AS TO THE ADMISSIBILITY OF

Application No. 17571/90
by Michele BORRELLI
against Switzerland

The European Commission of Human Rights sitting in private on 2 September 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
Mrs. G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA

Mr. M. de SALVIA, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 5 November 1990 by Michele Borrelli against Switzerland and registered on 18 December 1990 under file No. 17571/90;

Having regard to:

- the report provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 21 January 1993 and the observations in reply submitted by the applicant on 18 March 1993;

- the submissions of the parties at the hearing of 2 September 1993;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows:

The applicant, a Swiss citizen born in 1957, is a trustee administrator (Treuhänder) residing in Zurich. Before the Commission he is represented by Mr. L.A. Minelli, a lawyer practising at Forch in Switzerland.

PARTICULAR CIRCUMSTANCES OF THE CASE

I.

The applicant was carrying out a military repetition course (Wiederholungskurs) during which he undertook guard duties at Landquart in Switzerland from 17 to 18 October 1989. While on guard duty he was placed on 18 October after 14h00 on alert duty (Pikettdienst); as such he was only permitted to leave the guard building on service orders of the head of guard.

On 18 October 1989 at 16h05 the applicant was seen walking, without gun or helmet, by officer S. to the Landquart village centre. When questioned, the applicant informed S. that he was on his way to the hairdresser. S. reported the incident to the applicant's company whereupon proceedings were instituted against the applicant.

On 19 October 1989 Captain L., the company commander, questioned the applicant. The latter submitted that he had undertaken 22 hours of guard duty and was then having a pause. He referred to the guard order (Wachtbefehl) which permitted soldiers on guard to take care of personal hygiene (Körperpflege). He stated that in his view this included the right to go to the hairdresser. The applicant pointed out that he had not undertaken guard duty since 1981, and that he thought that he had complied with his duties. If he was to be punished, he would request an admonition (Verweis). He had acted in good faith.

On 20 October 1990 Captain L. questioned Lance Corporal E. who had acted as head of guard on 18 October 1990. E. could not understand how anybody could go to the hairdresser during guard, since soldiers on alert duty had to be ready within two minutes if needed. The minutes of this questioning were then shown to the applicant.

By disciplinary criminal order (Disziplinarstrafverfügung) of 20 October 1989, signed by Major M., the battalion commander, the applicant was punished (Strafe) with five days strict arrest (scharfer Arrest). The order stated that the guard building could not be left for reasons of personal hygiene. While the applicant's culpability was slight (leichtes Verschulden), offences on guard duty weighed particularly severe according to Section 275 para. 1 of the Service Regulations (Dienstreglement; see below Relevant domestic law and practice). The order stated as motives for the offence the applicant's "carelessness" ("Nachlässigkeit"), "laziness" ("Bequemlichkeit") and his reprehensible attitude. His conduct was described as "correct" ("anständig") and "good in his subject matter" ("fachlich gut").

II.

The disciplinary criminal order was served on the applicant on 20 October 1989 at 21h45. On the same day at 24h00 the applicant submitted an appeal against the order.

In his appeal the applicant submitted inter alia that he could not understand the grounds of "carelessness" and "laziness"; these grounds did not transpire from the file, and he had not been questioned in this respect. These grounds also contradicted the description of the applicant's conduct. In fact, by going to the hairdresser he had complied with Section 573 of the Service Regulations.

On 23 October 1989 Colonel F., the regiment commander, dismissed the appeal. The decision recalled the guard order and considered that the applicant's culpability weighed particularly severe. It noted that a slight case within the meaning of Section 303 b) of the Service Regulations was at issue, and it considered that the gravity of the culpability (Schwere des Verschuldens) called for a severe punishment. The applicant's personal circumstances did not directly affect the proceedings. His conduct during service was a mitigating factor. On the whole five days strict arrest did not appear arbitrary.

III.

Colonel F's decision was served on the applicant on 23 October 1989 at 19h30. On 25 October 1989 the applicant filed a disciplinary court appeal (Disziplinargerichtsbeschwerde).

In his appeal the applicant disputed that he had put his own interests first and that he had acted culpably, since a tidy hair cut lay in the army's interest. Insofar as the contested decision referred to his culpability, his motives, the personal circumstances, and his conduct in service there were not documents enabling such an assessment. The applicant had not been questioned in this respect.

The trial (Hauptverhandlung) took place before the Military Court of Appeal 2B on 6 February 1990. The applicant and his lawyer were present. The applicant explained inter alia that he had told the head of guard, Lance Corporal E., that he was going to the hairdresser and had received his permission. The applicant further complained that he had not been able to consult the case-file. Captain L. had come to him while he was standing under the shower. After the applicant had been ordered to dry himself, he was told in another room about the offence. He had not been able to take any notes. The applicant also explained that on 16 October 1989 at midnight a course was given on guard duty, though all soldiers nodded off (eingenickt), including the applicant. When commencing guard duty on 17 October 1989 nothing had been said about alert duty.

The Military Court of Appeal then questioned Captain L. It transpires from the minutes that certain questions of the applicant were not admitted, or rephrased, by the presiding judge. L. recalled that he had questioned Lance Corporal E. after the applicant, and that the latter was able to consult all documents. When interrogated, the applicant had said nothing about E. agreeing to his going to the hairdresser. L. recalled that he had not informed the applicant of his right to remain silent. The applicant had had the possibility to comment on E.'s statement, though L. no longer remembered whether this was stated in the minutes of the interrogation. He, L., had not put the applicant under pressure when filing his disciplinary court appeal.

The Military Court of Appeal then granted the applicant's request and adjourned the trial in order to question further witnesses.

On 15 March 1990 the applicant complained to the Court that on 6 February 1990 it had not sat publicly. Thus, when a journalist had left the room, the President had instructed the court usher no longer to let the public in and the journalist was unable to return. This contradicted Article 6 of the Convention as well as Section 48 of the Military Code of Criminal Procedure (Militärstrafprozessrecht).

IV.

The trial was resumed before the Military Court of Appeal on 6 June 1990. Following the hearing the Court pronounced on 6 June 1990 its decision (Entscheid) in which it dismissed the appeal and ordered execution of the disciplinary punishment of five days severe arrest.

In its decision the Court first dealt with the applicant's objections. Insofar as he complained that the trial had not been conducted publicly, the Court found that the presiding judge had the right to stop the constant coming and going during a trial. It could not be said in view thereof, or of other decisions concerning the taking of evidence, that the presiding judge was biased.

The Court considered that the case concerned disciplinary proceedings and did not amount to the determination of a criminal charge within the meaning of Article 6 of the Convention. Thus, the

punishment of arrest did not bring about "serious disadvantages" for the applicant: he continued to receive pay, and after the second day of arrest he had a daily walk of one hour. He could contact his lawyer, and receive mail, albeit on a reduced level.

The Court found that in any event the complaints under Article 6 of the Convention were unfounded. Article 6 did not imply a duty to inform the accused of his right to consult a lawyer, or to remain silent. In fact, the applicant's conduct during the appeal proceedings disclosed that he was able to employ his rights.

In the Court's opinion, it did not breach Article 6 subpara. 3 (b) if the applicant, after having been served the appeal decision, was told that he would be placed in arrest if he did not decide, even before the time-limit of three days expired, whether he would file a disciplinary court appeal. The Court considered that the "immediate execution of the arrest did not reduce defence rights" ("bewirkt der sofortige Strafantritt keine Reduktion der Verteidigungsrechte"), since a plain written appeal statement sufficed; any formal shortcomings could be ameliorated later. The Court found that "during detention the accused can consider in peace whether he wants to file an appeal, or withdraw an appeal which he has already filed" ("während des Arrestvollzuges kann der Angeklagte in Ruhe überlegen, ob er Beschwerde erheben oder eine erhobene Beschwerde wiederum zuruckziehen will"). Finally, Article 6 subpara. 3 (b) did not grant the accused the right to use a typewriter in a separate room when filing an appeal.

With regard to the applicant's legal representation the Court recalled Section 333 para. 3 of the Service Regulations according to which private representation was possible in the disciplinary proceedings, though the applicant had to appear in person, and the lawyer was excluded from the first interrogation. It sufficed if the punished person could be advised by a lawyer during the disciplinary appeal proceedings and disciplinary court appeal proceedings.

Under Article 6 subpara. 3 (d) of the Convention the Court found that no right was granted to question witnesses in disciplinary appeal proceedings. The first hearing of witness E., the head guard, had thus taken place before the Military Court of Appeal, and the applicant had had the possibility to question him.

The Court then dealt with the merits of the applicant's appeal. It noted inter alia that if the applicant now stated that he had received the permission from E. to go to the hairdresser, in earlier statements, for instance on 20 October 1989, he had not referred to this permission. On the other hand, E. contested having been asked for permission, and his statement was confirmed by other witnesses. E.'s testimony appeared credible. The Court concluded that "the applicant was thus to be found guilty of a violation of Section 76 para. 1 (2) of the Military Criminal Code" ("der Beschwerdeführer ist daher der Verletzung von Art. 76 Ziff. 1 Abs.2 MStG schuldig zu sprechen").

The Court further considered that the applicant's military superiors had correctly assumed that the applicant's offence constituted a slight case within the meaning of Section 76 para. 2 of the Military Criminal Code, warranting disciplinary punishment. After considering all circumstances the Court found that a disciplinary punishment of five days strict arrest appeared adequate.

The applicant served his detention from 10 to 15 September 1990 at the Zurich-Reppischtal military barracks.

RELEVANT DOMESTIC LAW AND PRACTICE

I. Military Criminal Code

Section 76 para. 1 of the Military Criminal Code states:

<Translation>

"1. Whoever culpably or negligently renders himself unable to comply with his service duties as guard,

whoever deserts his guard post on his own accord or in any other way breaches the regulations on guard duty,

will be punished with imprisonment.

2. In slight cases there shall be disciplinary punishment.
..."

<German>

"1. Wer sich vorsätzlich oder fahrlässig ausserstand setzt, seine Dienstpflichten als Wache zu erfüllen,

wer eigenmächtig seinen Wachtposten verlässt oder sonst den Vorschriften über den Wachtdienst zuwiderhandelt,

wird mit Gefängnis bestraft.

2. In leichten Fällen erfolgt disziplinarische Bestrafung.
..."

Section 275 para. 1 of the Service Regulations states:

<Translation>

"1. Guard duty will ensure the security of the troops, accommodation, installations, ammunition and material. It sets high requirements and demands a thorough instruction. Guard offences weigh particularly severe.
..."

<German>:

"1. Der Wachtdienst hat die Sicherheit von Truppe, Unterkunft, Einrichtungen, Munition und Material zu gewährleisten. Er stellt hohe Anforderungen und verlangt eine gründliche Ausbildung. Wachtvergehen wiegen besonders schwer.
..."

Section 186 of the Military Criminal Code states that the duration of strict arrest will last at least three days and at the most 20 days. Detention is served in isolation. According to Section 197 et seq. the Company Commander may order severe arrest lasting up to three days and the Battalion Commander up to ten days; Sections 199 et seq. envisage higher officers ordering longer periods up to 20 days. If a disciplinary appeal is filed against the punishment order, the punishment may not be aggravated upon appeal (Section 345 of the Service Regulations).

Section 213 para. 5 of the Military Criminal Code provides that the decision of the Military Court of Appeal deciding on disciplinary sanctions will be final.

According to Section 48 of the Military Code of Criminal Procedure the proceedings before military courts are public, though the Court may exclude the public inter alia in the interests of order.

II. Service Regulations

Section 303 of the Service Regulations defines disciplinary faults (Disziplinarfehler) inter alia as "slight cases of criminal

offences in respect of which the Military Criminal Code envisages the possibility of disciplinary punishment" ("leichte Fälle von Straftatbeständen, für die das Militärstrafgesetz die Möglichkeit der disziplinarischen Bestrafung vorsieht").

According to Section 315 of the Service Regulations the arrest will be executed immediately after the punishment has been pronounced. The execution will be interrupted, or adjourned, if a disciplinary appeal or a disciplinary court appeal is filed. If the arrest cannot be executed before the applicant is released from military service, another military troops or the Cantonal Military Authority will be authorised to execute the arrest.

According to Section 349 the time-limit for filing a disciplinary court appeal is three days.

In respect of disciplinary proceedings Section 333 of the Service Regulations, which concerns the defence rights of the accused, states:

<Translation>

"1. The accused must be heard on record.

2. At the beginning of the interrogation the accused must be told the offence laid against him, and he must be granted the possibility before the criminal order is issued to consult the case-file and to explain his conduct.

3. The accused cannot let himself be represented."

<German>

1. Der Beschuldigte ist zu Protokoll einzuvernehmen.

2. Dem Beschuldigten sind zu Beginn der Einvernahme der vorgeworfene Sachverhalt zu nennen und vor Erlass der Strafverfügung Gelegenheit zu geben, die Akten einzusehen und sein Verhalten zu begründen.

3. Der Beschuldigte kann sich nicht vertreten lassen."

Section 573 of the Service Regulations states that a soldier's "hair must be clean and tidy" (" die Haare sind sauber und gepflegt zu tragen").

COMPLAINTS

1. The applicant who submits that Article 6 is applicable in his case, raises various complaints under this provision.

a) The applicant complains that the Military Court of Appeal was not a "tribunal" within the meaning of Article 6 para. 1 of the Convention. He submits inter alia that the judges are chosen by the Director of the Office of the Administration of Military Justice (auditeur en chef; Oberauditor).

b) The applicant further complains under Article 6 para. 1 of the Convention that upon institution of the proceedings he was not informed of his rights of defence. There was no mention thereof in the minutes.

c) The applicant complains under Article 6 para. 1 of the Convention that the proceedings before the Military Court of Appeal were not conducted publicly.

d) Also under Article 6 para. 1 of the Convention the applicant contends that the various decisions taken by the presiding judge

demonstrate his bias.

e) Under Article 6 subpara. 3 (b) of the Convention the applicant complains that he was told that he would be placed in detention if he did not immediately file his disciplinary court appeal, even before the time-limit of three days had expired.

f) Also under Article 6 subpara. 3 (b) of the Convention the applicant complains that he received only with much difficulty a typewriter and paper to prepare his appeal statement.

g) Under Article 6 subpara. 3 (c) the applicant complains that during the disciplinary proceedings and disciplinary appeal proceedings he could not be represented by a lawyer.

h) The applicant complains under Article 6 para. 3 (d) of the Convention of a breach of the equality of arms in that he could only question witness E. at the trial, i.e. over seven months after E. was questioned by the military authorities.

i) The applicant complains under Article 6 para. 3 (d) that at the trial the presiding judge did not admit, or rephrased, certain questions put by the applicant to the witnesses.

2. The applicant complains that as the Military Court of Appeal was not a court, and its proceedings were not fair, he was not detained following conviction "by a competent court' within the meaning of Article 5 para. 1 (a) of the Convention. For this reason the applicant claims damages under Article 5 para. 5 of the Convention.

3. The applicant complains that his conviction was not reviewed by a higher tribunal as required by Article 2 of Protocol No. 7. The applicant submits that the offences of which he was convicted did not constitute "offences of a minor character" within the meaning of Article 2 para. 2 of Protocol No. 7.

4. Under Article 13 of the Convention the applicant complains that he had no effective remedy to complain about the decision of the Military Court of Appeal.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 5 November 1990 and registered on 18 December 1990.

On 19 October 1992 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application under Article 6 para. 1 and 3 (c) and (d) of the Convention and under Article 2 of Protocol No.7.

The Government's observations were received by letter dated 21 January 1993 and the applicant's observations in reply by letter dated 18 March 1993.

On 11 May 1993 the Commission decided to invite the parties to an oral hearing on the admissibility and merits of the application.

The hearing took place on 2 September 1993. The Government were represented by their Agent, Mr. O. Jacot-Guillarmod, Deputy Director of the Federal Office of Justice, and by Mr. J. Van Wijnkoop, Director of the Office of the Administration of Military Justice (Auditeur en chef), Mr. F. Schürmann, Deputy Head of the European Law and International Affairs Section of the Federal Office of Justice, and Mr J. Lindenmann of the European Law and International Affairs Section of

the Federal Office of Justice. The applicant, who was also present, was represented by Mr. L. A. Minelli.

THE LAW

1. The applicant complains of the proceedings instituted against him resulting in a punishment of five days' strict arrest. He invokes Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention.

The issue arises whether the proceedings concerned "the determination of ... any criminal charge against him" within the meaning of this provision.

The applicant considers that Article 6 (Art. 6) of the Convention is applicable to the proceedings in which he was involved since in his view they concerned "the determination of (a) criminal charge" within the meaning of this provision.

The applicant submits that the maximum possible duration of strict arrest must be considered. Thus, Section 186 of the Military Criminal Code envisages a period of strict arrest of up to 20 days. At the outset of disciplinary proceedings, the specific period will never be clear. For this reason, the protection of Article 6 (Art. 6) of the Convention must apply from the commencement of such proceedings. The applicant points out that the shortest possible duration of imprisonment under the Swiss Criminal Code is three days (see Section 36 of the Criminal Code); yet even a prison sentence of this length will fall under Article 6 (Art. 6) of the Convention.

As regards the manner in which strict arrest is executed, the applicant points out that there is solitary confinement; a prohibition of work and of reading books of one's own choice; and a prohibition in principle of receiving visits or correspondence. As a result, strict arrest is considerably more severe than ordinary imprisonment under the general law.

The applicant also suggests as a further criterion to be considered the proportionality between the actual culpability of the person concerned and the severity of the sanction. In the present case, slight culpability was severely punished.

In the Government's submissions, the applicability of Article 6 (Art. 6) of the Convention must be assessed according to the criteria developed in the Convention organs' case-law, in particular the Engel case (see Eur. Court H.R., Engel and others judgment of 8 June 1976, Series A, no. 22, p. 35, para. 82). The Government recall that in the Eggs case, which concerned a disciplinary sanction of 5 days' strict arrest, Article 6 para. 1 (Art. 6-1) of the Convention was found not to be applicable (see Comm. Report 4.3.78, D.R. 15 p. 35 at p.65).

The Government contend that in the present case the Military Court of Appeal, when imposing the sanction on the applicant, relied on Section 76 para. 1 in connection with para. 2 of the Military Criminal Code. The latter provision concerns disciplinary punishment. Thus, Swiss law regarded the offence at issue as a disciplinary one.

The Government moreover point out that disciplinary military law is addressed to a well defined group of persons and the soldiers are in a specific situation of subordination. Thus, in the Eggs case the Commission found that that offence "infringes a legal rule governing the internal operation of the armed forces; it does not, in the particular sector of the armed forces, affect the general interests of society normally protected by criminal law" (Comm. Report 4.3.78, D.R. 15 p. 35 at p.65).

Moreover, the Government contend that regard must be had, not to

the maximum possible sanction, but to the sanction imposed in the concrete case. The Military Court of Appeal could not have imposed a harsher sentence. Furthermore, five days strict arrest in the military service cannot be compared to five days imprisonment following a criminal conviction under common law. Military arrest may not be served in prisons, and the sanction must as a rule be executed during the military service (Section 315 of the Service Regulations).

The Commission recalls the case-law of the Convention organs according to which, when determining whether such proceedings fall under the scope of Article 6 (Art. 6) of the Convention, regard must be had in particular to three criteria (see Eur. Court H.R., Engel and others judgment, loc. cit., p. 35, para. 82).

The first question is whether the provisions defining the offence belong, according to the legal system of the respondent State, to criminal or to disciplinary law.

It is true that the offence of which the applicant was charged, namely the breach of guard duty, is listed in the Swiss Military Criminal Code. However, the provision applied was Section 76 para. 2 of the Military Criminal Code which emphasises the disciplinary character of slight cases, such as the present one. Moreover, Section 303 of the Service Regulations, themselves concerned with the discipline within the army, defines disciplinary faults as "slight cases of criminal offences in respect of which the Military Criminal Code envisages the possibility of disciplinary punishment". Indeed, the Swiss authorities, when instituting the appropriate proceedings, considered that the offence amounted to a contravention of disciplinary rather than criminal law.

Finally, the Commission notes that Section 180 of the Military Criminal Code, which was also referred to in the Eggs case, determines that behaviour contrary to the requirements of military discipline is to be sanctioned as a disciplinary offence unless it falls to be regarded as an offence within the meaning of the Special Part of the Military Criminal Code.

Thus, according to domestic legal system the offence belonged to disciplinary law.

Next, the nature of the offence must be considered.

The Commission observes that the guard set up on 17 and 18 October 1989 at Landquart in which the applicant participated was not concerned with the protection of public safety. Rather, the guard duties were ordered in the context of a military repetition course and constituted part of the military instruction and training of soldiers. As such, the duties amounted to a typical aspect of the internal operation of the military; they did not affect the general interests of society.

The very nature of the offence was, therefore, disciplinary rather than criminal.

Finally, the degree of severity of the penalty, which the applicant risked incurring, must be considered.

In this respect, the Commission notes the similarities of the present case to the Eggs case, which concerned that applicant's strict arrest of five days, which he served after military service had ended at Basel prison. In that case the Commission concluded that there had been no criminal charge against the applicant within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (see Eggs v. Switzerland, Comm. Report 4.3.78, D.R. 15 p. 35).

Having regard to the Eggs case the Commission considers that no

substantial difference has been made out in the present case, either as to the actual duration of the penalty which was five days strict arrest in both cases, or the manner in which the strict arrest was enforced.

It is true that in the present case the Battalion Commander could have ordered up to ten days strict arrest. The present case thus appears to differ from the Eggs case, where the five days arrest actually imposed on the applicant was the maximum which could be imposed by the Company Commander (see loc. cit.).

However, the Commission notes that the Military Court of Appeal had no jurisdiction to impose a harsher penalty than the one originally imposed by the Battalion Commander (see mutatis mutandis the case of Engel and others, loc cit., paras. 84 et seq.). It follows that the maximum penalty which the Military Court of Appeal could in fact have pronounced did not exceed five days strict arrest.

As a result, the penalty concerned was not sufficiently severe to bring the offence concerned within the sphere of criminal law. In the Commission's opinion, this conclusion would remain the same even if it was assumed that in the present case the maximum possible sanction amounted to ten days strict arrest.

Thus, in applying the criteria developed in the Convention organs' case-law to the circumstances of the present case, the Commission finds that the proceedings instituted against the applicant were disciplinary in nature. Thus, they did not concern "the determination of ... any criminal charge against him" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 (Art. 6) of the Convention was therefore not applicable to the proceedings instituted against the applicant.

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains that as the Military Court of Appeal was not a court, and its proceedings were not fair, he was not detained following conviction "by a competent court' within the meaning of Article 5 para. 1 (a) (Art. 5-1-a) of the Convention. This provision states:

> "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:
>
> a. the lawful detention of a person after conviction by a competent court ..."

The Commission recalls that the notion of a "court" in Article 5 para. 1 (a) (Art. 5-1-a) of the Convention requires an organ which, on account of the way in which it is organised, is judicial in character in that it is independent of the executive and of the parties to the case and offers adequate procedural guarantees (Eggs v. Switzerland, Comm. Report, loc. cit., para. 66, p. 61).

The Commission further recalls that in two cases against Switzerland it found a violation of Article 5 para. 1 (Art. 5-1) of the Convention in that in the military disciplinary cases before the Swiss authorities the applicants concerned had not been convicted by "a competent court" within the meaning of this provision (see Comm. Report 13.10.81, Santschi and others v. Switzerland, D.R. 31 p. 5; Comm. Report, Eggs. v. Switzerland, loc. cit. para. 72, p. 63).

As a result, in compliance with its obligations under Article 32

(Art. 32) of the Convention, the Swiss Government subsequently informed the Committee of Ministers that the Military Criminal Code and the Code on Military Criminal Procedure had been revised to the extent that a court with full powers could henceforth reverse decisions of military commanders (see Resolution DH (83), adopted by the Ministers' Deputies on 24 March 1983, D.R. 31 p. 48 et seq.).

In the present case the Commission notes that upon the applicant's disciplinary court appeal the Military Court of Appeal conducted a trial which eventually led to the dismissal of the applicant's appeal.

The Commission further considers that the requirements of Article 5 para. 1 (a) (Art. 5-1-a) do not necessarily correspond with the guarantees enshrined in Article 6 (Art. 6) of the Convention. Having regard to the applicant's submissions, the Commission finds that the Military Court of Appeal which convicted the applicant complied with the requirements of "a competent court" within the meaning of Article 5 para. 1 (a) (Art. 5-1-a) of the Convention.

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Under Article 2 of Protocol No. 7 (P7-2) the applicant complains that his conviction was not reviewed by a higher tribunal as required by Article 2 of Protocol No. 7 (P7-2). According to this provision, "everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentenced reviewed by a higher tribunal. ..."

The Government submit that Article 2 of Protocol No. 7 (P7-2) is not applicable in the present case. Thus, the interpretation of the term "criminal offence" mentioned in this provision must correspond with that of the term "criminal charge" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention which, as has been submitted, does not apply to the proceedings at issue.

The Commission has just found that the proceedings instituted against the applicant did not constitute the "determination of ... (a) criminal charge against him" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. The Commission considers that for the same reasons it cannot be said that the applicant was "convicted of a criminal offence" within the meaning of Article 2 of Protocol No. 7 (P7-2). This provision was therefore also not applicable to the proceedings instituted against the applicant.

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. Under Article 13 (Art. 13) of the Convention the applicant complains that he had no effective remedy to complain about the decision of the Military Court of Appeal. However, having regard to its conclusion under Article 2 of Protocol No. 7 (P7-2), the Commission finds no separate issue under Article 13 (Art. 13) of the Convention. The remainder of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Deputy Secretary to the Commission — President of the Commission

(M. de SALVIA) — (C.A. NØRGAARD)