three applicants had their equivalent in the internal legal system of practically all the Contracting States. Based on an element objective in itself, that is rank, these distinctions could have been dictated by a legitimate aim, namely the preservation of discipline by methods suited to each category of servicemen. While only privates risked committal to a disciplinary unit, they clearly were not subject to a serious penalty threatening the other members of the armed forces, namely reduction in rank. As for confinement in a cell during strict arrest, the Netherlands legislator could have had sufficient reason for not applying this to officers. On the whole, the legislator does not seem in the circumstances to have abused the latitude left to him by the Convention. Furthermore, the Court does not consider that the principle of proportionality, as defined in its previously cited judgment of 23 July 1968 (Series A no. 6, p. 34, para. 10, second sub-paragraph in fine), has been offended in the present case.

73. Mr. Engel, Mr. Dona and Mr. Schul in the second place object to inequalities of treatment between servicemen and civilians. In point of fact, even civilians subject by reason of their occupation to a particular disciplinary system cannot in the Netherlands incur penalties analogous to the disputed deprivations of liberty. However, this does not result in any discrimination incompatible with the Convention, the conditions and demands of military life being by nature different from those of civil life (paragraphs 54 and 57 above).

74. The Court thus finds no breach of Articles 5 para. 1 and 14 (art. 14+5-1) taken together.

### C. On the alleged violation of Article 5 para. 4 (art. 5-4)

75. In addition to paragraph 1 of Article 5 (art. 5-1), the applicants invoke paragraph 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."

76. This question arises only for the committal of Mr. Dona and Mr. Schul to a disciplinary unit. Mr. Engel did not raise it, even from the factual aspect, as regards his provisional arrest; as for the other penalties or measures challenged, they had not "deprived" anyone "of his liberty by arrest or detention" (paragraphs 61-66 above).

77. The Court recalls that the committal of Mr. Dona and Mr. Schul to a disciplinary unit ensued from their "conviction by a competent court", within the meaning of Article 5 para. 1 (a) (art. 5-1-a) (paragraph 68 above). While "Article 5 para. 4 (art. 5-4) obliges the Contracting States to make available ... a right of recourse to a court" when "the decision depriving a person of his liberty is one taken by an administrative body", "there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings". "In the latter case", as for example, "where a sentence of imprisonment is pronounced after 'conviction by a competent court' (Article 5 para. 1 (a) of the Convention) (art. 5-1-a)", "the supervision required by Article 5 para. 4 (art. 5-4) is incorporated in the decision" (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 40-41, para. 76). The Court, like the Government (paragraph 21 of the memorial), thus concludes that there was no breach of Article 5 para. 4 (art. 5-4) in the case of Mr. Dona and Mr. Schul.

## II. ON THE ALLEGED VIOLATIONS OF ARTICLE 6 (art. 6)

## A. On the alleged violation of Article 6 (art. 6) taken alone

78. The five applicants allege violation of Article 6 (art. 6) which provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

79. For both the Government and the Commission, the proceedings brought against Mr. Engel, Mr. van der Wiel, Mr. de Wit, Mr. Dona and Mr. Schul involved the determination neither of "civil rights and obligations" nor of "any criminal charge".

Led thus to examine the applicability of Article 6 (art. 6) in the present case, the Court will first investigate whether the said proceedings concerned "any criminal charge" within the meaning of this text; for, although disciplinary according to Netherlands law, they had the aim of repressing through penalties offences alleged against the applicants, an objective analogous to the general goal of the criminal law.

### *1. On the applicability of Article 6 (art. 6)*

**(a) On the existence of "any criminal charge"**

80. All the Contracting States make a distinction of long standing, albeit in different forms and degrees, between disciplinary proceedings and criminal proceedings. For the individuals affected, the former usually offer substantial advantages in comparison with the latter, for example as concerns the sentences passed. Disciplinary sentences, in general less severe, do not appear in the person's criminal record and entail more limited consequences. It may nevertheless be otherwise; moreover, criminal proceedings are ordinarily accompanied by fuller guarantees.

It must thus be asked whether or not the solution adopted in this connection at the national level is decisive from the standpoint of the Convention. Does Article 6 (art. 6) cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification? This problem, the importance of which the Government acknowledge, was rightly raised by the Commission; it particularly occurs when an act or omission is treated by the domestic law of the respondent State as a mixed offence, that is both criminal and disciplinary, and where there thus exists a possibility of opting between, or even cumulating, criminal proceedings and disciplinary proceedings.

81. The Court has devoted attention to the respective submissions of the applicants, the Government and the Commission concerning what they termed the "autonomy" of the concept of a "criminal charge", but does not entirely subscribe to any of these submissions (report of the Commission, paragraphs 33-34, paragraphs 114-119 and the separate opinion of Mr. Welter; memorial of the Government, paragraphs 25-34; memorial of the Commission, paragraphs 9-16, paragraphs 14-17 of Annex I and paragraphs 12-14 of Annex II; verbatim report of the hearings on 28 and 29 October 1975).

In the Neumeister judgment of 27 June 1968, the Court has already held that the word "charge" must be understood "within the meaning of the Convention" (Series A no. 8, p. 41, para. 18, as compared with the second sub-paragraph on p. 28 and the first sub-paragraph on p. 35; see also the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, para. 110).

The question of the "autonomy" of the concept of "criminal" does not call for exactly the same reply.

The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not

constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7 (art. 7). Such a choice, which has the effect of rendering applicable Articles 6 and 7 (art. 6, art. 7), in principle escapes supervision by the Court.

The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal.

In short, the "autonomy" of the concept of "criminal" operates, as it were, one way only.

82. Hence, the Court must specify, limiting itself to the sphere of military service, how it will determine whether a given "charge" vested by the State in question - as in the present case - with a disciplinary character nonetheless counts as "criminal" within the meaning of Article 6 (art. 6).

In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government.

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (see, mutatis mutandis, the De Wilde, Ooms and

Versyp judgment of 18 June 1971, Series A no. 12, p. 36, last sub-paragraph, and p. 42 in fine).

83. It is on the basis of these criteria that the Court will ascertain whether some or all of the applicants were the subject of a "criminal charge" within the meaning of Article 6 para. 1 (art. 6-1).

In the circumstances, the charge capable of being relevant lay in the decision of the commanding officer as confirmed or reduced by the complaints officer. It was undoubtedly this decision that settled once and for all what was at stake, since the tribunal called upon to give a ruling, that is the Supreme Military Court, had no jurisdiction to pronounce a harsher penalty (paragraph 31 above).

84. The offences alleged against Mr. Engel, Mr. van der Wiel, Mr. de Wit, Mr. Dona and Mr. Schul came within provisions belonging to disciplinary law under Netherlands legislation (the 1903 Act and Regulations on Military Discipline), although those to be answered for by Mr. Dona and Mr. Schul (Article 147 of the Military Penal Code), and perhaps even by Mr. Engel and Mr. de Wit (Articles 96 and 114 of the said Code according to Mr. van der Schans, hearing on 28 October 1975), also lent themselves to criminal proceedings. Furthermore, all the offences had amounted, in the view of the military authorities, to contraventions of legal rules governing the operation of the Netherlands armed forces. From this aspect, the choice of disciplinary action was justified.

85. The maximum penalty that the Supreme Military Court could pronounce consisted in four days' light arrest for Mr. van der Wiel, two days' strict arrest for Mr. Engel (third punishment) and three or four months' committal to a disciplinary unit for Mr. de Wit, Mr. Dona and Mr. Schul.

Mr. van der Wiel was therefore liable only to a light punishment not occasioning deprivation of liberty (paragraph 61 above).

For its part, the penalty involving deprivation of liberty that in theory threatened Mr. Engel was of too short a duration to belong to the "criminal" law. He ran no risk, moreover, of having to undergo this penalty at the close of the proceedings instituted by him before the Supreme Military Court on 7 April 1971, since he had already served it from 20 to 22 March (paragraphs 34-36, 63 and 66 above).

On the other hand, the "charges" against Mr. de Wit, Mr. Dona and Mr. Schul did indeed come within the "criminal" sphere since their aim was the imposition of serious punishments involving deprivation of liberty (paragraph 64 above). The Supreme Military Court no doubt sentenced Mr. de Wit to twelve days' aggravated arrest only, that is to say, to a penalty not occasioning deprivation of liberty (paragraph 62 above), but the final outcome of the appeal cannot diminish the importance of what was initially at stake.

The Convention certainly did not compel the competent authorities to prosecute Mr. de Wit, Mr. Dona and Mr. Schul under the Military Penal

Code before a court martial (paragraph 14 above), a solution which could have proved less advantageous for the applicants. The Convention did however oblige the authorities to afford them the guarantees of Article 6 (art. 6).

**(b) On the existence of a "determination" of "civil rights"**

86. Three of the five applicants allege, in the alternative, that the proceedings instituted against them concerned the "determination" of "civil rights": Mr. Engel characterises as "civil" his freedom of assembly and association (Article 11) (art. 11), Mr. Dona and Mr. Schul their freedom of expression (Article 10) (art. 10).

87. Article 6 (art. 6) proves less exacting for the determination of such rights than for the determination of "criminal charges"; for, while paragraph 1 (art. 6-1) applies to both matters, paragraphs 2 and 3 (art. 6-2, art. 6-3) protect only persons "charged with a criminal offence". Since Mr. Dona and Mr. Schul were the subject of "criminal charges" (paragraph 85 in fine above), Article 6 (art. 6) applied to them in its entirety. The Court considers it superfluous to see whether paragraph 1 (art. 6-1) was relevant on a second ground, since the question is devoid of any practical interest.

As for Mr. Engel, who had not been "charged with a criminal offence" (paragraph 85 above, third sub-paragraph), the proceedings brought against him were occasioned solely by offences against military discipline, namely having absented himself from his home on 17 March 1971 and subsequently having disregarded the penalties imposed on him on the following two days. In these circumstances, there is no need to give any ruling in the present case as to whether the freedom of assembly and association is "civil".

88. In short, it is the duty of the Court to examine under Article 6 (art. 6) the treatment meted out to Mr. de Wit, Mr. Dona and Mr. Schul, but not that complained of by Mr. Engel and Mr. van der Wiel.

*2. On compliance with Article 6 (art. 6)*

89. The Supreme Military Court, before which appeared Mr. de Wit, Mr. Dona and Mr. Schul, constitutes an "independent and impartial tribunal established by law" (paragraphs 30 and 68 above) and there is nothing to indicate that it failed to give them a "fair hearing". For its part, the "time" that elapsed between the "charge" and the final decision appears "reasonable". It did not amount to six weeks for Mr. Dona and Mr. Schul (8 October - 17 November 1971) and hardly exceeded two months for Mr. de Wit (22 February - 28 April 1971). Furthermore, the sentence was "pronounced publicly".

In contrast, the hearings in the presence of the parties had taken place in camera in accordance with the established practice of the Supreme Military Court in disciplinary proceedings (paragraph 31 above). In point of fact, the applicants do not seem to have suffered on that account; indeed the said

Court improved the lot of two of their number, namely Mr. Schul and, to an even greater extent, Mr. de Wit. Nevertheless, in the field it governs Article 6 para. 1 (art. 6-1) requires in a very general fashion that judicial proceedings be conducted in public. Article 6 (art. 6) of course makes provision for exceptions which it lists, but the Government did not plead, and it does not emerge from the file, that the circumstances of the case amounted to one of the occasions when the Article allows "the press and the public (to be) excluded". Hence, on this particular point, there has been violation of paragraph 1 of Article 6 (art. 6-1).

90. Mr. Dona and Mr. Schul complain that the Supreme Military Court took account of their participation in the publication, prior to no. 8 of "Alarm", of two writings whose distribution had only been provisionally forbidden under the "Distribution of Writings Decree" and for which they had never been prosecuted (paragraph 49 above). The Supreme Military Court, it is alleged, thereby disregarded the presumption of innocence proclaimed by paragraph 2 of Article 6 (art. 6-2) (report of the Commission, paragraph 45, antepenultimate sub-paragraph).

In reality, this clause does not have the scope ascribed to it by the two applicants. As its wording shows, it deals only with the proof of guilt and not with the kind or level of punishment. It thus does not prevent the national judge, when deciding upon the penalty to impose on an accused lawfully convicted of the offence submitted to his adjudication, from having regard to factors relating to the individual's personality.

Before the Supreme Military Court Mr. Dona and Mr. Schul were "proved guilty according to law" as concerns the offences there alleged against them (no. 8 of "Alarm"). It was for the sole purpose of determining their punishment in the light of their character and previous record that the said Court also took into consideration certain similar, established facts the truth of which they did not challenge. The Court did not punish them for these facts in themselves (Article 37 of the 1903 Act and the memorial filed by the Government with the Commission on 24 August 1973).

91. Mr. de Wit, Mr. Dona and Mr. Schul do not deny that sub-paragraph (a) of paragraph 3 of Article 6 (art. 6-3-a) has been complied with in their regard and they are evidently not relying upon sub-paragraph (e) (art. 6-3-e). On the other hand, they claim not to have enjoyed the guarantees prescribed by sub-paragraphs (b), (c) and (d) (art. 6-3-b, art. 6-3-c, art. 6-3-d).

Their allegations, however, prove far too vague to lead the Court to conclude that they did not "have adequate time and facilities for the preparation of (their) defence" within the meaning of sub-paragraph (b) (art. 6-3-b).

Then again, each of the three applicants has had the opportunity "to defend himself in person" at the various stages of the proceedings. They have furthermore received the benefit before the Supreme Military Court

and, in Mr. de Wit's case, before the complaints officer, of "legal assistance of (their) own choosing", in the form of a fellow conscript who was a lawyer in civil life. Mr. Eggenkamp's services were, it is true, limited to dealing with the legal issues in dispute. In the circumstances of the case, this restriction could nonetheless be reconciled with the interests of justice since the applicants were certainly not incapable of personally providing explanations on the very simple facts of the charges levelled against them. Consequently, no interference with the right protected by sub-paragraph (c) (art. 6-3-c) emerges from the file in this case.

Neither does the information obtained by the Court, in particular on the occasion of the hearings on 28 and 29 October 1975, disclose any breach of sub-paragraph (d) (art. 6-3-d). Notwithstanding the contrary opinion of the applicants, this provision does not require the attendance and examination of every witness on the accused's behalf. Its essential aim, as is indicated by the words "under the same conditions", is a full "equality of arms" in the matter. With this proviso, it leaves it to the competent national authorities to decide upon the relevance of proposed evidence insofar as is compatible with the concept of a fair trial which dominates the whole of Article 6 (art. 6). Article 65 of the 1903 Act and Article 56 of the "Provisional Instructions" of 20 July 1814 place the prosecution and the defence on an equal footing: witnesses for either party are summoned only if the complaints officer or the Supreme Military Court deems it necessary. As concerns the way in which this legislation was applied in the present case, the Court notes that no hearing of witnesses against the accused occurred before the Supreme Military Court in the case of Mr. de Wit, Mr. Dona and Mr. Schul and that it does not appear from the file in the case that these applicants requested the said Court to hear witnesses on their behalf. Doubtless Mr. de Wit objects that the complaints officer heard only one of the three witnesses on his behalf allegedly proposed by him, but this fact in itself cannot justify the finding of a breach of Article 6 para. 3 (d) (art. 6-3-d).

### B. On the alleged violation of Articles 6 and 14 (art. 14+6) taken together

92. According to the applicants, the disciplinary proceedings of which they complain did not comply with Articles 6 and 14 (art. 14+6) taken together since they were not attended by as many guarantees as criminal proceedings brought against civilians (report of the Commission, paragraph 37).

Whilst military disciplinary procedure is not attended by the same guarantees as criminal proceedings brought against civilians, it offers on the other hand substantial advantages to those subject to it (paragraph 80 above). The distinctions between these two types of proceedings in the

legislation of the Contracting States are explicable by the differences between the conditions of military and of civil life. They cannot be taken as entailing a discrimination against members of the armed forces, within the meaning of Articles 6 and 14 (art. 14+6) taken together.

### C. On the alleged violation of Articles 6 and 18 (art. 18+6) taken together

93. According to Mr. Dona and Mr. Schul, the decision to take disciplinary rather than criminal proceedings against them had the result, or even the aim, of depriving them of the benefit of Article 6 (art. 6). The choice made by the competent authorities allegedly had an arbitrary nature that cannot be reconciled with Article 18 (art. 18) (report of the Commission, paragraph 53).

The Court's conclusions on the applicability and observance of Article 6 (art. 6) in the case of these two applicants (paragraphs 85 and 89-91 above) make it unnecessary for it to rule on this complaint.

## III. ON THE ALLEGED VIOLATIONS OF ARTICLE 10 (art. 10)

### A. On the alleged violation of Article 10 (art. 10) taken alone

94. Mr. Dona and Mr. Schul allege violation of Article 10 (art. 10) which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The complaint, as declared admissible by the Commission, concerns solely the disciplinary punishment undergone by the applicants after 17 November 1971 for having collaborated in the publication and distribution of no. 8 of "Alarm". It does not relate to the prohibition under the "Distribution of Writings Decree" of this number, of no. 6 of "Alarm" and of the "Information Bulletin" for new recruits nor to the strict arrest imposed

on the applicants on 13 August 1971 for their participation in distributing a pamphlet during the incidents at Ermelo (paragraphs 43-45 above).

95. The disputed penalty unquestionably represented an "interference" with the exercise of the freedom of expression of Mr. Dona and Mr. Schul, as guaranteed by paragraph 1 of Article 10 (art. 10-1). Consequently, an examination under paragraph 2 (art. 10-2) is called for.

96. The penalty was without any doubt "prescribed by law", that is by Articles 2 para. 2, 5-A-8°, 18, 19 and 37 of the 1903 Act, read in conjunction with the Article 147 of the Military Penal Code. Even in regard to the part played by the accused in the editing and distribution, prior to no. 8 of "Alarm", of writings prohibited by the military authorities, the punishment was based on the 1903 Act (paragraph 90 above) and not on the "Distribution of Writings Decree". The Court thus does not have to consider the applicants' submissions on the validity of this decree (report of the Commission, paragraph 45, fifth sub-paragraph).

97. To show that the interference at issue also met the other conditions of paragraph 2 of Article 10 (art. 10-2), the Government pleaded that the measures taken in this case were "necessary in a democratic society", "for the prevention of disorder". They relied on Article 10 para. 2 (art. 10-2) only with reference to this requirement.

98. The Court firstly emphasises, like the Government and the Commission that the concept of "order" as envisaged by this provision, refers not only to public order or "ordre public" within the meaning of Articles 6 para. 1 and 9 para. 2 (art. 6-1, art. 9-2) of the Convention and Article 2 para. 3 of Protocol no. 4 (P4-2-3): it also covers the order that must prevail within the confines of a specific social group. This is so, for example, when, as in the case of the armed forces, disorder in that group can have repercussions on order in society as a whole. It follows that the disputed penalties met this condition if and to the extent that their purpose was the prevention of disorder within the Netherlands armed forces.

Mr. Dona and Mr. Schul admittedly maintain that Article 10 para. 2 (art. 10-2) takes account of the "prevention of disorder" only in combination with the "prevention of crime". The Court does not share this view. While the French version uses the conjunctive "et", the English employs the disjunctive "or". Having regard to the context and the general system of Article 10 (art. 10), the English version provides a surer guide on this point. Under these conditions, the Court deems it unnecessary to examine whether the applicants' treatment was aimed at the "prevention of crime" in addition to the "prevention of disorder".

99. It remains to be seen whether the interference with the freedom of expression of Mr. Dona and Mr. Schul was "necessary in a democratic society", "for the prevention of disorder".

100. Of course, the freedom of expression guaranteed by Article 10 (art. 10) applies to servicemen just as it does to other persons within the

jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings. Article 147 of the Netherlands Military Penal Code (paragraph 43 above) is based on this legitimate requirement and does not in itself run counter to Article 10 (art. 10) of the Convention.

The Court doubtless has jurisdiction to supervise, under the Convention, the manner in which the domestic law of the Netherlands has been applied in the present case, but it must not in this respect disregard either the particular characteristics of military life (paragraph 54 in fine above), the specific "duties" and "responsibilities" incumbent on members of the armed forces, or the margin of appreciation that Article 10 para. 2 (art. 10-2), like Article 8 para. 2 (art. 8-2), leaves to the Contracting States (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 45, para. 93, and Golder judgment of 21 February 1975, Series A no. 18, p. 22).

101. The Court notes that the applicants contributed, at a time when the atmosphere in the barracks at Ermelo was somewhat strained, to the publication and distribution of a writing the relevant extracts from which are reproduced above (paragraphs 43 and 51 above). In these circumstances the Supreme Military Court may have had well-founded reasons for considering that they had attempted to undermine military discipline and that it was necessary for the prevention of disorder to impose the penalty inflicted. There was thus no question of depriving them of their freedom of expression but only of punishing the abusive exercise of that freedom on their part. Consequently, it does not appear that its decision infringed Article 10 para. 2 (art. 10-2).

### B. On the alleged violation of Articles 10 and 14 (art. 14+10) taken together

102. Mr. Dona and Mr. Schul allege a dual breach of Articles 10 and 14 (art. 14+10) taken together. They stress that a civilian in the Netherlands in a comparable situation does not risk the slightest penalty. In addition, they claim to have been punished more severely than a number of Netherlands servicemen, not belonging to the V.V.D.M., who had also been prosecuted for writing or distributing material likely to undermine military discipline.

103. On the first question, the Court emphasises that the distinction at issue is explicable by the differences between the conditions of military and of civil life and, more specifically, by the "duties" and "responsibilities" peculiar to members of the armed forces in the field of freedom of expression (paragraphs 54 and 100 above). On the second question, the Court points out that in principle it is not its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must, just like the Contracting States, respect the independence of those

courts. Such a decision would actually become discriminatory in character if it were to depart from others to the point of constituting a denial of justice or a manifest abuse, but the information supplied to the Court does not permit a finding of this sort.

### C. On the alleged violation of Article 10 taken with Articles 17 and 18 (art. 17+10, art. 18+10)

104. Mr. Dona and Mr. Schul further claim that, contrary to Articles 17 and 18 (art. 17, art. 18), the exercise of their freedom of expression was subject to "limitation to a greater extent than is provided for" in Article 10 (art. 10) and for a "purpose" not mentioned therein.

This complaint does not support examination since the Court has already concluded that the said limitation was justified under paragraph 2 of Article 10 (art. 10-2) (paragraphs 96-101 above).

## IV. ON THE ALLEGED VIOLATION OF ARTICLE 11 (art. 11)

105. According to Mr. Dona and Mr. Schul, after their cases, many conscripts who were members of the V.V.D.M. incurred penalties for having written and/or distributed publications tending to undermine discipline, within the meaning of Article 147 of the Military Penal Code. In their submission, these were systematic measures calculated to impede the functioning of the V.V.D.M., thereby infringing Article 11 (art. 11) of the Convention which provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

106. The Court may take into consideration only the case of the two applicants and not the situation of other persons or of an association not having authorised them to lodge an application with the Commission in their name (De Becker judgment of 27 March 1962, Series A no. 4, p. 26 in fine, and Golder judgment of 21 February 1975, Series A no. 18, p. 19, para. 39 in fine).

107. Insofar as Mr. Dona and Mr. Schul rely also upon their own freedom of association, the Court finds that they were not punished by reason either of their membership of the V.V.D.M. or of their participation

in its activities, including preparation and publication of the journal "Alarm". While the Supreme Military Court punished them, it was only because it considered that they had made use of their freedom of expression with a view to undermining military discipline.

108. In view of the absence of any interference with the right of the two applicants under paragraph 1 of Article 11 (art. 11-1), the Court does not have to consider paragraph 2 (art. 11-2), or Articles 14, 17 and 18 (art. 14, art. 17, art. 18).

## V. ON THE APPLICATION OF ARTICLE 50 (art. 50)

109. Under Article 50 (art. 50) of the Convention, if the Court finds "that a decision or measure taken" by any authority of a Contracting State "is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said (State) allows only partial reparation to be made for the consequences of this decision or measure", the Court "shall if necessary afford just satisfaction to the injured party".

The Rules of Court specify that when the Court "finds that there is a breach of the Convention, it shall give in the same judgment a decision on the application of Article 50 (art. 50) of the Convention if that question, after being raised under Rule 47 bis, is ready for decision; if the question is not ready for decision, the Court shall reserve it in whole or in part and shall fix the further procedure" (Rule 50 para. 3, first sentence, read in conjunction with Rule 48 para. 3).

110. At the hearing on 29 October 1975, the Court, pursuant to Rule 47 bis, invited those appearing before it to present observations on the question of the application of Article 50 (art. 50) in the present case.

It emerges from the reply of the Commission's principal delegate that the applicants make no claim for compensation for material damage. However, they expect to be granted just satisfaction should the Court find failure to comply with the requirements of the Convention in one or more instances, but they do not for the moment indicate the amount of their claim were such satisfaction to take the form of financial compensation.

On their side the Government, through their Agent, declared that they left this point completely to the discretion of the Court.

111. The question of the application of Article 50 (art. 50) of the Convention does not arise in the case of Mr. van der Wiel, or for those complaints of Mr. Engel, Mr. de Wit, Mr. Dona and Mr. Schul which the Court has not retained. On the other hand, it does arise for the breach of Article 5 para. 1 (art. 5-1) in the case of Mr. Engel and of Article 6 para. 1 (art. 6-1) in that of Mr. de Wit, Mr. Dona and Mr. Schul (paragraphs 69 and 89 above). The information supplied by the Commission's principal delegate shows however that the question is not ready for decision; it is therefore

appropriate to reserve the question and to fix the further procedure in connection therewith.

## FOR THESE REASONS, THE COURT,

1. Holds, unanimously, that Article 5 (art. 5) was not applicable to the light arrest of Mr. Engel (second punishment) and of Mr. van der Wiel;

2. Holds, by twelve votes to one, that it was also not applicable to the aggravated arrest of Mr. de Wit, or to the interim aggravated arrest of Mr. Dona and Mr. Schul;

3. Holds, by eleven votes to two, that the committal of Mr. Dona and Mr. Schul to a disciplinary unit did not violate Article 5 para. 1 (art. 5-1);

4. Holds, by nine votes to four, that the whole period of Mr. Engel's provisional strict arrest violated Article 5 para. 1 (art. 5-1), since no justification is to be found for it in any sub-paragraph of this provision;

5. Holds, by ten votes to three, that apart from that it violated Article 5 para. 1 (art. 5-1) insofar as it exceeded the period of twenty-four hours stipulated by Article 45 of the Netherlands Military Discipline Act of 27 April 1903;

6. Holds, unanimously, that the committal of Mr. Dona and Mr. Schul to a disciplinary unit and Mr. Engel's provisional arrest did not violate Articles 5 para. 1 and 14 (art. 14+5-1) taken together;

7. Holds, by twelve votes to one, that there has been no breach of Article 5 para. 4 (art. 5-4) as regards the committal of Mr. Dona and Mr. Schul to a disciplinary unit;

8. Holds, by eleven votes to two, that Article 6 (art. 6) was not applicable to Mr. Engel on the ground of the words "criminal charge";

9. Holds, unanimously, that it was also not applicable to this applicant on the ground of the words "civil rights and obligations";

10. Holds, unanimously, that neither was it applicable to Mr. van der Wiel;

11. Holds, by eleven votes to two, that there was a breach of Article 6 para. 1 (art. 6-1) in the case of Mr. de Wit, Mr. Dona and Mr. Schul insofar as hearings before the Supreme Military Court took place in camera;

12. Holds, unanimously, that there was no breach of Article 6 para. 2 (art. 6-2) in the case of Mr. Dona and Mr. Schul;

13. Holds, unanimously, that there was no breach of Article 6 para. 3 (b) (art. 6-3-b) in the case of Mr. de Wit, Mr. Dona and Mr. Schul;

14. Holds, by nine votes to four, that there was no breach of Article 6 para. 3 (c) (art. 6-3-c) in the case of these three applicants;

15. Holds, by nine votes to four, that there was no breach of Article 6 para. 3 (d) (art. 6-3-d) in the case of Mr. de Wit;

16. Holds, by twelve votes to one, that there was no breach of Article 6 para. 3 (d) (art. 6-3-d) in the case of Mr. Dona and Mr. Schul;

17. Holds, unanimously, that there was no breach of Articles 6 and 14 (art. 14+6) taken together in the case of Mr. de Wit, Mr. Dona and Mr. Schul;

18. Holds, unanimously, that there is no need to rule on the complaint based by Mr. Dona and Mr. Schul on the alleged violation of Articles 6 and 18 (art. 18+6) taken together;

19. Holds, unanimously, that there was no breach of Article 10 (art. 10) taken alone or together with Articles 14, 17 or 18 (art. 14+10, art. 17+10, art. 18+10) in the case of Mr. Dona and Mr. Schul;

20. Holds, unanimously, that there was no breach of Article 11 (art. 11) in the case of Mr. Dona and Mr. Schul;

21. Holds, unanimously, that the question of the application of Article 50 (art. 50) does not arise in the case of Mr. van der Wiel, or for those of the complaints of Mr. Engel, Mr. de Wit, Mr. Dona and Mr. Schul which the Court has not herein retained (items 1 to 3, 6 to 10 and 12 to 20 above);

22. Holds, by twelve votes to one, that the question is not yet ready for decision as regards the breaches found in the case of Mr. Engel (Article 5 para. 1, items 4 and 5 above) (art. 5-1) and in the case of Mr. de Wit, Mr. Dona and Mr. Schul (Article 6 para. 1, item 11 above) (art. 6-1);

Accordingly,

(a) reserves the whole of the question of the application of Article 50 (art. 50) as it arises for these four applicants;

(b) invites the Commission's delegates to present in writing, within one month from the delivery of this judgment, their observations on the said question;

(c) decides that the Government shall have the right to reply in writing to those observations within a month from the date on which the Registrar shall have communicated them to the Government;

(d) reserves the further procedure to be followed on this aspect of the case.

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this eighth day of June, one thousand nine hundred and seventy-six.

Hermann MOSLER
President

Marc-André EISSEN
Registrar

The separate opinions of the following Judges are annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

Mr. Verdross;

Mr. Zekia;

Mr. Cremona;

Mr. O'Donoghue and Mrs. Pedersen;

Mr. Vilhjálmsson;

Mrs. Bindschedler-Robert;

Mr. Evrigenis.

H.M.
M.-A.E.

# SEPARATE OPINION OF JUDGE VERDROSS

*(Translation)*

I have voted for the operative provisions of the judgment as they are in line with the Court's established case-law. However, I cannot, to my great regret, accept the proposition underlying the judgment, namely, that Article 5 (art. 5) of the Convention is violated by any detention imposed by a competent military authority whose decision is not subject to a judicial remedy having a suspensive effect.

Here are my reasons. If one compares disciplinary detention in a cell in the barracks with incarceration of a civilian or a serviceman in a prison (paragraph 1 (a) of Article 5) (art. 5-1-a), one is bound to see that there is a fundamental difference between the two. In the second case, the convicted person is completely cut off from his ordinary environment and occupation since he is removed from his home. On the other hand, the soldier detained for disciplinary reasons stays in the barracks and may, from one moment to the next, be ordered to carry out one of his military duties; he thus remains, even whilst so detained, potentially within the confines of military service. It seems to me from this that such detention does not in principle amount to a deprivation of liberty within the meaning of Article 5 para. 1 (art. 5-1). This does not mean that all disciplinary detention imposed by the competent military authority escapes the Court's supervision. It may contravene the Convention if it violates Article 3 (art. 3) or if its duration, or its severity, exceeds the norm generally admitted by the member States of the Council of Europe in the matter of disciplinary sanctions; I take the view that, in the final analysis, the nature of a punishment depends on this yardstick which can, of course, vary with the requirements of international military life.

# SEPARATE OPINION OF JUDGE ZEKIA

I have respectfully subscribed to the main part of the judgment dealing with views and conclusions reached and criteria formulated for demarcation of the line where deprivation of liberty in the case of a conscript or an army serviceman occurs or does not occur within the ambit of Article 5 para. 1 (art. 5-1) of the Convention. Admittedly a certain amount of restriction on the right to liberty of a conscript or soldier might be imposed without infringement of Article 5 (art. 5) whereas such restriction cannot lawfully be imposed in the case of a civilian. Full reasons having been given in the judgment I need not repeat them.

I felt, however, unable to associate myself with the line of interpretation taken in determining the scope of application to the present case of certain Articles of the Convention, namely, Articles 5 para. 1 (a), 6 para. 1, 6 para. 3 (c) and (d) (art. 5-1-a, art. 6-1, art. 6-3-c, art. 6-3-d). In my view, once, in the light of the criteria enunciated by this Court, a conscript or soldier is charged with an offence which entails deprivation of his liberty such as committal to a disciplinary unit, and proceedings are directed to that end, such conscript or soldier is fully entitled to avail himself of the provisions of the Articles under consideration. For all intents and purposes the proceedings levelled against him are criminal in character and as far as court proceedings are concerned there need not be any difference between him and a civilian. I am not suggesting that such proceedings should be referred to civil courts. On the contrary, I consider it very appropriate that military courts composed of one or more judges, assisted by assessors or lawyers if needed, might take cognisance of cases where army servicemen are to be tried.

Mr. de Wit, Mr. Dona and Mr. Schul were all of them serving as privates in the Netherlands Army. The first was charged with driving a jeep in an irresponsible manner over uneven ground at a high speed. His company commander committed him to a disciplinary unit for three months. He complained to the complaints officer who heard the applicant and one out of three witnesses whom he wanted to be heard. He had the assistance of a lawyer who could assist him only on legal points. He lodged an appeal with the Supreme Military Court which, after hearing the appellant and his legal adviser and obtaining the opinion of the State Advocate, reduced the punishment to twelve days' aggravated arrest to be executed thereafter. The date of his original sentence was 22 February 1971 and the Supreme Military Court gave its decision on 28 April 1971.

On 8 October 1971 Mr. Dona and Mr. Schul, as editors of a journal called "Alarm", were sentenced by their superior commanding officer to committal to a disciplinary unit for a period of three and four months respectively, for publications undermining military authority in the Army. Both complained to the complaints officer who confirmed the sentence.

Then they appealed to the Supreme Military Court. On 17 November 1971 their case was heard. Both were assisted on the legal aspects of the case by a lawyer. Sentences were confirmed. Mr. Schul's sentence was reduced to three months. Both Mr. Dona and Mr. Schul, pending their appeal before the Supreme Military Court, were placed under aggravated arrest from 8 to 19 October and remained under interim arrest as from the latter date to 27 October. They were then released until their case came up for hearing before the Supreme Military Court.

It is evident from the statement of facts made in the judgment and from the short reference I have given to certain facts that the superior commanding officer assumed the status of a judge who constituted a court of first instance and after hearing the case convicted the applicants and sentenced them for committal to a disciplinary unit. Likewise, the complaints officer assumed the status of a revisional court in dealing with complaints made by persons convicted and sentenced by a lower court, here by the superior commanding officer. The decision of the complaints officer is also subject to appeal to the Supreme Military Court which is empowered to confirm or reverse conviction and sentence or to alter them. The Supreme Military Court exercises an appellate jurisdiction over the decisions of the commanding and complaints officers. The conviction and sentence do not emanate from this Court. The sentence for committal to a disciplinary unit originated in the decision of the superior commanding officer who is neither a judge nor entitled to constitute a court. The proceedings before him are conducted partly in a quasi-judicial manner and not in full compliance with Articles 6 para. 1 and 6 para. 3 (c) and (d) (art. 6-1, art. 6-3-c, art. 6-3-d) of the Convention. The same considerations more or less apply to the status of the complaints officer. The Supreme Military Court is correctly denominated as a court although the proceedings before the court are conducted in camera in contravention of Article 6 para. 1 (art. 6-1). This court is not supposed to take the place of a trial court but rather to correct decisions already taken and convictions and sentences already passed. Therefore I am of the opinion that the requirements of Article 5 para. 1 (a) (art. 5-1-a) have not been met. It is a great advantage to persons facing charges to have a hearing, first before a trial court which affords equality of arms and observes the rules of fair trial. In case of conviction and receiving sentence, again it is a further advantage for a convicted man to have the chance to assert his innocence before a higher court. Usually a court of appeal considers itself as bound by the findings of fact of the lower court unless there is strong reason to upset such findings. The significance in the administration of justice of a trial court of first instance cannot be regarded as over-emphasised. On the other hand if I am right in my way of thinking that, once a soldier is sought to be deprived of his right to liberty to the extent inadmissible and impermissible with regard to his status as a soldier or conscript, he is entitled to be treated as a civilian, then the detention of

the applicants either in the form of aggravated arrest or interim arrest before their cases were heard by the Supreme Military Court amounted to a detention before a conviction by a competent court had been passed. Furthermore, the detention of the applicants for the period indicated above before the Supreme Military Court heard the case was made on the strength of a conviction and sentence passed by a superior commanding officer who was not a competent court and such detention was not linked with the exigencies of service.

I have little to say in respect of infractions of Articles 6 para. 1 and 6 para. 3 (c) and (d) (art. 6-1, art. 6-3-c, art. 6-3-d). Violation of Article 6 para. 1 (art. 6-1) is found by the Court. I have nothing to add. Coming to Article 6 para. 3 (c) (art. 6-3-c), it appears from the record that the applicants were assisted only on the legal aspects of their case and very probably because they had recourse to the Articles of the Convention. This, to my mind, does not satisfy the provisions of the aforesaid sub-paragraph. As to Article 6 para. 3 (d) (art. 6-3-d), it appears again that the applicants could not obtain the attendance and examination of some witnesses they wanted to call for their defence. The omission or refusal to call such witnesses for the defence does not appear to be based either on the irrelevancy of their evidence or on some other good reason. The applicants were not fully afforded the chance to examine witnesses against them either directly or through their counsel or through the court as envisaged in sub-paragraph 3 (d) of Article 6 (art. 6-3-d) of the Convention.

# SEPARATE OPINION OF JUDGE CREMONA

I have agreed with the majority of my brother judges in the finding of the violations of the Convention indicated in the judgment. But having come to the conclusion, along with them, that certain punitive measures complained of in this case (strict arrest and committal to a disciplinary unit) were in fact deprivations of personal liberty also in the context of the special characteristics and exigencies of military life, I feel that certain other points become pertinent, and on these points, which I am briefly setting out hereunder, I find myself, with respect, in disagreement with the conclusions reached by the majority of my colleagues.

In the first place, having already excluded certain punitive measures (also described as arrests) from the purview of deprivation of liberty for the purposes of Article 5 para. 1 (art. 5-1) of the Convention solely on the accepted ground that "when interpreting and applying the rules of the Convention in the present case, the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces" (paragraph 54 of the judgment), then, in proceeding to identify as possible charges of a criminal nature (for the purposes of Article 6 para. 1 of the Convention) (art. 6-1) certain "disciplinary charges" which involve liability to punishments entailing unquestionable deprivation of liberty, I am unable to distinguish further, as the majority of my colleagues do (paragraph 82), particularly on the basis of the relative duration of such deprivation of liberty.

Thus I find that also in the case of Mr. Engel (and not only in that of Mr. de Wit, Mr. Dona and Mr. Schul, as stated in paragraph 88 of the judgment) the position was one of the determination of a criminal charge against him, and since the hearing in his case too, as in that of the others, took place in camera, there is also in respect of him a violation of Article 6 para. 1 (art. 6-1), irrespective of the short duration of the strict arrest to which he was liable. The question of the assessment of the risk to which he was in practice exposed on 7 April 1971 cannot in my view alter the existing legal situation.

In paragraph 63 it is accepted in the judgment that the provisional arrest inflicted on Mr. Engel in the form of strict arrest did have the character of deprivation of liberty and this, as therein stated, despite its short duration. While appreciating that what I am about to say is not quite the same thing though the basis is essentially common, I feel that when considering the true nature of a criminal charge, liability to a punishment entailing unquestionable deprivation of liberty should also be viewed irrespective of its duration. In such a case the nature of the punishment itself in fact overrides its duration. An established deprivation of personal liberty cannot, without injury to the spirit of the Convention, be considered as obliterated by the shortness of its duration, also in the process of determining, for the purposes of Article 6 para. 1 (art. 6-1) of the Convention, the true nature of

a criminal charge. With particular reference to what is stated in the last sub-paragraph of paragraph 82 of the judgment, it is my belief that the detriment involved in a deprivation of personal liberty, once established as such, cannot (as is done there) properly be qualified by the quantitative concept "not appreciable" nor indeed judged by reference to time, except only for the purposes of the relative gravity.

Another point concerns Article 6 para. 3 (c) (art. 6-3-c) of the Convention, which, among certain minimum rights guaranteed to a person charged with a criminal offence, includes the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". I do not propose to controvert the fact that this right as a whole and as formulated in this provision is not in every respect an absolute right. But then I do believe that this important right of the accused cannot be subjected to the limitation that the legal assistance (in this case a fellow-conscript with legal qualifications chosen by the applicants themselves) be confined exclusively to any points of law arising in the case.

It will be recalled in this connection that at the time of the measures complained of, the Supreme Military Court in practice granted legal assistance in certain cases where it was expected that the person concerned would not be able himself to cope with the special legal problems raised in his appeal and such legal assistance was confined to the legal aspects of the case. This limitation is in fact the subject of complaint here and I find that its application in the case of the applicants mentioned in paragraph 91 of the judgment is in violation of Article 6 para. 3 (c) (art. 6-3-c) of the Convention. The legal assistance mentioned in this provision refers to the case as a whole, that is to say, in all its aspects, both legal and factual. Indeed it is only too clear that every case is made up of both law and fact, that these are both important for the defence (which is what this provision is intended to protect) and that at times it may also not be too easy to separate one from the other.

In particular, it is, with respect, hardly reasonable to seek to justify the situation complained of, as the majority of my colleagues do in the third sub-paragraph of paragraph 91 of the judgment, on the ground that "the applicants were certainly not incapable of personally providing explanations on the very simple facts of the charges levelled against them". Indeed, quite apart from the questionable simplicity of the facts of the charges or at any rate some of them, the essential point here is not the matter of providing explanations, but the matter of adequately defending oneself against a criminal charge. The right guaranteed in Article 6 para. 3 (c) (art. 6-3-c) is a vital right of the accused and indeed of the defence in general and is designed to ensure that proceedings against a person criminally charged will not be conducted in such a way that his defence will be impaired or not

adequately put. Nor is the right to legal assistance of one's own choosing, as enshrined in this provision, conditional on the person charged being incapable of defending himself (or, as stated in the judgment, providing explanations) in person. Furthermore, here the question clearly was not that the applicants were unable to defend themselves in person, but that they showed themselves unwilling to do so, preferring, as entitled to do under the Convention, to be defended (in respect of not only the legal but also the factual aspects of the charges against them) by a lawyer of their own choosing. That lawyer was in fact accepted, but then his services in the defence of the applicants were, as already stated, in my view unjustifiably restricted.

Another point concerns the failure to call two witnesses for the defence of Mr. de Wit (named by him), a failure of which he also complained in this case, invoking Article 6 para. 3 (d) (art. 6-3-d) of the Convention, which guarantees to a person charged with a criminal offence, among certain other minimum rights, the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Again, there is no gainsaying the fact that this is not an absolute right and is limited, for instance and to mention but one factor, by the concept of relevance. Now when Mr. van der Schans assisting the delegates of the Commission (he had previously also represented the applicants before the Commission) put it to this Court that the witnesses for the defence who were not ordered to appear were witnesses who could have helped the case for the defence (they were described as "eye-witnesses"), the Government representatives countered by saying that in view of the fact that Mr. de Wit had made a declaration acknowledging certain facts, "there was no need for further witnesses" (verbatim report of the public hearing of 29 October 1975). But, without here wishing to interfere unduly with the decisions of national jurisdictions and apart from the fact that Mr. de Wit's declaration covered only part of the charge against him (in it he certainly denied certain parts of the charge, as may be seen from the relevant decision), what was stated by the Government representatives seems to indicate that the non-admission of Mr. de Wit's two witnesses out of the three proposed by him (as against the admission of five witnesses against him) was not grounded on such justifiable considerations as, for instance, relevance, but rather on their becoming unnecessary because of certain of the accused's statements, which in my view, at least on the basis of what is before me, is not justifiable.

# JOINT SEPARATE OPINION OF JUDGES O'DONOGHUE AND PEDERSEN

We are in agreement with the view that no breach has been found in any of the cases before the Court under Articles 10, 11, 14, 17 and 18 (art. 10, art. 11, art. 14, art. 17, art. 18) of the Convention. It is clear from the judgment that the difficulties arise from the consideration of the applicability of two Articles 5 and 6 (art. 5, art. 6). These Articles (art. 5, art. 6) can be said to have a certain inter-relationship because if Article 5 (art. 5) is applicable in the sense that there has been a deprivation of liberty involving a criminal charge the full impact of the obligation to comply with Article 6 (art. 6) will follow.

We feel unable to adopt the conclusion of the majority of the Court that the clear obligation of members of the armed forces to observe the code of discipline applicable to such forces is an unspecified obligation and therefore outside the reach of Article 5 para. 1 (b) (art. 5-1-b). There is a clear distinction in our opinion between the obligation of citizens at large to obey the law and the special position of military personnel to obey the disciplinary code which is a vital and integral constituent of the force of which they are members.

Apart from the considerations set out in the separate dissenting opinion of MM. Fawcett and others [pp. 74-75 of the Report][1], with which conclusion we fully agree, there is an elementary factor which should be looked at in the structure and character of a military establishment in any country which is party to the Convention. This factor is the disciplinary code, the maintenance of which is vital to the very continued existence of an armed force, and quite different from any other body or association which purports to exercise a measure of discipline over its members.

The special importance of discipline in an armed force and the recognition of this by its members, lead us to take the view that you have here a clear case of a specific and concrete obligation prescribed by law and imposed on the members. In the light of these considerations we are satisfied that in none of the cases before the Court has there been a breach of Article 5 para. 1 (art. 5-1) of the Convention because of the exception stated in Article 5 para. 1 (b) (art. 5-1-b).

What is described as the provisional detention of Mr. Engel commenced with his arrest on 20 March 1971. The Military Discipline Act of 1903 sanctioned such an arrest and detention but Article 45 of that Act restricted the period of provisional detention to twenty-four hours. In the events which took place in Mr. Engel's case there was an excessive detention of twenty-two hours and this excess was unlawful. But in the case of Mr. Engel we consider that the whole period during March to June 1971 be taken into

[1] Note by the Registry: Page-numbering of the stencilled version

account. The Ministerial decision to suspend the execution of his punishments to allow him to take his examination and the reduction of the several penalties in April must be balanced against the definite but technically excessive detention of twenty-two hours. In all these circumstances we would not hold that the Netherlands Government committed a breach of Article 5 para. 1 (art. 5-1) of the Convention.

As we regard the breaches of the applicants as disciplinary offences, concerned only with the applicants' conduct as servicemen and with their military obligations (cf. para. 122 of the Commission's report), it follows that the question of "the determination of his civil rights and obligations" as stated in Article 6 para. 1 (art. 6-1) of the Convention does not arise for any of the applicants.

For the same reasons we are of the opinion that there was no contravention of Article 6 (art. 6) in dealing with the cases, and in not treating any of them as in essence criminal charges requiring the application of the process contained in that Article (art. 6).

It is to be recognised that difficulty may be experienced by States in dealing with cases which are a breach of discipline and at the same time an offence under the criminal law. It seems to us that a test should be whether the complaint is predominantly a disciplinary breach or a criminal offence. If the latter, the provisions of Article 6 (art. 6) must be observed. The nature of the complaint and the punishment prescribed under the disciplinary code and under the criminal law would be helpful pointers as to the course to be followed in order to comply with the Convention. Any attempt to dilute the procedure in the case of a grave crime by treating it as a disciplinary infraction would in our opinion be such a serious abuse, and indeed quite powerless under the Convention to exclude the application of Article 6 (art. 6) and would oblige full compliance with the requirements of that Article (art. 6).

We have derived much assistance from the separate opinion of Mr. Welter and in particular we agree with his view expressed in paragraph 9 of the opinion and his reasons given why Article 6 (art. 6) was not applicable to any of the five applicants.

It follows from the foregoing that no questions arise under Article 50 (art. 50).

# SEPARATE OPINION OF JUDGE THÓR VILHJÁLMSSON

1. I feel unable to go along with the reasoning of the majority of the Court expressed in paragraph 62 of the judgment. There the majority finds that aggravated arrest under the 1903 Act is not a deprivation of liberty within the meaning of Article 5 (art. 5) of the Convention. In my opinion it is. This is both because of its nature and its legal character.

As is described in paragraph 19 of the judgment, servicemen undergoing aggravated arrest are not allowed the same freedom of movement as other servicemen. These restrictions deviate clearly from the usual conditions of life within the Netherlands armed forces. Thus the servicemen concerned have to remain during off-duty hours in a specially designated place, cannot go to the recreation facilities open to others in the same barracks and often sleep in special rooms.

The view that this treatment is tantamount to deprivation of liberty is strengthened by its purpose which obviously is punitive. It is also worth noting that we have here a treatment in respect of which the term arrest is used and this in itself indicates a deprivation of liberty.

What is stated above does not lead me to find a breach of Article 5 (art. 5) of the Convention as regards the aggravated arrest of Mr. de Wit (paragraph 41 of the judgment) and of Mr. Dona and Mr. Schul (paragraph 65 of the judgment). This conclusion is based on my interpretation of Article 5 para. 1 (b) (art. 5-1-b) of the Convention dealt with below. In the case of Mr. de Wit it is also based on the fact that he served aggravated arrest after a decision was rendered by the Supreme Military Court of the Netherlands.

2. Article 5 para. 1 (b) (art. 5-1-b) of the Convention permits "the lawful arrest or detention of a person ... in order to secure the fulfilment of any obligation prescribed by law". The majority of the Court, in agreement with the majority of the Commission, finds this provision not applicable in the present case (paragraph 69 of the judgment). I cannot agree with the majority on this point. Any country which has a military service organises it on the basis of well-established principles, which in the case of the Netherlands are specified in the laws and regulations mentioned in the judgment. These rules form a distinct entity and they impose upon servicemen certain specific obligations. It seems to me that, far from endangering respect for the rule of law, this body of rules falls under the above-cited provision of Article 5 para. 1 (b) (art. 5-1-b).

This conclusion, nevertheless, does not apply to the provisional detention of Mr. Engel in excess of the twenty-four hours permitted by Article 45 of the 1903 Act (paragraph 26 of the judgment). On this particular point I am in agreement with the majority of the Court (see paragraph 69).

3. In paragraph 91 of the judgment, the majority of the Court sets out its opinion in connection with sub-paragraphs (c) and (d) of Article 6 para. 3 (art. 6-3-c, art. 6-3-d) of the Convention. I do not share this opinion.

As to Article 6 para. 3 (c) (art. 6-3-c), a natural reading of the text seems to me to indicate that it is up to the accused to decide whether he defends himself in person or entrusts this task to a lawyer. This, moreover, is in line with the general principles of law reflected in Article 6 (art. 6). I fail to see how, in a given case, a court – not to speak of an administrative authority - can reasonably decide to what degree the accused is capable of conducting his own defence. I therefore find a breach of Article 6 para. 3 (c) (art. 6-3-c) in the case of Mr. de Wit, Mr. Dona and Mr. Schul.

As to Article 6 para. 3 (d) (art. 6-3-d) of the Convention, I agree with the majority of the Court when it states in paragraph 91 of the judgment that this provision does not require the examination of every witness that an accused person may wish to have called. I am also of the opinion, like the majority, that "equality of arms" is an important point when this provision is interpreted. Nevertheless, this provision entitles a person charged with a criminal offence to have witnesses on his behalf heard by the tribunal dealing with his case unless legally valid reasons are given for not doing so. This Court has, it is true, somewhat incomplete information on the facts concerning the alleged violations of Article 6 para. 3 (d) (art. 6-3-d). It is stated that in the case of Mr. de Wit the calling of two witnesses was prevented at every juncture (paragraphs 42 and 91 of the judgment). This has in my opinion not been refuted. Even if the complaints officer on 5 March 1971 heard witnesses (paragraph 41), this cannot count as a fulfilment of the obligation under Article 6 para. 3 (d) (art. 6-3-d) because he is not a court or a tribunal within the meaning of Article 6 para. 1 (art. 6-1). Accordingly I find a violation of Article 6 para. 3 (d) (art. 6-3-d) in the case of Mr. de Wit. On the other hand I agree with the majority of the Court in not finding a breach of this provision in the case of Mr. Dona and Mr. Schul as it has not been established that they made any request to the Supreme Military Court in this respect.

# SEPARATE OPINION OF JUDGE BINDSCHEDLER-ROBERT

*(Translation)*

I am in agreement with the operative provisions of the judgment, except the two items concerning Mr. Engel's provisional arrest. These items record the finding that this arrest violated Article 5 para. 1 (art. 5-1) of the Convention, firstly, since no justification is to be found for it in any sub-paragraph of this provision (item 4), and secondly, because it exceeded the period of twenty-four hours stipulated by Netherlands law and insofar as it exceeded this period (item 5).

1. The difference of opinion over the first item reflects a fundamental disagreement on the applicability of Article 5 para. 1 (art. 5-1) in the matter.

The first part of the judgment ("as to the law") is based on the idea that Article 5 para. 1 (art. 5-1) is applicable de plano to disciplinary measures and penalties occasioning deprivation of liberty imposed in the context of military disciplinary law. It follows from this (i) that disciplinary penalties occasioning deprivation of liberty would comply with the Convention only if imposed by a court, in conformity with Article 5 para. 1 (a) (art. 5-1-a); and (ii) that, in conformity with sub-paragraph (c) (art. 5-1-c), there may be provisional arrest or detention only for the purpose of bringing the person arrested before the competent legal authority, and not before the hierarchical superior even if he is impowered to impose a disciplinary penalty. Whilst, on the facts of the case, the first of these consequences does not result in the finding of a violation of the Convention, the second leads the Court to conclude that there has been a violation of Article 5 para. 1 (art. 5-1) as regards Mr. Engel's provisional arrest.

To my great regret, I cannot share this point of view; I think that, despite the apparently exhaustive nature of Article 5 para. 1 (art. 5-1), the measures and penalties of military disciplinary law should not be put on the scales of Article 5 para. 1 (art. 5-1). Here are my reasons:

(1) Account must be taken of the nature of military service and the role of disciplinary law in instilling and maintaining discipline which is a sine qua non for the proper functioning of that special institution, the army. It is not enough to adopt, as does the Court, a narrow concept of deprivation of liberty; what must be borne in mind is the whole system of disciplinary law. Military discipline calls in particular for speedy and effective measures and penalties, adapted to each situation, and which, therefore, the hierarchical superior must be able to impose.

(2) The Convention itself recognises in its Article 4 para. 3 (b) (art. 4-3-b) the special characteristics of military service. This provision reflects a basic choice made by the Contracting States and establishes in a general way the compatibility with the Convention of military service. The

derogations from and restrictions on the fundamental rights to which it may give rise - for example, the right to liberty of movement guaranteed by Article 2 of Protocol no. 4 (P4-2) - are thus not contrary to the Convention, even if there is no express reservation about them. Now the system of discipline peculiar to the army constitutes one of these derogations; Article 5 para. 1 (art. 5-1) does not concern military disciplinary law and its exhaustive nature relates only to situations in civil life. Judge Verdross is right to emphasise in his separate opinion that disciplinary penalties in the framework of military service are sui generis.

(3) The fact that disciplinary law does not fall under Article 5 para. 1 (art. 5-1) is the only explanation for the wording of this provision and its complete lack of adaptation to the situations which military disciplinary law concerns. These factors, as well as the place of Article 5 (art. 5) in the Convention and its logical link with Article 6 (art. 6), are an indication that the drafters of the Convention really had in mind situations belonging to criminal procedure.

(4) The above points are corroborated by the way in which the States party to the Convention have dealt with the question in their domestic law. Even today, in their military disciplinary law, the hierarchical superior is generally the authority empowered to take measures or impose penalties whether occasioning deprivation of liberty or not. Some States certainly provide for judicial review but this does not always have a suspensive effect; furthermore, Article 5 para. 1 (a) (art. 5-1-a) makes no distinction in its requirements between the different authorities. The governments do not seem to have envisaged the possibility that their military disciplinary law - as opposed to their military penal procedure - could be affected by the Convention. It appears difficult in these circumstances to countenance an interpretation that disregards so widespread a conception, namely, the "common denominator of the respective legislation of the various Contracting States", to adopt the Court's language in another context (paragraph 82 of the judgment).

I conclude from the above that Mr. Engel's provisional arrest, since it occurred in the framework of disciplinary procedure, was not subject to Article 5 para. 1 (a) (art. 5-1-a) and that, as a result, it has not violated this provision on the ground that Mr. Engel was arrested and detained for the purpose of being brought before his hierarchical superior and not before a legal authority.

2. That Article 5 para. 1 (art. 5-1) is inapplicable to disciplinary law does not mean that disciplinary measures and penalties escape supervision altogether. In point of fact, as is stated in the judgment, Article 6 (art. 6) gives the Convention institutions the possibility of correcting excessive extension of the scope of disciplinary law; furthermore there is ground for saying that the measures and penalties in disciplinary law that involve

deprivation of liberty do not escape the requirement of lawfulness which underlies the whole of Article 5 (art. 5).

Mr. Engel's provisional arrest can certainly be assessed from this angle. However, although I admit that it was initially tainted with unlawfulness to the extent that it lasted more than twenty-four hours, I cannot agree with the item in the operative provisions of the judgment which records a violation of the Convention in this respect. The State which redresses injury caused contrary to international law expunges by that very act its international responsibility; to afford it this possibility is precisely the meaning of the rule on exhaustion of domestic remedies (cf. Guggenheim, Traité de droit international public, vol. II, p. 23). In the case before us, the State completely redressed Mr. Engel's injury when the authority hearing the appeal decided that the two days' strict arrest to which he had been sentenced would be deemed to have been served during the provisional arrest. In these circumstances it is no longer appropriate for the operative provisions of the judgment to record a violation of the Convention. This approach is not contrary to the Court's case-law; each time it has held that the reckoning of detention on remand as part of a sentence did not prevent it from taking the unlawfulness of that detention into account, there had been a detention of long duration for which the deduction did not amount to complete reparation. Besides, the question has been pleaded before the Court in the context of affording just satisfaction (cf. for example, the Neumeister case, judgment of 7 May 1974, Series A no. 17, pp. 18-19).

# SEPARATE OPINION OF JUDGE EVRIGENIS

*(Translation)*

1. To my great regret I have not been able to concur with the majority of the Court on items no. 3, 14, 15 and 16 of the operative provisions of the judgment. These are the points which caused me to disagree:

(a) The majority of the Court thought that the committal of Mr. Dona and Mr. Schul to a disciplinary unit, by virtue of a decision of the Supreme Military Court of the Netherlands, met with the requirements of Article 5 para. 1 (a) (art. 5-1-a) of the Convention. Their sentence to a punishment involving deprivation of liberty emanated, according to the majority of my colleagues, from a "court" within the meaning borne by this term in Article 5 para. 1 (a) (art. 5-1-a). The Military Court, to adopt the terminology used in our Court's case-law, was a court from the organisational point of view; yet it seems on the other hand difficult to regard the procedure prescribed by law and in fact followed before it in the present cases as being in conformity with the conditions that should be satisfied by a judicial body corresponding to the notion of a court, within the meaning of Article 5 para. 1 (a) (art. 5-1-a). Two aspects of this procedure appear to me not to fulfil these conditions, namely, the freedom of action allowed to the accused's lawyer on the one hand and the taking of evidence on the other.

On the first aspect, the facts noted by the Court (judgment, paras. 32, 48, 91) reveal an important restriction on the defence lawyer's freedom of action before the Military Court when it hears a disciplinary case like those now before us. The lawyer may not, in fact, take part in the proceedings except to deal with legal problems and, what is more, only with any specific legal problems that might be presented by his client's appeal, such as, for example, the questions that would be raised by the entry into play of the European Convention on Human Rights. Furthermore, there are good reasons for thinking that the lawyer is not allowed to plead during the hearing (cf. the reference to the report dated 23 December 1970 of the acting Registrar of the Netherlands Supreme Military Court, decision on admissibility, report of the Commission, p. 99)[1]. Taking these restrictions into account, it seems difficult to reconcile the procedure in question with the notion of a court within the meaning of Article 5 para. 1 (a) (art. 5-1-a); this, let us not forget, is a court which imposes sanctions involving deprivation of liberty (cf. De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 41-42, paras. 78-79, and (b) below).

The same points also apply to the second procedural aspect mentioned above, namely, the procedure prescribed by law and followed in practice for taking evidence before the Military Court when it sits as a disciplinary

[1] Note by the Registry: Page-numbering of the stencilled version.

tribunal. According to the facts noted by the Court and bearing in mind the provisions of Netherlands law applicable in this case (cf. paras. 31 and 91 of the judgment), the attendance and hearing of defence witnesses apparently cannot take place in conditions ensuring the guarantees for the defence which I consider that a trial must provide if it involves the imposition of a punishment occasioning deprivation of liberty and if it is to be fair. For these reasons I have had to conclude that there has been a violation of Article 5 para. 1 (art. 5-1) in the case of Mr. Dona and Mr. Schul.

Having said this, I think that, once the Court had held that the charge against these two applicants was "criminal" (Article 6, judgment paras. 80 et seq., in particular para. 85 in fine) (art. 6), it should have refrained from examining whether the Military Court corresponded to the notion of a court within the meaning of Article 5 para. 1 (a) (art. 5-1-a). Whilst the expression "court" is, in principle, an autonomous concept in each of the above-mentioned provisions, this nevertheless does not alter the fact that the court mentioned in Article 5 para. 1 (a) (art. 5-1-a) must meet the requirements of Article 6 (art. 6) when, as in the present case, the penalty occasioning deprivation of liberty which it imposes is finally deemed to be the outcome of a criminal charge and hence to fall within Article 6 (art. 6). It is permissible, in appropriate cases, for the court mentioned in Article 5 para. 1 (a) (art. 5-1-a) not to fulfil all the conditions stipulated by Article 6 (art. 6) for a criminal court. The converse seems both logically and legally difficult. If a penalty occasioning deprivation of liberty was inflicted by a court that had to meet the conditions of Article 6 (art. 6), there is no point in asking the further question whether that court complied with the notion of a court within the meaning of Article 5 para. 1 (a) (art. 5-1-a).

(b) The same reasons have led me to believe that I must dissent from the opinion of the majority of the Court on items 14, 15 and 16 of the operative provisions of the judgment. I will thus do no more than refer to the remarks set out under 1 (a) above.

The fact remains that I think that the examination of the cases of committal to a disciplinary unit in the light of the notion of "criminal charge" in Article 6 (art. 6) calls for some observations of a more general nature. I take the liberty of putting them forward as I wish to demonstrate that on these points my disagreement with the majority is more pronounced.

When imposing the penalty of committal to a disciplinary unit (case of Mr. Dona and Mr. Schul) or when reviewing such a penalty imposed by a non-judicial authority (case of Mr. de Wit), the Military Court was acting under Netherlands law as a disciplinary tribunal. If and to the extent that the Military Court was not dealing with conduct that could be sanctioned by penalties occasioning deprivation of liberty, its procedure could not in principle be considered contrary to the Convention. However, our Court thought, and rightly moreover, that the above-mentioned cases not only involved punishments occasioning deprivation of liberty, but also were

covered by the notion of "criminal charge" within the meaning of Article 6 (art. 6) of the Convention. It thus had to investigate whether the Military Court afforded the guarantees that this provision requires of a criminal court. The majority considered that in the present case those guarantees were present, except the requirement of Article 6 para. 1 (art. 6-1) that the hearings be in public. Now the picture of the criminal court presented by the opinion of the majority seems to me hardly reconcilable with the minimal requirements of Article 6 (art. 6) for the ideal criminal court. Indeed I find it very hard to admit that a criminal court, irrespective of its level or jurisdiction, can, without contravening the provisions of Article 6 (art. 6), operate with a defence lawyer subject to important restrictions on the freedom of action traditionally allowed in the criminal procedure of the democratic countries in Europe and with rules of taking evidence little favourable to the accused. Of course, one cannot attribute these deficiencies to the Military Court which, it must be remembered, was acting under Netherlands law in the present cases as a disciplinary tribunal and did not therefore normally have to enquire whether it was complying with Article 6 (art. 6) of the Convention. It is our judgment which, by drawing the borderline beyond which the disciplinary becomes the criminal, requires retrospectively, by virtue of the Convention, that a disciplinary tribunal should have afforded the guarantees of a criminal court. Now I fear that the majority opinion, to the extent that it restricts these guarantees, may take the interpretation of Article 6 (art. 6), and especially the notion of a criminal court, on a path which, may I say, would not be free of risks. I would also like to point out in the same context that the classification under the Convention of a question as criminal, whether or not this corresponds to the conceptions of the relevant national law, must bring into play the guarantees of Article 7 (art. 7) of the Convention as well.

(c) In finding a violation of Article 5 para. 1 (art. 5-1) for the reasons given in 1 (a) above, I should logically conclude that there was a violation of Article 5 para. 4 (art. 5-4) in the case of Mr. Dona and Mr. Schul (item no. 7 of the operative provisions of the judgment). If the Supreme Military Court, which, according to the judgment, performs cumulatively the functions both of the court mentioned in Article 5 para. 1 (a) (art. 5-1-a) and of the court mentioned in Article 5 para. 4 (art. 5-4), did not comply with the former paragraph's notion of a court, likewise it would also not comply in principle with the latter paragraph's notion of a court. I have, however, agreed with the majority on this point, taking into account that under Netherlands law there is a civil court with general jurisdiction before which the legality of any deprivation of liberty may be challenged by summary application (Article 289 of the Civil Procedure Code and Sections 2 and 53 of the Judicature Act).

2. My vote on item 6 of the operative provisions of the judgment was to the effect that there was no violation, in the cases there mentioned, of

Articles 5 para. 1 and 14 (art. 14+5-1 taken together. If the question had been put, I would for the same reasons (judgment, paras. 72 et seq.) have voted the same way as regards the complaints before the Court which were not considered to concern deprivations of liberty. The Court, however, thought it was able not to retain these cases for the reasons set out in paragraph 71 of the judgment. I cannot share this view. According to the Court's case-law (case relating to certain aspects of the laws on the use of languages in education in Belgium, judgment of 23 July 1968, Series A no. 6, pp. 33-34, para. 9; National Union of Belgian Police Case, judgment of 27 October 1975, Series A no. 19, p. 19, para. 44), a "measure which is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe Article 14 (art. 14) for the reason that it is of a discriminatory nature". Article 14 (art. 14) obliges States to secure "without discrimination" the enjoyment of the rights and freedoms set forth in the Convention. The Convention thus prohibits any discrimination appearing in the context of the enjoyment of a right which it guarantees, whether such discrimination takes the positive form of measures enhancing the enjoyment of that right, or the negative form of limitations, legitimate or otherwise, on that right. I can hardly conceive how one could, a fortiori, make a distinction under Article 14 (art. 14), as interpreted by the Court, between measures involving an unlawful limitation on the right in question and measures tolerated by the Convention. Discriminatory treatment by measures in either of these two categories may lead to a discrimination in the enjoyment of rights that must be subject to supervision under Article 14 (art. 14) of the Convention. The Court should therefore have examined from the point of view of their conformity with Article 14 (art. 14) as well, those of the penalties brought to its attention which it finally considered not to involve deprivation of liberty.