COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Applications Nos. 8805/79, 8806/79, 9242/81

DE JONG, BALJET, VAN DEN BRINK
against
THE NETHERLANDS

Report of the Commission

(Adopted on 11 October 1982)

STRASBOURG

TABLE OF CONTENTS

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Page

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I. Introduction

1. The following is an outline of the case as it has been submitted by the Parties to the European Commission of Human Rights.

A. The substance of the applications

2. The first applicant, Mr. T. de Jong, was born in 1958. The second applicant, Mr. J.H. Baljet, was born in 1953. The third applicant, Mr. G. van den Brink, was born in 1960. They are all Dutch citizens residing in the Netherlands. In the proceedings before the Commission they are represented by Mr. P. Huisman, a lawyer practising in Groningen.

3. Drafted as conscript servicemen in the Netherlands Armed Forces, the applicants refused to obey particular orders on the ground that they were conscientious objectors. Having thereby infringed the Military Penal Code, they were placed under arrest by the competent military officers in accordance with the provisions of the Sovereign Decree relating to the Administration of Justice in the Army and Air Force (1). The applicants allege that contrary to what is required by Art. 5 (3) of the Convention, they were not brought promptly before a judge or other officer authorised by law to exercise judicial power, and in particular that the "Auditeur-Militair" before whom they appeared one, five and two days respectively after their arrest, cannot be considered as such. They also submit that under the provisions of the above decree they were not in a position to seize a court to have the lawfulness of their detention speedily decided, contrary to what is required by Art. 5 (4) of the Convention.

B. Proceedings before the Commission

4. The first two applications were introduced with the Commission on 3 August 1979 and registered on 12 November 1979. The Commission proceeded to a first examination of the applications on 6 May 1980. On that date it decided to join the applications, in accordance with Art. 29 of its Rules of Procedure and to give notice of the applications to the respondent Government for observations on the admissibility and merits, in accordance with Rule 42 (2) (b) of its Rules of Procedure. The respondent Government were consequently invited to submit their observations before 28 July 1980. The Government's observations dated 28 July 1980 were received on 13 August 1980. The applicants were invited to reply before 1 October 1980. The applicants' observations in reply, dated 7 October 1980, were received on 9 October 1980.

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(1) Besluit Rechtspleging bij de Land- en Luchtmacht.

5. The Commission examined the applications again on 18 December 1980 and decided to hold a hearing on the admissibility and merits of the applications. The hearing took place on 7 May 1981 in Strasbourg.

The applicants were represented by Mr. P. Huisman, counsel. The second applicant, Mr. Baljet, was also present. The respondent Government were represented by Miss F.Y. van der Wal, Assistant Legal Adviser, Ministry for Foreign Affairs, Mr. W. Breukelaar, Counsellor at the Ministry of Justice, Mr. J. Demmink, Head of the Department of Legislation and Public Law, Ministry of Defence, adviser and Mr. A.J.G.S.M. van Hellenberg Hubar, Assistant at the Department of Legislation and Public Law, Ministry of Defence, assistant adviser.

6. Following the hearing the Commission deliberated on the question of admissibility and merits of the applications. On the same date, i.e. 7 May 1981, the Commission declared the applications admissible on the ground that the applications raised substantial questions of interpretation of the Convention which were of such complexity that their determination should depend on a full examination of the merits, in particular as regards the question whether the "Auditeur-Militair" can be considered as an officer authorised by law to exercise judicial power (Art. 5 (3) of the Convention) and the further question whether the applicants were entitled to take proceedings by which the lawfulness of their detention could be speedily decided (Art. 5 (4) of the Convention).

7. Upon communication of the decision to the Parties under Rule 43 (1) of the Rules of Procedure, the Parties were given the opportunity to make additional submissions in writing on the merits of the applications. The applicants were invited to do so before 19 July 1981. At the applicants' request this time-limit was extended until 15 August 1981. By letter dated 18 August 1981, received at the Commission's Secretariat on 24 August 1981, the applicants stated that they did not wish to make additional submissions on the merits. The respondent Government were then invited to make any additional submissions before 1 October 1981. The Government informed the Commission on 18 September 1981 that they equally did not wish to do so.

8. Legal aid under the Addendum to the Commission's Rules of Procedure was granted to the applicants on 16 October 1980.

9. Following the decision on admissibility the Commission, acting in accordance with Art. 28 (b) of the Convention, placed itself at the disposal of the Parties with a view to securing a friendly settlement of the matter.

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10. The third application was lodged with the Commission on 17 December 1980 and registered on 19 January 1981. The Commission first examined the application on 7 May 1981. It decided on that date to communicate the application to the respondent Government for observations on the admissibility and merits under Rule 42 (2) (b) of its Rules of Procedure.

The respondent Government were consequently invited to submit their observations before 27 July 1981. The Government's observations of 26 July 1981 were received on 14 August 1981.

The applicant was invited to reply before 1 October 1981. This time-limit was extended on request of the applicant until 9 October 1981. The applicant's observations in reply of 8 October 1981 were received on 12 October 1981.

11. The Commission examined the application again on 5 March 1982 and declared the application admissible, in particular as regards the question whether the "Auditeur-Militair" can be considered as "an officer authorised by law to exercise judicial power"(Art. 5 (3) of the Convention) and the further question whether the applicant was entitled to take proceedings by which the lawfulness of his detention could be speedily decided (Art. 5 (4) of the Convention).

The Commission declared inadmissible the complaint relating to Art. 5 (3) of the Convention in respect of the "Officier-Commissaris" for non-exhaustion of domestic remedies (Art. 26 and Art. 27 (3) of the Convention).

12. The Parties were invited to extend their efforts to reach a friendly settlement in the first two applications to this third application. However in the light of the Parties' reaction, the Commission now finds that there is no basis on which such a settlement could be effected.

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C. The present Report

13. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
J.E.S. FAWCETT
E. BUSUTTIL
L. KELLBERG
G. JÖRUNDSSON
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
M. MELCHIOR
J. SAMPAIO
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.C. SOYER

14. This Report was adopted by the Commission on 11 October 1982 and is now sent to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

15. A friendly settlement not having been achieved, the object of this Report is accordingly, as provided in Art. 31 (1) of the Convention, to:

(1) establish the facts, and

(2) state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

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16. A schedule setting out the history of proceedings before the Commission is attached hereto as Appendix I. The Commission's decision on the admissibility of the case of MM. de Jong and Baljet (Nos. 8805/79 and 8806/79) and the decision on the admissibility of the case of Mr. van der Brink (No. 9242/81) form Appendices II and III respectively.

17. The full text of the oral and written pleadings and the documents produced by the Parties in support of their submissions are held in the Commission's archives and are available to the Committee of Ministers if required.

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II. Establishment of the Facts

18. This section of the Report contains a description of the facts found by the Commission on the basis of the information submitted by the Parties. The facts are not in dispute between the parties.

A. Relevant domestic law

19. The criminal procedure for the military land and air force is governed by the provisions of the Sovereign Decree of 20 July 1814 relating to the Administration of Justice for the Army and Air Force, as amended, and published in the Governmental Gazette on 9 January 1954 (No. 9) ("Besluit Rechtspleging bij de Land- en Luchtmacht"), hereinafter referred to as "the Decree".

20. The following is a brief outline of the procedure relating to arrest and detention:

Every officer and non-commanding officer is empowered to arrest the military of lower rank suspected of a serious offence if the circumstances require the immediate deprivation of liberty. The detention is not to exceed 24 hours (Arts. 4 and 5 of the Decree).

The commanding officer may order or maintain the arrest on three specific grounds: a) risk of absconding, b) certain further specified weighty reasons of public safety and c) necessity with a view to maintenance of discipline among the other military. The detention order may be issued for suspicion of all offences set out in the military Penal Code and those for which under the civilian Code of Criminal Procedure detention is permitted. The order may not be issued if the accused is unlikely to be penalised by unconditional imprisonment or by any other measure restricting his freedom, or will be given a sentence likely to be of shorter duration than that of the provisional detention.

The detention must be terminated if the grounds for it cease to exist. All cases of detention exceeding four days shall be reported to the commanding general (Art. 7 of the Decree).

If the detention has lasted 14 days the accused may petition the competent military court to decide a term (liable to extension) within which the commanding general must decide whether the case is to be referred to a Military Court or the detention terminated. The Military

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Court decides on the petition without delay, after hearing the authority empowered to refer the case, the "Auditeur-Militair" and the accused, who may have the assistance of legal counsel (Art. 13 of the Decree).

The above provisions concern the detention that is ordered prior to the commanding general's decision to refer, after hearing the "Auditeur-Militair" and if possible the accused (Art. 11 of the Decree), or not to refer the case to the Military Court (Art. 12 of the Decree).

21. In the event the commanding general (or a principal officer designated by him) decides to refer the accused for trial by the Military Court, he will do so in writing and state in his decision whether the latter is to be released or kept in detention (Art. 14 of the Decree).

If, on that occasion, the accused's detention is confirmed or ordered, the detainee shall be heard by the "Auditeur-Militair" or "Officier-Commissaris", in charge of the preliminary judicial enquiry (Art. 29 of the Decree), within four days (Art. 33 of the Decree). Detention after the referral shall not exceed 14 days unless extended by 30-day terms, by the Military Court at the "Auditeur-Militair's" request (Arts. 31 and 33 of the Decree).

The "Auditeur-Militair" proprio motu or the "Officier-Commissaris", at the "Auditeur-Militair's" request may order the arrest or detention for a 30-day period during the time elapsing between the referral to the Military Court and the actual trial. This detention order requires confirmation by the Military Court. Again the accused must be heard within four days after his arrest by the "Auditeur-Militair" or by the "Officier-Commissaris" - or by the Military Court if required. In this he may be assisted by legal counsel (Art. 32 of the Decree).

As soon as the reasons for the arrest cease to exist the release of the accused must be ordered. This decision may be taken proprio motu by the "Auditeur-Militair" before the trial but only after the decision to refer the case to the Military Court. The Military Court has a similar competence, but only at the request of either the "Officier-Commissaris" or the accused himself. The "Auditeur-Militair" is heard in relation to this request. The accused is equally heard if he requests his release for the first time (Art. 34 of the Decree).

22. If the accused is in detention at the first hearing of the Military Court the court will decide whether the nature and circumstances of the case require the continued detention of the accused during the trial. The Court may also take such decision at a later stage in the proceedings, having heard the "Auditeur-Militair" and the accused, assisted by counsel (Art. 151 and 156 of the Decree).

B. The arrest and detention of the applicants

23. All three applicants were, at the time of the relevant facts, conscript soldiers serving in different units of the Netherlands Armed Forces. MM. de Jong and Baljet were incorporated in the 44th armoured infantry in Zuidlaren, Mr. de Jong as from 5 July 1978 and Mr. Baljet as from 3 May 1978. Mr. van den Brink was forcibly incorporated as from 20 November 1979 in the Training Centre of the Technical Service in Utrecht, when he failed to register.

a) MM. de Jong and Baljet

24. On 29 January 1979 Mr. de Jong refused to participate in a particular exercise. Shortly before, on 17 January 1979, he had lodged an application with the Minister of Defence in order to be recognised as a conscientious objector in accordance with the procedure of the Act on Conscientious Objections for Military Service (Wet Gewetensbezwaren Militaire Dienst).

25. On 25 January 1979 Mr. Baljet, who had introduced a similar request with the Minister of Defence on 18 January 1979, equally refused to participate in a particular exercise.

26. Thereupon the applicants were placed under arrest by their respective commanding officers, in accordance with Art. 7 of the Decree and accused of deliberate disobedience which constitutes a criminal offence under Art. 114 of the Military Penal Code.

Mr. de Jong was detained from 29 January 1979 in the military barracks in Assen; Mr. Baljet from 25 January 1979 in the military barracks in Zuidlaren.

On 30 January 1979 they both appeared before the "Auditeur-Militair" in Arnhem. Thereafter they were transferred to the Disciplinary Unit (Depotafdeling van het Depot voor Discipline) in the King William III Barracks in Nieuwersluis.

27. Following a recommendation by the "Auditeur-Militair" MM. de Jong and Baljet were referred to trial by the Military Court on 5 February 1979 (Art. 11 of the Decree). On the same day the applicants' release was ordered by the commanding general (Art. 14 of the Decree) and criminal proceedings were suspended as a result of the initiation of the examination of their request to be recognised as conscientious objectors (Art. 4, para. 2 of the Act on Conscientious Objections).

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28. On 7 February 1979 they appeared before the Advisory Board on matters concerning conscientious objectors. Their request was granted and they were discharged from military service.

29. On 8 February 1979 the applicants brought a hierarchical complaint for unfair treatment against the commanding officer who had ordered and confirmed their arrest. The applicants submitted so far as relevant that the decisions ordering and maintaining their arrest taken in accordance with Art. 7 of the Decree were in breach of Art. 5 (1) (c) and 5 (3) of the Convention. The divisional commander rejected the applicants' complaint with explicit reference to the position of the Netherlands Government as expressed in parliament in 1971/1972, according to which the provisions concerned were considered to be in accordance with Art. 5 of the Convention, on the understanding that a final decision on this question was within the competence of the courts. Both applicants' complaints were rejected on 1 March 1979.

30. On 7 May 1979 the applicants addressed a request for compensation to the Minister of Defence relying on Art. 5 (5) of the Convention.

On 25 July 1979 the Under Secretary of State for Defence dismissed the applicants' request on the grounds that there was no basis for compensation, as none of the provisions of Art. 5 had been violated;

In respect of Art. 5 (1) (c) the Under Secretary stated that all requirements had been observed. The applicants had been brought before the "Auditeur-Militair", who must, in his view, be regarded as a "competent legal authority" within the meaning of that provision. The applicants had confessed that they had committed a criminal offence and the fact that the applicants continued to refuse to obey was sufficient reason to assume that they would refuse on a further occasion to obey an order and thereby commit a further offence.

Moreover the detention was in accordance with Art. 7 (2) (c) of the Decree. The mere fact that this particular ground for detention (maintenance of discipline) was not set out in the Convention did not affect its lawfulness, since the requirements of the Convention itself had been observed.

In respect of Art. 5 (3) the Under Secretary of State expressed the view that the "Auditeur-Militair" can be regarded as "... other officer authorised by law to exercise judicial power". He referred in this respect to the above views expressed by the Ministers of Defence and Justice in 1972.

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In respect of Art. 5 (4) the Under Secretary of State held that the delay mentioned in Art. 13 of the Decree (14 days) was compatible with the European Convention. Moreover Art. 34 of the Decree stipulated that once a case has been referred to the Military Court, the latter court can order the release. In the case of the applicants, this decision was taken 7 and 11 days respectively after their arrest. In the light of the above, the Under Secretary of State considered that the applicants had no claim under Art. 13 of the Convention either.

b) Mr. van den Brink

31. Mr. van den Brink, who had been forcibly incorporated on 20 November 1979 upon his failure to register in due time, was, upon his arrival in the Training Centre of the Technical Service in Utrecht, asked to take receipt of his military uniform and dress himself in it, which he refused to do. He persisted in his refusal, although it was pointed out to him that his refusal constituted an offence under Art. 114 of the Military Penal Code. He was then placed the same day under arrest by the commanding officer.

32. On 22 November 1979 he appeared before the "Auditeur-Militair". He was then transferred to the military House of Detention in Nieuwersluis.

33. Following a recommendation by the "Auditeur-Militair" the applicant was referred for trial by the Military Court on 26 November 1979 (Art. 11 of the Decree). It was at the same time decided that the applicant be kept in detention (Art. 14), with a view to the maintenance of military discipline amongst other servicemen. He was then transferred to the House of Detention in Leeuwarden.

34. On 28 November 1979 the applicant was heard by the "Officier-Commissaris" (Art. 33 of the Decree) at the Military District Court in Arnhem.

35. On 30 November 1979 the "Auditeur-Militair" requested that the applicant's detention be prolonged.

The Military Court examined this request on 6 December 1979 and acceded to this request by prolonging the detention for another 30 days (Arts. 7, 14, 31 and 33 of the Decree). It rejected the applicant's complaint under Art. 5 (3) of the Convention and considered that the necessary speed in the present proceedings had been observed as the decision to refer the case to the Military Court had been taken 6 days after his arrest. It further considered that the applicant's arrest had been ordered in accordance with Art. 5 (1) (c) of the Convention.

The applicant's detention was subsequently regularly prolonged by the Military Court.

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36. On 6 February 1980 the trial took place before the Military Court. Applicant's counsel submitted that the applicant had committed the offence of which he was charged, because he had been prevented by circumstances beyond his control (overmacht) to perform his military service or to rely on the Act on Conscientious Objection. He invoked in this respect Art. 9 of the European Convention on Human Rights and Art. 14 in that military service of Jehovah witnesses was automatically suspended, and the final act of the Helsinki Conference. The applicant repeated his complaint under Art. 5 (3) of the Convention.

The Military Court rejected all complaints on 20 February 1980. It recalled that the Act on Conscientious Objections provided for specific procedures to obtain the status of conscientious objector and that the applicant, who had failed to make use of the proceedings, could not otherwise validly invoke "circumstances beyond his control". It confirmed its previous decision of 6 December 1979 on the issue under Art. 5 (3) of the Convention.

The applicant was convicted and sentenced to 18 months' imprisonment, the time spent on remand being deducted.

37. The applicant appealed to the Supreme Military Court.

A hearing took place on 7 May 1980. The applicant requested his release. The Court did not accede to his request. It held that the relationship between the detention order and its prolongation on the one hand, and the necessity of maintaining discipline amongst servicemen on the other hand, lay in the fact that it was necessary - with a view to maintaining discipline - to prevent the repetition of the offence. It further considered that the reasons for his arrest - reasonable suspicion that the applicant had committed a criminal offence - was still valid. Consequently the Court considered that Art. 5 (1) (c) had been complied with, and that it saw no ground to release the applicant. As to the applicant's complaints under Art. 5, paras. (3) and (4) of the Convention and Art. 13 equally invoked by the applicant, the Court held that the time elapsed between the applicant's arrest and his appearance before the "Officier-Commissaris" on 28 November 1979 had come close to the limits drawn by Art. 5 (3) but had not transgressed them.

On 19 May 1980 the applicant was convicted and sentenced to eighteen months' imprisonment by the Supreme Military Court.

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38. The applicant introduced a plea of nullity with the Supreme Court.

On 4 July 1980 the applicant requested once more his release. He alleged a violation of Art. 5 (1) (c) and of Arts. 5 (3), 5 (4) and 13 of the Convention.

On 15 August 1980 the Supreme Court dismissed the applicant's request. It considered the applicant's complaint under Art. 5 (1) (c) of the Convention to be unfounded since it appeared from the decision of the Supreme Military Court endorsed by the Supreme Court that in the present case the continuation of the detention on remand was necessary for reasons of fear of repetition of a criminal offence of which the applicant had been convicted by the Military Court, which would be unacceptable in the light of the need for the maintenance of military discipline.

The Supreme Court went on to consider that the remaining complaints contained in the petition were all based on the (erroneous) assumption that the decision by which the Military Court had prolonged the detention (Art. 31 of the Decree), without observing Art. 5, paras. (3) and (4) and Art. 13, was void and would entail the nullity of all subsequent decisions on the maintenance of the detention.

The Court could not accept that reasoning, stating that, in general a judicial decision ceases to exist by annulment by a higher judicial body. Where, however, the law does not provide for a remedy, the judicial decision cannot be considered void on the ground that it is vitiated by formal or material defects. At the in the present case the detention on remand was based on a lawful decision of the Military Court, the alleged violations of the Convention did not as such warrant the conclusion that the applicant ought to be released by the Supreme Court.

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III. Submissions of the Parties

39. The Parties' submissions concerning the facts of the case (II, B.) and the relevant domestic law (II, A) are incorporated in the preceding section of the Report. The substance of the remaining written and oral submissions made by them in the course of the proceedings set out below concern therefore only the legal issues under the Convention.

A. Art. 5 (1)

40. The applicants contend that their arrest and detention was in breach of Art. 5 (1) of the Convention since it did not fall within any of the sub-paragraphs of Art. 5 (1) of the Convention and in particular not within Art. 5 (1) (c). In this regard the applicants admit that there was reasonable suspicion that they had committed a criminal offence since, admittedly, they had refused to obey a particular order. They point out however that the ground on which their arrest and detention was based under the applicable domestic law - maintenance of discipline amongst other military (Art. 7 (2) (c) of the Decree)was not one listed in Art. 5, para. (1) (c) of the Convention. Thus Art. 5 (1) (c) had only been complied with in part. The applicants cannot accept that deprivation of liberty is permitted on other grounds other than those set forth in the Convention.

Art. 7 (2) (c) of the Decree is a provision which offers the possibility of arresting and detaining a person for reasons of general prevention of crime, which in their view is wholly unacceptable.

In any event the applicants de Jong and Baljet hold the view that the maintenance of discipline amongst the other military men was in no way compromised by their reliance on the Act on Conscientious Objections and their resulting refusal to obey a particular order.

41. The Government contest this view. Art. 7 of the Decree contains a twofold condition for arrest and detention. On the one hand Art. 7, para. 2 of the Decree enumerated a certain number of alternative grounds on which detention may be ordered, one of them being the requirement of maintaining discipline amongst the military. On the other hand Art. 7 (4) of the Decree stipulates that the detention order may only be given where a person is suspected of having committed a criminal offence, defined in the Military Penal Code, or an offence for which under the civil Code of Criminal Procedure detention on remand may be ordered, with the exception of those offences of which Military Courts take no cognisance.

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In the present case this dual condition had been fulfilled. The applicants were accused of a criminal offence of the Military Penal Code (Art. 114) and secondly there were good reasons to believe that by not depriving the applicants of their liberty serious problems would arise in the field of military discipline, since two applicants, MM. de Jong and Baljet, formed part of a unit which, upon a request of the Secretary General of the United Nations, was soon to be made available for the Lebanon and since the exercise in which they refused to participate was to take place in that particular context.

As regards the third applicant, the Government point out that if, as was feard, the applicant repeated the offence, the discipline amongst the other military could be compromised. In this context the fact that the applicant did not wish to rely on the Act on Conscientious Objections was equally taken into account.

B. Art. 5 (3)

42. The applicants submit that the "Auditeur-Militair" cannot be regarded as "a judge or other officer authorised by law to exercise judicial power" within the meaning of Art. 5 (3) of the Convention and that consequently they have not been brought "promptly" before such judge or other officer as Art. 5 (3) requires.

They refer in this respect to the Judgment of the European Court of Human Rights in the case of Schiesser (Eur. Court of Human Rights, Judgment of 4 December 1979, Vol. 34, para. 31) in which the Court has defined the conditions which the officer concerned has to satisfy in order to offer the guarantees befitting judicial power conferred on him by law.

43. The first of these conditions is independence of the executive and the parties. The applicants point out that Art. 276 of the Decree stipulates that the "Auditeur-Militair", in the exercise of his duties, is compelled to comply with orders given to him by the Minister of Justice, either directly or through the intermediary of the "Advocaat-Fiscaal". This constitutes in the view of the applicants a clear indication of the "Auditeur-Militaire's" lack of independence.

44. The court has next formulated a procedural requirement which puts the "officer" under the obligation of hearing the individual brought before him. In this respect the applicants do not deny that they have indeed been heard by the "Auditeur-Militair", and consequently consider that this requirement has been observed.

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45. The Court has further formulated a substantive requirement which "imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons".

46. According to the applicants the "Auditeur-Militair" does not meet this substantive requirement.

In this respect they point out that the "Auditeur-Militair" under the Decree(Art. 11) brings out advice to the commanding general or officer on the question whether the accused has to be referred to trial before the Military Court. It is true that under Art. 14 of the Decree the referral decision must necessarily be accompanied by a decision on the detention. The applicants deny however the Government's contention that in practice the "Auditeur-Militair's" advice to the commanding general or officer equally covers the question of arrest and/or detention. Normally the competent officer takes advice in the first place from his hierarchial inferiors.

47. The applicants further deny that, in general, the "Auditeur-Militair's" advice is binding. Art. 15 of the Decree offers to the "Auditeur-Militair", if the commanding general is not willing to refer a case to the Military Court contrary to the advice of the "Auditeur-Militair", a possibility to appeal to the High Military Court. However, if the commanding general wishes to refer a case to the Military Court against the advice of the "Auditeur-Militair", the referral simply takes place and no remedy is provided.

Summing up, the "Auditeur-Militair", before the referral decision, has merely an advisory function and only in relation to the question of referral. After the referral he acts as an autonomous prosecuting authority. It follows in the view of the applicants that the "Auditeur-Militair" does not meet the requirements of Art. 5, para. 3 of the Convention.

However even assuming that the "Auditeur-Militair" can be regarded as complying with Art. 5 (3), the applicants point out that the five days which elapsed between the arrest of Mr. Baljet and his appearance before the "Auditeur-Militair" cannot meet the requirement of promptness set by that provision.

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48. The Government deny that the lack of independence of the "Auditeur-Militair" follows, as suggested by the applicants, from Art. 276 of the Decree. The Government point out that in civil criminal law the public prosecutor is equally obliged to comply with orders given to him by the Minister of Justice.

The above provision has to be understood as a provision which constitutes the legal basis for issuing general guidelines on prosecution policy. For years the Minister of Justice has not acted on the basis of that provision in a concrete and specific situation.

It is in this context equally relevant in the Government's opinion that the "Auditeur-Militair" is situated outside the military hierarchical order. He is appointed by Royal Decree on proposal of the Minister of Justice after consultation with the Minister of Defence. This implies that the "Auditeur-Militair" cannot take any orders from the Minister of Defence or any other military authority.

49. The Government divide the functions of the "Auditeur-Militair" into two phases, the phase preceding the referral decision and the phase after the referral decision.

50. As regards the first phase, the Government affirm that the "Auditeur-Militair" decides, in the light of legal criteria, whether in a particular case the accused should be referred to trial by a military court and, subsequently, whether his detention on remand shall be ordered or detained.

The Government submit that, in line with the procedure under civilian criminal law, the accused cannot be placed in detention unless the "Auditeur-Militair" draws up a detention order to that effect.

Finally, no decision to refer a case may be taken unless the "Auditeur-Militair" has been consulted (Art. 11 of the Decree).

51. In the second phase, after the referral the "Auditeur-Militair" submits the case to the military court and acts henceforth as a prosecuting authority and may order the accused's release until the beginning of the trial (Art. 34 of the Decree).

52. As regards the substantive requirement, the Government explain that in practice the "Auditeur-Militair" advises the commanding general or competent commanding officer on the question whether conditions for detention as set out in Art. 7 of the Decree are fulfilled. This practice has undergone such a development that such advice has become binding.

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53. In addition under Art. 11 of the Decree the "Auditeur-Militair" brings out an advice on the question of referral, the accused having been heard, if possible. According to the Government in practice this hearing takes place in all cases where detention has been ordered.

In assessing whether a case should or should not be referred to the military court, the "Auditeur-Militair" includes in his considerations the question of detention since under Art. 14 of the Decree the decision on the referral has to be accompanied by a decision on the detention.

54. In conclusion, the Government draw the attention to a distinction between the role of the "Auditeur-Militair" of autonomous adviser before the referral and of a prosecuting authority after the referral. Contrary to what the applicants suggest, the "Auditeur-Militair" has a very strong influence on the decision of the competent officer.

55. Having concluded that the "Auditeur-Militair" meets the requirement of Art. 5 (3) of the Convention, the Government point out that the applicants were brought before that authority within one day (Mr. de Jong), 4 days (sic) (Mr. Baljet) and 2 days (Mr. van den Brink) which in their view is in conformity with the concept of promptness contained in Art. 5 (3).

C. Art. 5 (4)

56. The applicants emphasise that their arrest and detention had been ordered by a non-judicial authority.

Art. 13 of the Decree offers to the accused, who has been detained for a period exceeding 14 days, the possibility of addressing himself to the Military Court so that the latter may fix a time-limit within which either a decision to refer the case must be taken or the detention terminated. Subordinating the use of remedy to a court to either the referral decision or the evolvement of a period of 14 days is in the view of the applicants incompatible with Art. 5 (4) of the Convention.

57. The detention of MM. de Jong and Baljet was ended on 5 February 1979 when they were referred to the Military Court. Consequently they had never been in the position to avail themselves of a remedy to a court in order to challenge the lawfulness of their detention while they were still detained.

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As far as Mr. van den Brink is concerned, it is submitted that a period of six days which elapsed before the applicant could seize a court does not meet the requirement of "speediness" of Art. 5 (4).

58. The Government point out that under Art. 34 of the Decree the "Auditeur-Militair" may order the release of the accused after the referral and before the trial. The "Officier-Commissaris" had a similar competence. It has, the Government submit, become general and current practice to refer a case to the Military Court soon after the accused has been heard by the "Auditeur-Militair". Thus the accused may after the referral decision - on average four to five days after the arrest - seize the Military Court under Art. 34 of the Decree with a request for release.

This, in the view of the Government, is in conformity with Art. 5 (4).

59. Only if the referral has not been decided within 14 days, which in practice hardly ever occurs, the accused may, relying on Art. 13 of the Decree,ask the Military Court to fix a deadline within which either a decision on the referral must be taken or the detention ended.

The Government emphasise that in both procedures, whether under Art. 34 of the Decree or under Art. 13 of the Decree, Art. 5 of the Convention can be directly invoked and has precedence over national provisions conflicting with it.

60. In the light of the wording of Art. 5 (4): "speedily" and that of Art. 5 (3): "promptly", the Government stresses that Art. 5 (4) does not require that the accused should have immediate access to the court for the question of lawfulness of his detention.

61. As regards the cases in point, the Government consider that the fact that MM. de Jong and Baljet, because they were released at the same time as their case was referred to the Military Court, could not make use of a remedy, removed the interest of the applicants to do so.

They further consider that the six-day period which elapsed in the case of Mr. van den Brink to be in conformity with Art. 5 (4).

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D. Art. 13

61. The applicants consider that they were denied the right to an effective remedy before a national authority, within the meaning of Art. 13 of the Convention, on the same grounds as set out above in respect of Art. 5 (1) (c), (3) and (4) of the Convention. They draw particular attention to Art. 13 of the Decree which allows for access to a court after 14 days of detention. This they consider cannot be regarded as an "effective" remedy which the meaning of Art. 13 of the Convention.

62. The Government recall that in their view there has been no breach of any of the rights and freedoms set forth in the Convention. However, even assuming this were the case, the Decree provided for such effective remedy. Consequently they consider that Art. 13 of the Convention has not been breached.

E. Arts. 14 and 18

63. The applicants explain that under the Act on Conscientious Objections conscripts who have introduced a request on the basis of that law within 30 days after their conscription are granted leave pending the decision. Those who apply for the status of conscientious objector after that period normally have to wait one or two days before they are granted leave, namely the time required for the request to be transmitted by the commanding officer and to arrive at the Desk for Conscientious Objections in The Hague. Given the above short period of time, normally these conscripts continue to perform their military duties.

64. MM. de Jong and Baljet feel that their request was transmitted after an unusually long delay, since their applications lodged on 17 January 1979 (Mr. de Jong) and 18 January 1979 (Mr. Baljet) apparently reached the Board on Conscientious Objections only on 5 February 1979 as on that day they were released from detention as permitted under Art. 4 of the Act on Conscientious Objections.

The subsequent proceedings were exceptionally fast since the very day they were heard by the above Board, 7 February 1979, the Minister of Defence acceded to their request.

This, in the view of the applicants, constitutes a differential treatment which could not be justified under Art. 14 of the Convention.

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65. Moreover, they submit that it was the exceptional mission envisaged for the unit of which they formed part, namely a peace mission in the Lebanon, which had motivated this differential treatment. This they consider constitutes in addition a breach of Art. 18 of the Convention, their rights under Art. 5 having been restricted for other purposes than those for which they have been prescribed.

66. The Government deny that the applicants de Jong and Baljet have, as alleged, been treated differently from other servicemen, if their situation was comparable at all. They draw the attention to the fact that where a request for recognition as conscientious objector is made after 30 days the conscription leave is never granted automatically. In the cases in point there was no reason to do so since the Netherlands Government were confronted with a request by the Secretary General of the United Nations to provide, within a period of two months, i.e. at very short notice, a unit for the Lebanon. If the mere application for recognition as conscientious objector would have sufficed to obtain leave this would have had serious repercussions on the discipline. The decision not to grant leave to the applicants had been taken after carefully weighing mutual interests and was, in the Government's opinion, correct.

Consequently the Government hold the view that Art. 14 has not been breached.

The Government do not feel the need to make submissions on Art. 18 of the Convention.

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IV. Opinion of the Commission

Points at issue

67. The following are the points at issue in the present case:

1. Whether the applicants' arrest and detention were compatible with Art. 5 (1) of the Convention and in particular whether it was justified under sub-para. (c) of that provision;

2.a) Whether or not the "Auditeur-Militair", can be considered as a "judge or other officer authorised by law to exercise judicial power" within the meaning of Art. 5 (3); and in the light thereof

b) Whether or not there was any breach of Art. 5,para. (3) insofar as it guarantees a right to persons detained under Art. 5,para. (1) (c) to be brought"promptly"before a judge or other judicial officer;

3. Whether the applicants were deprived of their right, under Art. 5 (4) to take judicial proceedings whereby the lawfulness of their detention could be speedily determined;

4. Whether the applicants were deprived of an effective remedy, in breach of Art. 13 of the Convention, to challenge their deprivation of liberty which they considered to be in breach of the Convention;

5. Whether the applicants de Jong and Baljet's deprivation of liberty constituted discrimination prohibited by Art. 14 of the Convention in conjunction with Art. 5 of the Convention;

6. Whether the restrictions of the right of MM. de Jong and Baljet under the Convention and in particular Art. 5, taken alone and in conjunction with Art. 14, were applied for other purposes than those for which they had been prescribed in breach of Art. 18 of the Convention.

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A. Art. 5 (1)

68. The Commission has first considered the applicants' complaint that their arrest and detention were contrary to Art. 5 (1).

The placement of the applicants first in a cell in the military barracks and their subsequent confinement to a military detention house and as far as Mr. van den Brink is concerned, to an ordinary prison, did constitute a deprivation of liberty within the meaning of Art. 5 of the Convention (cf. Eur. Court of Human Rights, Case of Engel and others, judgment of 8 June 1976, Series A, Vol. 22, para. 59).

Both Parties have confined the arguments as to the justification thereof to sub-para. (c) of Art. 5 (1). The Commission does not find that any of the other sub-paras. of this provision are relevant in the present context and consequently confines itself to examining the applicants' detention in the light of the above provision.

69. Art. 5 (1) of the Convention is worded in the following terms:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or where it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ..."

70. Under domestic law the legal basis of each of the applicants' arrests was the Sovereign Decree on the Administration of Justice in the Army and Air Force (Besluit Rechtspleging bij de Land- en de Luchtmacht), hereinafter referred to as the Decree.

The applicants were conscript servicemen in the Netherlands Armed Forces and as such their conduct was circumscribed by the regulations on military discipline and military penal law.

71. In that capacity the applicants committed acts which constituted a criminal offence under Art. 114 of the Military Penal Code, namely insubordination.

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As a result of this the competent officers placed each applicant under arrest.

72. The legal basis for those decisions is to be found in Arts. 4 and 5 of the Decree. Under these provisions every officer and non-commissioned officer is empowered to order servicemen of lower rank who are suspected of having committed a serious offence to be detained if the circumstances require their immediate deprivation of liberty.

73. The detention on remand of the applicants was confirmed by the respective commanding officers on the basis of Art. 7 of the Decree. Under para. 2 of that provision detention on remand may be ordered:

a) if from the accused's behaviour or certain personal circumstances concerning him a serious risk of absconding can be inferred;

b) if from certain circumstances it can be inferred that weighty reasons of public safety (further specified) require the immediate deprivation of liberty;

c) if this is required with a view to the maintenance of discipline amongst other servicemen.

Para. 4 of that provision states that the above order can only be made where a person is accused of an offence penalised in the Military Code, or of an offence for which under the civilian Code of Criminal Procedure detention on remand is permitted, with the exception of those offences of which the Military Court takes no cognisance.

74. The reason invoked by the authorities for the applicants' arrest was the maintenance of discipline amongst other servicemen as set out under Art. 7 (2) (c) of the Decree.

75. The applicants consider their detention to be unlawful since the above ground is not referred to in Art. 5 (1) (c) of the Convention.

The Government explain that the necessity of maintaining discipline amongst other military is tantamount to the necessity of preventing the accused from committing a further offence and that the applicants consequently fell under the second category of reasons listed in Art. 5 (1) (c) of the Convention.

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76. The Commission points out that in Art. 5 (1)(c) of the Convention are listed three alternative circumstances in which detention may be ordered: where a person is reasonably suspected of having committed an offence or when it is reasonably considered necessary to prevent him from committing an offence or fleeing after having done so. The wording "or" separating these three categories of persons clearly indicates that this enumeration is not cumulative and that it is sufficient if the arrested person falls under one of the above categories.

77. In the present case the applicants were suspected of having committed a criminal offence, which they did and still do not deny, and their arrest and detention was effected in accordance with the procedure prescribed by domestic law for the purpose of bringing them before the competent legal authority on that suspicion. In these circumstances the Commission is satisfied that the applicants' arrest was lawful and justified under Art. 5, para. (1)(c) of the Convention.

Conclusion

78. The Commission concludes unanimously that there has been no breach of Art. 5 (1) in the present case.

B. Art. 5 (3)

79. The Commission must next consider the applicants' complaints that they were not brought promptly before a judge or other officer authorised by law to exercise judicial power within the meaning of Art. 5 (3) of the Convention.

80. Art. 5 (3) reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within reasonable time or to release pending trial ....".

81. The above provision which forms a whole with para. (1)(c) of Art. 5 (cf. Eur. Court of Human Rights, Lawless Case, judgment of 1 July 1961, Series A, No. 3, p. 52), is to afford to individuals deprived of their liberty a special guarantee: a procedure of judicial nature designed to ensure that no one should be arbitrarily deprived of his liberty (cf. Eur. Court of Human Rights, Schiesser Case, judgment of 4 December 1979, Series A, Vol. 34, para. 30 with further references).

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82. As the wording of Art. 5 (3) shows it creates for the Contracting States the obligation to bring a person deprived of his liberty automatically and as a matter of course promptly before a judge or other officer who is authorised by law to exericse judicial power so that the latter may decide whether or not further to detain the person ("shall be brought promptly/doit être aussitôt traduite").

83. The applicants, who were brought before the "Auditeur-Militair", contend that this officer is not an officer authorised by law to exercise judicial power within the meaning of Art. 5 (3). The Government hold the opposite view.

The applicants submit that, since Art. 276 of the Decree empowers the Minister of Justice to give instructions to the "Auditeur-Militair" in the exercise of his functions, the "Auditeur-Militair" lacks independence from the Executive as required by Art. 5 (3) (cf. Eur. Court of Human Rights, Schiesser Case, judgment of 4 December 1979, Series A, Vol. 34, para. 31).

The Government submit that this provision, which has its equivalent in civilian criminal law, constitutes merely a basis for the Minister of Justice to issue general guidelines on prosecution policy and that, at least in recent times, the Minister of Justice has not acted, on the basis of that provision, in a concrete case. Consequently, in the Government's view, the "Auditeur-Militair's" lack of independence from the Executive cannot be inferred from that provision.

However, the Commission does not find it necessary to investigate that question in more detail since the "Auditeur-Militair" cannot take a decision on the detention in the sense of Art. 5 (3).

84. Art. 5 (3) imposes on the judge or other judicial officer the obligation of reviewing the circumstances militating for or against detention, of deciding by reference to legal criteria whether there are reasons to justify detention and of ordering release if there are no such reasons (cf. Eur. Court of Human Rights, Schiesser Case, judgment of 4 December 1979, Series A, Vol. 34, para. 31 with further references).

In this respect the applicants point out that the "Auditeur-Militair" under the applicable law, namely the Decree, is not, as long as an accused has not been referred to the Military Court, vested with the power to take a decision on the question of his detention under Art. 11 of the Decree. He can merely state an opinion on the question whether or not a particular case ought, in his view, be referred to the Military Court.

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In reply to that argument the Government submit that in practice, because the referral decision must necessarily be accompanied by a decision on the maintenance of the detention of the accused (Art. 14 (2) of the Decree), the opinion of the "Auditeur-Militair" equally covers the question of detention. Moreover it is always followed and can thus be considered as binding.

85. It is clear from the relevant provisions of the Decree concerning status and powers of the "Auditeur-Militair" that the decision to release the accused does not come within the competence of the "Auditeur-Militair" in the phase preceding the decision to refer the accused to the Military Court. An advice, even if generally followed, cannot be regarded as a decision which Art. 5 (3) requires.

Indeed, in the cases of the three applicants, the "Auditeur-Militair" has not decided on the maintenance of their detention. It is not clear whether he made a recommendation concerning their release. In any event MM. de Jong and Baljet were released on the basis of an order by the competent officer. Mr. van den Brink was not released during the period preceding his trial.

The Commission finds, therefore, that the procedure before the "Auditeur-Militair" cannot be held as complying with the guarantee included in Art. 5 (3).

86. The question could be raised, however, whether Art. 5 (3) is satisfied given the fact that upon reference of the cases to the Military Court, that Court is called upon also to take decisions with regard to the continued detention of the person detained. This would presuppose of course that the applicants' appearance before the Military Court can be regarded as complying with the notion of "promptly" within the meaning of Art. 5 (3).

87. In the present case, as regards MM. de Jong and Baljet, the Military Court became competent to decide on the applicants' detention on 5 February 1979, i.e. 7 and 11 days respectively after their arrest. However that competence was not exercised since their release was ordered on the same day as a result of the examination of their request for being recognised as conscientious objectors. Mr. van den Brink was referred to the Military Court on 26 November 1979, i.e. 6 days after his arrest and a Military Court's first decision to prolong the detention was taken on 6 December 1979, i.e. 16 days after his arrest.

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88. By demanding that the person arrested must be brought "promptly" before a judge or other judicial officer, Art. 5 (3) protects the individual against prolonged police or administrative detention. In the military context this applies with regard to detention ordered by military officers.

The question whether or not the requirement of promptness laid down in Art. 5 (3) is satisfied must be assessed in the light of legal provisions in force in the countries which have ratified the Convention. Adopting this approach in an earlier application concerning the Netherlands (Application No. 2894/66, Yearbook 9, Vol. 9, p. 564), the Commission considered a delay of four days in common criminal proceedings to be acceptable. Later, in an application against Belgium, it indicated that only exceptional circumstances could justify such a lapse of time (Application No. 4960/71, Coll. of Dec. 41, p. 49).

89. Without finally deciding where the limit lies the Commission finds that periods of 7 days or more after the arrest cannot be considered as being within the concept of "promptly" in the sense of Art. 5 (3), even bearing in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces (cf. Eur. Court of Human Rights, case of Engel and others, Vol. 22, para. 54).

Taking into account the above decisions of the Commission and having regard to the exigencies of military justice, the Commission finds that periods of 7, 11 and 16 days are not in line with the concept of "promptness" referred to in Art. 5 (3) of the Convention.

Conclusion

90. The Commission concluded by thirteen votes against one that in the present case there has been a breach of Art. 5 (3) of the Convention.

C. Art. 5 (4)

91. Para. 4 of Art. 5 of the Convention is in the following terms:

> "4. 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".

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92. The applicants submit that although the law offers a remedy to the Military Court for judicial review, that remedy is not effective since the detained can only avail himself of that remedy either after a decision to refer the case to the Military Court has been taken or after 14 days of detention have elapsed (Art. 13 of the Decree).

93. The Government submit that in practice the decision to refer the accused to trial by the Military Court is taken immediately after the "Auditeur-Militair" has heard the detainee, e.g. maximum 4 to 5 days after the arrest, which, in their view, is sufficient for the purpose of Art. 5 (4).

In any event they consider that applicants de Jong and Baljet had lost all interest to take such proceedings as they were released on the day they were referred to the Military Court and that the period of 6 days which elapsed between Mr. van den Brink's arrest and the decision to refer him to the Military Court was not excessive for the purpose of Art. 5 (4).

94. The Commission recalls that the purpose of Art.5 (4) is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected (Eur. Court of Human Rights, Vagrancy Cases, judgment of 18 June 1981, Series A, para. 76).

95. The Decree provides in Art. 13 for a remedy to a court, namely the Military Court and it is not in dispute between the Parties that this Court can be considered as an authority which provides the fundamental guarantees of judicial procedure applicable in matters of deprivation of liberty.

Be that as it may, the Commission notes that this procedure is available only after the case has been referred to the Military Court or after 14 days of detention have elapsed. This shows that the applicants de Jong and Baljet had no remedy available during 7 and 11 days respectively of their detention. Since Art. 5 (4) guarantees unconditional and unlimited access to a court to anyone deprived of his liberty not on the basis of a judicial decision, the Commission does not find it important whether the applicants would have been able to address themselves to a court if they had been detained longer, i.e. once their case was pending before the Military Court.

For these reasons it considers irrelevant the fact that the applicants de Jong and Baljet were released on the day the Military Court achieved its competence to exercise its judicial review.

96. Mr. van den Brink did not avail himself of the remedy provided for by Art. 13 of the Decree immediately after the Court had become competent on 26 November 1979. The Military Court only examined the matter of detention on 6 December 1979. Since already on 28 November 1979 the applicant was heard by the "Officier-Commissaris" he could be certain that a judicial procedure was being conducted and that the question of his detention was being looked into. Consequently, there was no need for him to apply to the Court himself and the fact that he did not apply cannot deprive him of the right to complain under Art. 5 (4). Since Mr. van den Brink had been arrested on 20 November 1979 he had no access to a court during six days. Art. 5 (4) does not permit such a delay after deprivation of liberty.

Conclusion

97. The Commission concludes by nine votes against one with four abstentions that there has been a breach of Art. 5 (4) of the Convention.

D. Art. 13

98. The applicants also maintain that the impossibility of bringing proceedings before a court against the alleged unlawfulness of their detention amounts to a violation not only of Art. 5 (4) but also of Art. 13 of the Convention because there is no national authority to provide an effective remedy for a violation of Art. 5 (1).

99. Art. 13 reads as follows:

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

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100. In the Commission's opinion, however, it is not possible to exercise the remedy provided by Art. 13 in addition to that provided by Art. 5 (4). Since it guarantees a right to proceedings before a "court" with the special guarantees of independence and procedure attaching thereto (cf. Eur. Court of Human Rights, Neumeister Case, judgment of 27 June 1968, Series A, p. 44) and not merely before an "authority" of unspecified status, Art. 5 (4) must be considered as a lex specialis with respect to the general principle of providing an effective remedy for any victim of a violation of the Convention. The Commission has just examined the complaint based on Art. 5 (4) and therefore considers it is unnecessary to examine the merits of the question whether the same facts also constitute a violation of the more general principle contained in Art. 13 (cf. Application No. 7341/76, DR 6, pp. 170, 175).

E. Art. 14 in conjunction with Art. 5

101. According to the applicants, the deprivation of liberty of which they complain did not comply with Art. 5 read in conjunction with Art. 14, 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."

102. They submit that as a general rule, conscientious objectors are granted leave as soon as they have lodged a request to be recognised as such.

103. The Commission note however, as the Government have pointed out, that under the Dutch Act on Conscientious Objection and its Ministerial Decree of 31 July 1970, criminal proceedings may be suspended when a request for recognition as conscientious objector has been introduced, in particular when that request is deposited before or within 30 days after conscription.

Accordingly, the suspension must be decided in each particular case, having regard, inter alia, to the time which elapsed since the conscription and the lodging of the request.

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104. Applicants de Jong and Baljet have introduced their request more than six months after they entered military service and Mr. van den Brink has never made such request.

105. In the light of these circumstances the Commission considers that the fact that criminal proceedings were not suspended in the case of the applicants did not result in any discriminatory treatment prohibited by Art. 14 of the Convention.

Conclusion

106. The Commission concludes unanimously that there has been no breach of Art. 14 in conjunction with Art. 5 of the Convention.

107. In the absence of any substantial submissions of the Parties, the Commission does not consider it necessary to examine the alleged violation of Art. 18 of the Convention.

Secretary to the Commission

(H.C. KRÜGER)

President of the Commission

(C.A. NØRGAARD)

Separate opinion of Mr. Trechsel joined by MM. Kellberg and Gözübüyük

I have abstained in the vote on Art. 5 (4) not because of any doubts as to whether the applicants did or did not have the right to have the legality of their detention controlled by a court. I fully agree with the Commission's majority that they had no such right.

However, with regard to the cases of MM. van den Brink and de Jong, I did not find it necessary for the Commission to express an opinion in this respect. In fact, it has already found that these two applicants had not been brought promptly before a "judge or other officer ..." in the sense of Art. 5 (3). This ought to have happened during the first three, possibly four, days after their arrest. They could apply to a court on the 6th and 7th day after their arrest (para. 96); that would have meant 2 - 3 days after having been brought before a "judge ..." in the sense of Art. 5 (3). The question now arises whether from the moment of the arrest onwards the right to a remedy under Art. 5 (4) is immediately guaranteed independently from the right to be brought before a "judge or other officer..." or whether there is any link between the safeguards set out in paras. 3 and 4 of Art. 5.

In my view, such a link does indeed exist. Para. 4 is the general provision applying to every person deprived of his liberty. The following aspects of the interpretation of this rule have to be remembered in the present context.

In its decision on admissibility of application No. 7376/76 (Decisions and Reports 7), p. 123, the Commission said that Art. 5 (4) "seeks to secure judicial control of a person under arrest or detention" and that, in principle, that right applies "as from the moment of his being arrested or detained". In that case, however, the deprivation of liberty "ceased within a period shorter than that which would have been necessary for the application of the procedure envisaged in Art. 5 (4)". The absence of such a remedy was therefore not regarded as constituting a violation of the Convention.

On the other hand, the Court has consistently held that, whenever deprivation of liberty is based on reasons which are subject to change and may cease to exist, the possibility of a review of the lawfulness of that detention may be required "at reasonable intervals" (judgments in the cases of Winterwerp, Series A, No. 33, para. 55, X. v. the United Kingdom, Series A, No. 46, para. 52, and Van Droogenbroeck, Series A, No. 50, para. 45). This must also apply to detention on remand.

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In the case of a person arrested under the suspicion of having committed a criminal offence (Art. 5 (1) (c)), Art. 5 (3) provides for an additional, automatic control of the lawfulness of detention. Although that control does not have to be carried out by a "court" as in para. 4, it requires the intervention of an independent "officer" who acts in a judicial way and has to hear the arrestee in person (Court's judgment in the Schiesser Case, Series A, No. 3, para. 31). In this respect it is clearly more favourable to the person in question than para. 4.

In the present case, the Commission has found a violation of Art. 5 (3). The majority then go on to ask whether, in addition, the requirements of Art. 5 (4) were met. In denying this, they take into account the number of days the applicants spent in detention before they had the possibility to submit the question of the lawfulness of their detention to a court. Implicitly, this finding is based on the assumption that the safeguards of paras. 3 and 4 of Art. 5 apply concurrently. This would mean, for example, that an arrestee must have the possibility of seizing a court even before he has been seen by the "judge or other officer ...".

It is on this point that I cannot agree with the majority. In my view, such a cumulation of remedies would be quite uneconomical and could lead to puzzling results, in particular when the judge and the court reach different conclusions. Such an interpretation of Art. 5 would, in my view, be unreasonable.

The logic inherent in Arts. 5 (1) (c), (3) and (4) indicates a sequence of steps in the review. First, that review must be made "promptly" by a "judge or other officer ..."; later on, access must be open to a court. If one assumes that the first step must be taken after some hours - at the utmost after four days (cf. the Commission's decision on admissibility of Application No. 2894/66, Yearbook 9, p. 564), the applicant van den Brink had then access to the court two days later; the applicant de Jong three days later. The court could then have decided immediately. Had they immediately after their hypothetical appearance before the judicial officer filed an application for review of the lawfulness of their detention, and had the court decided within two or three days, this would certainly have been considered to be in conformity with the requirement of speediness ("shall be decided speedily") in para. 4. The question could even be raised whether a "reasonable interval" could be accepted between the two steps of review.

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In the circumstances of the present case, as far as it concerns the applicants van den Brink and de Jong, I do not find it necessary to answer this question. It arises, however, in the case of the applicant Baljet who had to wait 11 days until the lawfulness of his detention could be determined by the court, i.e. at least 7 days after he ought to have been brought before a "judge or other officer". There remains, therefore, an interval of several days.

In my view, it is not possible to decide in abstracto which interval between successive reviews is reasonable in cases of detention on remand. This depends mainly upon the overall duration of the deprivation of liberty. As a basic rule one could say that after a longer period of detention the interval between one review and the next may be longer. In the very initial phase of detention, however, no such interval is justified in my view. In other words, while the safeguards of paras. 3 and 4 are not applicable concurrently, the right under para. 4 can be exercised immediately after the arrestee has been brought before the "judge or other officer ...". This means that the proceedings under para. 4 constitute de facto some sort of appeal from those set out in para. 3 of Art. 5.

It follows from the above considerations that I agree with the finding of the majority as far as the applicant Baljet is concerned, but I find no separate violation of Art. 5 (4) in the cases of the applicants van den Brink and de Jong.

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APPENDIX I

History of Proceedings

Item	Date	Note
Examination of admissibility		
- Introduction of applications Nos. 8805/79 and 8806/79, de Jong and Baljet	3 August 1979	
- Registration of applications Nos. 8805/79 and 8806/79	12 November 1979	
- Commission's deliberations and decision to join the applications and to give notice of the applications to the Netherlands Government and invite their written observations on admissibility and merits of applications Nos. 8805/79 and 8806/79	6 May 1980	MM. G. SPERDUTI, Acting President C.A. NØRGAARD B. DAVER C.H.F. POLAK J.A. FROWEIN G. JÖRUNDSSON G. TENEKIDES S. TRECHSEL B. KIERNAN M. MELCHIOR J. SAMPAIO J.A. CARRILLO
- Receipt of Government's observations on admissibility and merits of application No. 8805/79 and 8806/79	13 August 1980	
- Receipt of observations in reply of applications Nos. 8805/79 and 8806/79	9 October 1980	
- Introduction of application No. 9242/81, van den Brink	17 December 1980	
- Commission's deliberations and decision to hold a hearing on the admissibilty and merits on applications Nos. 8805/79 and 8806/79	18 December 1980	MM. J.E.S. FAWCETT, President C.A. NØRGAARD F. ERMACORA L. KELLBERG C.H.F. POLAK J.A. FROWEIN G. JÖRUNDSSON G. TENEKIDES S. TRECHSEL B. KIERNAN N. KLECKER J. SAMPAIO J.A. CARRILLO

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Item	Date	Note
- Registration of application No. 9242/81	19 January 1981	
- Hearing on admissibility and merits of applications Nos. 8805/79 and 8806/79	7 May 1981	MM. J.E.S. FAWCETT, President C.A. NØRGAARD B. DAVER J.A. FROWEIN G. JÖRUNDSSON S. TRECHSEL B. KIERNAN N. KLECKER M. MELCHIOR J.A. CARRILLO For the Government Miss F.Y. van der WAL MM. W. BREUKELAAR J. DEMMINK A.J.G.S.M. VAN HELLENBERG HUBAR For the applicants MM. P.T. HUISMAN J.H.H. BALJET
- Commission's deliberations and decision on admissibility of applications Nos. 8805/79 and 8806/79	7 May 1981	The same members as present at the hearing
- Commission's deliberations on application No. 9242/81 and decision to give notice of the application to the Netherlands Government and invite their written observations on admissibility and merits	7 May 1981	MM. J.E.S. FAWCETT, President C.A. NØRGAARD B. DAVER J.A. FROWEIN G. JÖRUNDSSON S. TRECHSEL B. KIERNAN N. KLECKER M. MELCHIOR J.A. CARRILLO
- Government's letter on friendly settlement of applications Nos. 8805/79 and 8806/79	7 August 1981	

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Appendix I

Item	Date	Note
- Receipt of Government's observations on admissibility and merits on application No. 9242/81	14 August 1981	
- Applicants' letter (Nos. 8805/79 and 8806/79) waiving opportunity to present observations on the merits	18 August 1981	
- Government's letter waiving opportunity to present observations on the merits in applications Nos. 8805/79 and 8806/79	18 September 1981	
- Receipt of applicants' observations in reply on application No. 9242/81	12 October 1981	
- Commission's deliberations on future procedure in applications Nos. 8805/79 and 8806/79	15 October 1981	MM. J.A. FROWEIN, Acting President G. JÖRUNDSSON G. TENEKIDES B. KIERNAN M. MELCHIOR J. SAMPAIO A.S. GÖZÜBÜYÜK A. WEITZEL
- Commission's deliberations on future procedure in applications Nos. 8805/79 and 8806/79	12 December 1981	MM. C.A. NØRGAARD, President G. SPERDUTI J.A. FROWEIN J.E.S.FAWCETT L. KELLBERG G. JÖRUNDSSON S. TRECHSEL B. KIERNAN M. MELCHIOR J. SAMPAIO J.A. CARRILLO A.S. GÖZÜBÜYÜK A. WEITZEL J.C. SOYER

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Item	Date	Note
- Commission's deliberations on future procedure in applications Nos. 8805/79 and 8806/79 and Commission's deliberations and decision on admissibility of application No. 9242/81	5 March 1982	MM. C.A. NØRGAARD, President J.A. FROWEIN G. JÖRUNDSSON G. TENEKIDES S. TRECHSEL B. KIERNAN M. MELCHIOR J. SAMPAIO J.A. CARRILLO A.S. GÖZÜBÜYÜK A. WEITZEL J.C. SOYER
- Applicants' letter on friendly settlement of applications Nos. 8805/79 and 8806/79	16 April 1982	
- Commission's deliberations and decision on future procedure in applications Nos. 8805/79, 8806/79 and 9242/81	4 May 1982	MM. C.A. NØRGAARD, President G. SPERDUTI J.A. FROWEIN G. JÖRUNDSSON G. TENEKIDES S. TRECHSEL B. KIERNAN M. MELCHIOR J. SAMPAIO A.S. GÖZÜBÜYÜK A. WEITZEL
- Commission's decision to join application No. 9242 to applications Nos. 8805/79 and 8806/79, deliberations and votes on the merits of the case, and adoption of the Report	11 October 1982	MM. C.A. NØRGAARD, President J.A. FROWEIN J.E.S. FAWCETT E. BUSUTTIL L. KELLBERG G. JÖRUNDSSON G. TENEKIDES S. TRECHSEL B. KIERNAN M. MELCHIOR J. SAMPAIO A.S. GÖZÜBÜYÜK A. WEITZEL J.C. SOYER

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