



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

COURT (CHAMBER)

**CASE OF VAN MECHELEN AND OTHERS
v. THE NETHERLANDS**

(Applications nos. 21363/93, 21364/93, 21427/93 and 22056/93)

JUDGMENT

STRASBOURG

23 April 1997

In the case of Van Mechelen and Others v. the Netherlands¹,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr F. MATSCHER,

Mr C. RUSSO,

Mr N. VALTICOS,

Mr I. FOIGHEL,

Mr B. REPIK,

Mr K. JUNGWIERT,

Mr E. LEVITS,

Mr P. VAN DIJK,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 27 January and 18 March 1997,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 17 April 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in four applications (nos. 21363/93, 21364/93, 21427/93 and 22056/93) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by Mr Hendrik van Mechelen and Mr Willem Venerius on 27 November 1992, by Mr Johan Venerius on 8 December 1992 and by Mr Antonius Amandus Pruijmbloom on 24 November 1992. All four applicants are Netherlands nationals.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

¹ The case is numbered 55/1996/674/861-864. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

² Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

the respondent State of its obligations under Article 6 paras. 1 and 3 (d) of the Convention (art. 6-1, art. 6-3-d).

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicants designated the lawyers who would represent them (Rule 31).

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 27 April 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Matscher, Mr C. Russo, Mr N. Valticos, Mr I. Foighel, Mr B. Repik, Mr K. Jungwiert and Mr E. Levits (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr P. van Dijk, the newly elected judge of Netherlands nationality, replaced Mr Martens who had resigned (Rules 6 and 21 para. 3 (a)).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 14 October 1996 and the applicants' memorials and Article 50 claims (art. 50) between 22 and 29 October.

5. On 30 September 1996 the President of the Chamber rejected an application by Rights International, a non-governmental organisation based in New York, for leave to submit written comments (Rule 39 para. 2).

6. On 10 January 1997 a document which the Registrar had sought from the Government at the request of the President of the Chamber was received at the registry.

7. On 22 January 1997 the President of the Chamber decided to admit to the case file certain additional documents submitted by the applicants.

8. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 January 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr R.A.A. BÖCKER, Ministry of Foreign Affairs,	
Mr H.A.M. VON HEBEL, Ministry of Foreign Affairs,	<i>Agents,</i>
Ms I.M. ABELS, Ministry of Justice,	
Ms N.H.N.I. HOUBEN, Ministry of Justice,	<i>Advisers;</i>

(b) for the Commission

Mr H.G. SCHERMERS,	<i>Delegate;</i>
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(c) for the applicants

Mr G.G.J. KNOOPS, advocaat en procureur,	
Mr J.M. SJÖCRONA, advocaat en procureur,	

Ms T. SPRONKEN, advocaat en procureur, *Counsel*,
Ms M. GARÉ,
Ms S. VAN DER TOORN, *Assistants*.

The Court heard addresses by Mr Schermers, Mr Knoops, Mr Sjöcrona, Ms Spronken and Mr von Hebel.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Background to the case

9. The police received information to the effect that the applicants were the perpetrators of several robberies, and that they operated from two residential caravan sites. It was decided to detail a police observation team (observatieteam, "OT") to keep these caravan sites under observation as from 25 January 1989.

10. On 26 January 1989 at around 5.15 p.m. three motor cars, a Mercedes estate car, a BMW and a Lancia, were seen to leave one of the two caravan sites shortly after each other. Their registration numbers were noted.

11. On 26 January 1989 at around 6 p.m. the post office of the town of Oirschot was robbed. The window of the post office was broken down by backing a Mercedes estate car equipped with a steel girder into it. One of the robbers, wearing a black balaclava helmet and armed with a pistol, forced the staff to surrender some 70,000 Netherlands guilders. The robbers then set the Mercedes car alight and made off in a BMW.

Police cars alerted by radio followed the BMW. Police officers saw the BMW drive onto a sand track leading into a nearby forest. Later they saw a column of smoke coming out of the forest. The BMW was subsequently found there, burnt out.

Four police officers in a police car saw a red car (later found to be a Lancia) leave the forest via the same sand track used by the BMW and gave chase. In the course of the chase the boot of the car was opened from the inside and men squatting in the back opened fire at the pursuing police car with a pistol and a sub-machine gun. A car containing civilians was hit by a stray bullet but its occupants were not hurt.

The Lancia made off at high speed and entered a side road. When the police car caught up with it the Lancia was stationary. A man standing in the road fired at the police car with a sub-machine gun. The police car was

hit and its occupants injured, after which the gunman and the persons in the Lancia made their escape.

12. All three cars - the Mercedes, the BMW and the Lancia - were later identified as the cars which had been seen leaving the caravan site (see paragraph 10 above).

B. The criminal proceedings

1. Proceedings in the 's-Hertogenbosch Regional Court

13. The applicants and one other man, called Amandus Pruijmbloom (not to be confused with the applicant Antonius Amandus Pruijmbloom), were charged with attempted murder - or, in the alternative, attempted manslaughter - and robbery with the threat of violence and summoned to appear for trial before the 's-Hertogenbosch Regional Court (arrondissementsrechtbank) on 19 May 1989.

Evidence proffered by the prosecution included statements made to a named police officer by police officers identified only by a number.

14. In interlocutory judgments of 2 June 1989 the Regional Court decided that it was necessary to establish whether the police officers identified only by numbers had investigative competence (opsporingsbevoegdheid). To that end it referred the case to the investigating judge (rechter-commissaris) and adjourned the case until 20 July.

The investigating judge established that the police officers in question did in fact have investigative competence.

Counsel for Mr Willem Venerius argued, inter alia, that the police officers identified only by a number were anonymous witnesses, so that their statements did not constitute sufficient proof, in the absence of corroborating evidence, to support a conviction. The Regional Court rejected this argument, holding that since the police officers in question had investigative competence, the evidential value of their statements was not affected by their anonymity.

The Regional Court convicted the accused of attempted manslaughter and robbery with the threat of violence. The evidence identifying the applicants as perpetrators of these crimes was constituted by the statements made before the trial by the anonymous police officers, none of whom gave evidence before either the Regional Court or the investigating judge.

All five accused were sentenced to ten years' imprisonment.

2. Proceedings in the 's-Hertogenbosch Court of Appeal

15. The five convicted men appealed to the 's-Hertogenbosch Court of Appeal (gerechtshof).

At the hearing before that court on 2 May 1990 the applicants' lawyers made requests for several named and anonymous witnesses to be heard. The Court of Appeal thereupon referred the case to the investigating judge, firstly because it considered it necessary to find out what objections the police officers themselves had against the lifting of their anonymity and secondly because the number of persons to be heard was such that it could not conveniently be done in open court. The persons to be heard were four named police officers, eleven anonymous police officers (identified to the defence and the court only by a number) and two civilians.

16. The named and anonymous witnesses were questioned on 24 and 27 September and on 5-8 and 13 November 1990.

All of the anonymous witnesses were - or had at the relevant time been - police officers invested with investigative competence.

The procedure followed for questioning them was that the investigating judge, the witness and a registrar were together in one room, and the defendants, their lawyers and the advocate-general in another. The defendants, the lawyers and the advocate-general could hear all the questions asked to the witnesses and their replies through a sound link. The statements of the witnesses were repeated by the investigating judge to the registrar, who took them down.

17. On 24 September 1990 witness 001 was interrogated. He was a member of an observation team. It was his wish and that of his superiors that he remain anonymous in the interests of the service; in addition, his family had been threatened in the past. Witness 001 confirmed a statement which he had made earlier, to the effect that when confronted with Mr van Mechelen through a two-way mirror he had identified him as the man who had sat next to the driver of the Lancia.

Witness BRZ03 was interrogated the same day. His wish to remain anonymous was primarily inspired by the wish to ensure the safety of his family and friends; he had been threatened in the past. At the time of the crimes in question he had been a member of an arresting team. He had been a passenger in the front seat of the police car used to pursue the Lancia and had been badly wounded in the shooting.

Witness 006 was a member of an observation team. He wished to remain anonymous to ensure the safety of his family and friends and his colleagues; he knew of cases in which a police officer's family had been threatened. He confirmed the correctness of a report which he had drawn up together with witness 005.

Witness BRZ09 had been a member of an arresting team at the relevant time. He wished to remain anonymous in the interests of the service but also for the safety of his family. He confirmed an earlier report to the effect that he had been a back-seat passenger in the police car which had pursued the Lancia, and had been fired at.

18. On 27 September 1990 the investigating judge drew up an official report of his findings with regard to the first four anonymous witnesses. He considered them all reliable, although they had shown great caution when asked questions which might affect their anonymity. He also considered their reasons for wishing to remain anonymous well-founded.

19. Also on 27 September 1990 the investigating judge interrogated, in addition to two named police officers, the named witness Mr Engelen. Mr Engelen was a civilian bystander who stated that he had seen a man fire a gun. He had later identified Mr van Mechelen as that man when confronted with him through a two-way mirror.

20. On 3 October 1990 the Court of Appeal resumed the hearing. The lawyer defending Mr Willem Venerius asked for one anonymous police officer - BRZ03 - to be heard in open court. The Court of Appeal however decided not to continue its own examination of the case until all witnesses had been questioned by the investigating judge.

21. On 5 November the investigating judge resumed the interrogation of the witnesses.

Witness BRZ10 stated that he was a member of an arresting team. He had been the driver of the police car used in the attempt to pursue the Lancia and force it to stop. He had recognised Mr Johan Venerius as the driver of the Lancia.

Witness 004 stated that he had been a member of an observation team at the relevant time. He wished to remain anonymous because he feared for the safety of his family. In addition, he was involved in the work of the criminal intelligence department (Criminele Inlichtingen Dienst, "CID"). His superiors wanted him to remain anonymous for that reason. He too had recognised Mr Johan Venerius as the driver of the Lancia.

Witness 005 was also a member of an observation team. He had been a passenger in a police car which had passed the Lancia and had recognised Mr Johan Venerius as the driver.

22. Witness 003 had been a member of an observation team at the relevant time. He wished to remain anonymous in the interests of the service as well as for the safety of his family. He had been the driver of an unmarked police car and had seen the BMW and the Lancia drive past but had not recognised any of their occupants.

Witness 46204 had been a member of an arresting unit. He wished to remain anonymous in the interests of the service as well as for the safety of his family. He had seen the BMW both before and after the robbery in Oirschot. The driver on both occasions had been the applicant Pruijmboom, whom he had later recognised at a confrontation.

Witness 46203 had been a member of the same arresting unit. He was "99% certain" that he had seen Mr van Mechelen enter the caravan site about an hour before the three cars left from there.

Witness BRZ08 had left the police force but at the relevant time had been a member of an arresting team. He wished to remain anonymous for the safety of his family, three of his colleagues having been threatened in the past. He had been the driver of the police car which had pursued the Lancia and had been fired at. He had sustained injuries, as had the other police officers in the car.

23. The various named police officers provided background information relating to the investigation and the procedures followed but did not positively identify any of the applicants as the perpetrators. Some of them stated that they knew of colleagues who had been threatened in other cases but none of them had yet been threatened in this case.

24. On 19 November 1990 the investigating judge drew up a report of his findings concerning the questioning of the witnesses. This document reads as follows:

"REGIONAL COURT OF 's-HERTOGENBOSCH

Investigating judge
with responsibility
for criminal cases

OFFICIAL RECORD OF FINDINGS

The cases against:
Willem Venerius,
Johan Venerius,
Hendrik van Mechelen,
Amandus Pruijmboom, and
Antonius Amandus Pruijmboom

were referred by the Court of Appeal at 's-Hertogenbosch to myself, A.H.L. Roosmale Nepveu, investigating judge with responsibility for criminal cases at the Regional Court of 's-Hertogenbosch. I, investigating judge, wish to place the following on record in connection with the investigation conducted by myself with the assistance of the registrar.

The Court of Appeal referred the cases against the said accused persons to me in order for a total of twenty-one witnesses to be heard. Eleven of them are designated only by a number in the documents.

I, investigating judge, questioned twenty witnesses in the presence of the registrar. I also, together with the registrar, drew up a record of the hearing for each accused separately. The statements of the witnesses are however similar in all cases, since the hearings took place simultaneously in all five cases.

Thus in the statements the names of fellow accused and their counsel appear as 'persons asking questions'.

The witnesses indicated were questioned on the dates given below:

24 September 1990	001 BRZ03 006 BRZ09
27 September 1990	F.P.W. Engelen A.P.J.M. de Vet G.J.M. Jansen
5 November 1990	BRZ10 004 005
6 November 1990	003 46204 46203
7 November 1990	BRZ08 H.P.C. Koene (adjourned)
8 November 1990	W.P.A. Meijers P.F.M. Aarts H.P.C. Koene (resumed)
13 November 1990	H.B. Corbijn P.J.M. Swartjes G.W.A.M. Ligtvoet.

...

The accused, their counsel and the advocate-general were always invited to the hearings. Whenever they appeared they were also given an opportunity to ask questions. They did so extensively. The hearings took up a great deal of time. The shortest hearing of an unidentified witness lasted nearly two hours (46203); the longest about five hours (BRZ08). The hearings of witnesses Jansen and Koene each lasted a good five hours. This information may perhaps be of use in assessing the suggestion that was made on 3 October 1990 to the Court of Appeal, that all the witnesses should be heard by the Court in a single day.

Where a witness did not answer a question, this is also indicated in the text of his statement.

The statements were recorded in very great detail and in fact cover all the matters raised - also by the defence -, in a factual and where necessary even literal transcript. Once the text existed in draft form, those present were invariably given the opportunity to make comments, request clarification and put further questions. Where necessary the statement was then amended, clarified and expanded - always, of course, within the limits of what the witness really wanted to say. And even if ... there are drawbacks to the manner in which the hearings of the unidentified witnesses were carried out, it is my belief that the advocate-general and the defence had sufficient opportunity to question the witnesses thoroughly at the hearings. Those present really did have the opportunity for hours on each occasion. If they so desired, those present had several chances to put questions to a witness. Unlike what normally happens at court hearings, everyone was able to follow the entire transcription of the statements and then still obtain clarifications and additions. Questions were barred only on substantive grounds (see the records for details), not by reason of the time taken for the interrogations.

In the light of recent case-law in the matter of statements by unidentified witnesses, I think it is right for me to make known my findings regarding the statements of the

unidentified witnesses heard in this case. I, the investigating judge, and the registrar, are the only persons who attended all the hearings from start to finish.

I stand by my official record of findings dated 27 September 1990 where the witnesses referred to in it are concerned [see paragraph 18 above]. I would now add the following:

All the ‘numbered witnesses’ made their identities known to me. It was clear to me that all eleven were different persons.

Their statements indicated such a knowledge of the facts that I am entirely convinced that I was talking to the witnesses referred to by numbers in the documents. I have no reason to doubt their reliability. Nor at any time did I have the impression that I was being lied to. On the contrary, each and every one of them was very much to the point. The persons facing me wore serious expressions. The unidentified witnesses were clearly quite aware of the serious nature of the oath or pledge they had given and of the very great interests at stake, especially for the accused persons involved. The calm, quiet manner in which, for example, BRZ03 and BRZ08 related their experiences in Leende (in which connection I expressly leave it to the Court of Appeal to decide whether these accused persons were the perpetrators) was impressive and certainly gave no indication of malice towards the accused. All the witnesses manifested a certain degree of wariness, which, in view of their desire to remain anonymous and the sometimes rather forceful manner of questioning on the part of [two of the defence lawyers] in particular, did not bother me.

If all the statements are laid side by side, some differences of detail can be observed. I do not think that these differences are such as to warrant the conclusion that the witnesses may be unreliable. Rather, in so far as I have observed any differences, I would describe them rather as the ‘extraneous noise’ which in my experience practically always affects statements by witnesses. Of course it is ultimately for the Court of Appeal to decide on the value of the statements.

The reasons for the witnesses wishing to remain anonymous in the instant case are given in the records of the hearings. It seems to me that I am now affording the Court an opportunity to reflect on the value of those arguments. I think that the text of the recent judgments of the Supreme Court of the Netherlands also compels me, as the judge conducting the questioning, to state my opinion on the reasons given by the witnesses for remaining anonymous. I am also concerned to inform the Court of Appeal that I am aware that the Court is called to take the final decision in these matters. I consider the reasons behind the desire to remain anonymous to be such as fully to justify anonymity. I have had regard in this connection to the nature of these cases and to the nature of the activities of the anonymous witnesses concerned.

I take the liberty of observing - while expressly leaving aside the question whether these accused persons are the perpetrators - that the instant case tellingly illustrates the fact that there are evidently people for whom human lives do not count when it comes to evading responsibility for exceptionally serious crimes which they may have committed.

I can understand that there are major objections to revealing the names and appearance of members of arresting teams, observation teams and arresting units to the public at large. By that I mean that the obvious interest of society in having very serious crimes solved should weigh in the balance. At the same time, I am of the

opinion that the conduct of the unidentified witnesses (who are no longer anonymous to myself) who have appeared in this case is the subject of proper judicial supervision. It is not apparent to me as investigating judge that the 'numbered witnesses' acted carelessly. Rather, in my opinion, the opposite was true.

During the last hearing of the witness Koene, [two of the defence lawyers] asked me to record that, in their view, the witness answered not only the questions of the defence but also questions by the investigating judge in a ponderous, deliberate manner that was hard to follow. I have been asked to endorse that opinion. I decline to do so. The witness Koene was wary in his answers, which I find understandable in view of the barrage of questions - which were not always formulated equally clearly. It must not be forgotten that a witness who is being questioned on oath about a multitude of events that occurred some years previously should not be reproached for failing, in his answers to those questions, to keep up with the tempo of the rather forceful questioning to which [the two lawyers] in particular subjected him on 8 November 1990, together and in tandem. Furthermore, I can imagine that a witness may be somewhat annoyed if he is repeatedly asked the same question, especially if he has already replied under oath on the day before. The witness Koene kept a cool head, and in so doing demonstrated a certain quality. As far as I can judge at the present time, I regard him as a reliable witness. Nor do I think that he can be regarded as a reluctant witness, if only by reason of his extensive statements in the records of 7 November and 8 November 1990.

The witness Koene informed me on 15 November 1990 that on 26 January 1989 the persons numbered BRZ05 and BRZ14 were in the car with BRZ10. He gave me this information following a request by the defence.

I think I ought not to omit to mention, with regard to the witness Engelen, that throughout the hours of insistent questioning he certainly did not strike me as untruthful. In my judgment, Mr Engelen is a simple, friendly and very obliging man. Perhaps I can illustrate the impression I had of him by recording that, after the interrogation had gone on for a considerable time, I thought it opportune to ask the unusual question whether the witness could read. I do not exclude the possibility that he is not entirely aware of the great importance of an exact and consistent account of what he saw.

In the second paragraph on the first page of the statement by the witness Engelen, I suggested to him that the confrontation had occurred on 15 February 1989. The date should be 9 March 1989. [One of the defence lawyers] pointed this out to me later and I think he is right.

...

(signed) A.H.L. Roosmale Nepveu

19 November 1990"

25. The hearing before the Court of Appeal was resumed on 16, 17 and 18 January 1991.

On 16 January a named witness, Mr Engelen, was heard in open court. He had stated to the police in March 1989, and to the investigating judge in September 1990, that he recognised the applicant Van Mechelen as the man

who had fired a sub-machine gun at a police car in the village of Leende. Before the Court of Appeal he stated that on the latter occasion he had been allowed to re-read his earlier statement, but that he was no longer sure whether he could still recognise either the weapon or the man who had fired it. He also said that he had not been threatened in connection with the case.

On 18 January the lawyer acting for the applicant Van Mechelen brought forward two persons chosen for their excellent eyesight (both having participated in the Olympic games as members of the Netherlands rifle-shooting team), and who had participated in a reconstruction of the shooting in light and weather conditions similar to those obtaining at the time of the crime. These witnesses both stated that they had been unable to distinguish the features of the persons acting the parts of the perpetrators at the distances at which it had been alleged that the accused had been seen by Mr Engelen. A video recording had been made of the reconstruction, in the presence of a notary who had kept the original videotape under seal.

The hearing was again resumed on 21 January 1991, and the video of the reconstruction was shown.

26. The Court of Appeal convicted all four applicants in four separate but similar judgments on 4 February 1991.

All four applicants were found guilty of attempted murder and robbery with the threat of violence and sentenced to fourteen years' imprisonment. The fifth suspect, Mr Amandus Pruijmbloom, was acquitted.

The Court of Appeal's judgment in the case of the applicant Van Mechelen contained the following:

"Considering with regard to the statements, used in evidence, of the persons who remained anonymous, that these statements were taken down by a judge, more particularly the investigating judge responsible for criminal cases within the jurisdiction of the 's-Hertogenbosch Regional Court, who himself knows the identity of the witnesses, who has heard these witnesses on oath, who in his official record of his findings ... has given his reasoned opinion of the reliability of the witnesses and their reasons for wishing to remain anonymous, and who, moreover, has offered the accused and the defence the opportunity to question these witnesses, of which opportunity, as appears from the official records of the interrogations, extensive use has been made.

The objections of the witnesses heard by the investigating judge and identified only by a number to remain anonymous (sic) are sufficient reason for the Court of Appeal to continue this anonymity. The Court of Appeal refuses the request made by counsel at the hearing to have these witnesses heard in open court, even if this request should be understood to imply that the witnesses might be disguised, since the possibility that the witnesses may be recognised in open court cannot be excluded.

Of the arguments for continuing the anonymity of the witnesses, the Court of Appeal considers particularly persuasive the personal safety of these witnesses and their families, and it makes no difference that these witnesses have not yet been threatened. As already noted in the Court of Appeal's interlocutory decision of 3 October 1990, the present case concerns extremely serious crimes, the [attempted murder] having been committed so as to evade recognition and arrest by the police,

the perpetrators having been prepared to sacrifice a number of human lives. In these circumstances, the risk run by the witnesses identified only by a number and their families if their anonymity is lifted or insufficiently guaranteed is decisive. In so far as anonymous witnesses have refused to answer questions this was done in order not to disclose methods of investigation or to maintain the anonymity of other investigating officers involved in the case."

The Court of Appeal considered the statements of the anonymous police officers to be corroborated by each other and by the evidence available from non-anonymous sources. This other evidence included a transcript of a telephone conversation between the wife of Mr Johan Venerius and her mother intercepted two days after the date of the crime, from which it appeared that Mr Johan Venerius had not returned home in the meanwhile and his whereabouts were unknown, as well as forensic reports relating to the cars and the weapons used for the crime and the above-mentioned statements of the named civilians and police officers. However, the Court of Appeal did not rely on the statements of Mr Engelen.

3. Proceedings in the Supreme Court

27. The applicants filed appeals on points of law (*cassatie*) to the Supreme Court (*Hoge Raad*).

In accordance with the advisory opinion of the advocate-general, the Supreme Court dismissed the appeals in a series of judgments of 9 June 1992. It held that in the circumstances the evidence given by the unnamed police officers was admissible, since on the one hand their evidence was sufficiently corroborated by the evidence obtained from named sources and on the other the procedure followed provided sufficient compensation for the handicaps under which the defence had laboured.

The Supreme Court's judgments concerning Mr Willem Venerius and Mr van Mechelen were reported in *Nederlandse Jurisprudentie* (Netherlands Law Reports, "NJ") 1992, nos. 772 and 773 respectively.

28. It has not been alleged that any named or anonymous witnesses were at any time threatened by or on behalf of the applicants.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. Except for the differences noted below (see paragraphs 39 and following), relevant domestic law and practice at the time of the criminal proceedings complained of were as set out in the Court's *Kostovski v. the Netherlands* judgment of 20 November 1989 (Series A no. 166). Reference is therefore made to that judgment, especially pp. 13-17, paras. 22-32.

A. The Code of Criminal Procedure

1. Evidence in general

30. The finding that an accused has committed the act with which he is charged must be based on "legal means of evidence" (wettige bewijsmiddelen - Article 338 of the Code of Criminal Procedure (Wetboek van Strafvordering - CCP)).

"Legal means of evidence" include inter alia statements of witnesses relating to facts or circumstances which they themselves have witnessed (Articles 339 para. 1 (3) and 342 para. 1 CCP) and written documents (Article 339 para. 1 (5) and 344 para. 1 CCP).

Such evidence must normally be corroborated by other evidence (Articles 342 para. 2, 344 para. 1 (5) CCP). However, an official record made in the proper form by a police officer invested with investigative competence can be admitted without corroboration (Article 344 para. 2 CCP).

2. Witnesses

31. The public prosecutor has the power to call witnesses and experts to the hearing (Article 260 CCP). In his summons to the accused he gives a list of the witnesses and experts to be brought forward by the prosecution. If the accused wishes to call witnesses, he can - according to Article 263 - submit a request to the public prosecutor no later than three days before the court hearing to summon a witness before the court. As a rule, the public prosecutor should summon the witness, but - according to Article 263 para. 4 - he may refuse to do so if it is to be reasonably assumed that no prejudice to the rights of the defence will be caused if the witness is not heard in open court ("Indien redelijkerwijs moet worden aangenomen, dat de verdachte niet in zijn verdediging kan worden geschaad wanneer een door hem opgegeven getuige ... niet ter terechtzitting wordt gehoord"). He has to give a reasoned decision in writing and must at the same time inform the defence of its right under Article 280 para. 3 (see paragraph 33 below) to renew the request to the trial court at the hearing.

32. At the opening of the trial hearing the prosecutor hands to the court a list of all the witnesses called, which is then read out by the registrar (griffier) (Article 280 para. 2).

33. If the public prosecutor has failed to summon a witness at the request of the accused, or declined to do so, the defence may ask the court to have that witness summoned (Article 280 para. 3). The court so orders, unless it finds that the non-appearance of this witness cannot reasonably be considered prejudicial to the rights of the defence ("De rechtbank beveelt dat de ... getuige ... zal worden gedagvaard of schriftelijk opgeroepen, tenzij zij ... van oordeel is dat door het achterwege blijven daarvan de verdachte

redelijkerwijs niet in zijn verdediging kan worden geschaad" - Article 280 para. 4).

34. A request by the defence to hear a witness who has not been placed on the list of witnesses, who has not been convened to attend the trial and whose summons the defence has not sought in accordance with Article 280 falls under Article 315 CCP (see paragraph 35 below). It appears from the judgment of 23 December 1986 by the Supreme Court that the trial court needs only accede to a request of this nature if it finds it necessary to do so.

35. Under Article 315 CCP the trial court has the power to order of its own accord the production of evidence, including the summoning of witnesses whom it has not yet heard.

36. If it finds that there is occasion to do so, the trial court may order that a witness be brought to its hearing by the police (Articles 282 para. 1 and 315 CCP).

37. If at the trial the trial court finds it necessary to have any factual question examined by the investigating judge, it must suspend the hearing and refer the question to the investigating judge along with the case file. The investigation carried out by the investigating judge in these cases is deemed to be a preliminary judicial investigation and is subject to the same rules (Article 316 CCP).

38. Appeal proceedings against the conviction or sentence at first instance involve a complete rehearing of the case. Both the prosecution and the defence may ask for witnesses already heard at first instance to be heard again; they may also produce new evidence and request the hearing of witnesses not heard at first instance (Article 414 CCP). The defence enjoys the same rights as it does at first instance (Article 415 CCP).

B. Case-law relating to anonymous witnesses

39. In its judgment of 9 January 1990, NJ 1990, no. 409, the Supreme Court held that there was no general rule in Netherlands law to the effect that statements by anonymous police officers could only be admitted if the trial court had first established the existence of clear indications that the officers were under threat.

40. In its judgment of 2 July 1990, NJ 1990, no. 692, the Supreme Court considered that it had to be assumed in light of the European Court's Kostovski judgment that the use of statements by anonymous witnesses was subject to stricter requirements than those defined in its case-law until then. It defined these stricter requirements in the following rule: such a statement must have been taken down by a judge who (a) is aware of the identity of the witness, and (b) has expressed, in the official record of the hearing of such a witness, his reasoned opinion as to the reliability of the witness and as to the reasons for the wish of the witness to remain anonymous, and (c) has provided the defence with some opportunity to put questions or have

questions put to the witness. On the other hand, according to the same judgment, a written document containing the statement of an anonymous witness may be used in evidence if (a) the defence has not at any stage of the proceedings asked to be allowed to question the witness concerned, and (b) the conviction is based to a significant extent on other evidence not derived from anonymous sources, and (c) the trial court makes it clear that it has made use of the statement of the anonymous witness with caution and circumspection.

C. Law reform

41. The Act of 11 November 1993, *Staatsblad* (Official Gazette) 1993, no. 603, has added to the CCP a number of detailed provisions relating to the "protection of witnesses". It entered into force on 1 February 1994. The additions include the following.

Article 226a now provides that the identity of a witness may remain secret if there is reason to believe that the disclosure of his identity may threaten his life, health, safety, family life or socio-economic existence and if the witness has made it clear that he does not wish to make any statement because of this. The decision is made by the investigating judge, who must first hear the prosecution, the defence and the witness himself.

An appeal against the decision of the investigating judge lies to the trial court (Article 226b).

The investigating judge may order that a threatened witness be heard in the absence of the accused, or of counsel, or of both, so as not to disclose the identity of the threatened witness; in that event, the prosecuting authorities may not attend the questioning of the witness either. The investigating judge must then allow the defence to put questions of its own to the witness, either through the use of telecommunication or in writing (Article 226d).

Article 264 now lays down that the prosecution may refuse to summon a threatened witness.

If the trial court has ordered that a witness be heard and that witness turns out to be under threat, he must be heard in camera by the investigating judge (Article 280 para. 5).

The statement of an anonymous witness taken in accordance with the above-mentioned provisions may only be used in evidence against a person accused of crimes in respect of which his detention on remand is permitted (Article 342 para. 2 (b)).

A new paragraph has been added to Article 344 to the effect that a written document containing a statement of a person whose identity is not apparent may only be used in evidence if the conviction is based to a significant degree on other evidence and if the defence has not at any time during the trial sought to question that person or have him questioned.

42. The following passages are taken from the explanatory memorandum of the bill which became the Act of 11 November 1993:

"The Bill is based on the assumption that only threatened witnesses should be in a position to claim complete anonymity. I realise that the usefulness of certain police officers (e.g. undercover agents posing as drugs purchasers, members of an arresting team or an observation team) will be reduced thereby. However, the public interest in investigating serious crime cannot alone justify guaranteeing complete anonymity. This interest can in my opinion be sufficiently protected if the law creates the possibility to refrain from asking the police officer for certain identifying information and by granting the interrogating judge the power to take all measures which are reasonably required to prevent the disclosure of such identifying information, such as making the police officer unrecognisable by the use of make-up or disguise or preventing eye contact between the accused and the police officer." (Explanatory Memorandum, Lower House of Parliament 1991-92, 22 483, no. 3, p. 17).

PROCEEDINGS BEFORE THE COMMISSION

43. Mr van Mechelen and Mr Willem Venerius applied to the Commission on 27 November 1992, Mr Johan Venerius on 8 December and Mr Pruijmboom on 24 November. They relied on Article 6 paras. 1 and 3 (d) of the Convention (art. 6-1, art. 6-3-d), complaining that their convictions were based to a decisive extent on the evidence of anonymous witnesses, in respect of whom the rights of the defence had been unacceptably restricted.

44. The Commission declared the applications (nos. 21363/93, 21364/93, 21427/93 and 22056/93) admissible on 15 May 1995. In its report of 27 February 1996 (Article 31) (art. 31) it expressed the opinion that there had been no violation of Article 6 paras. 1 and 3 (d) of the Convention (art. 6-1, art. 6-3-d) (twenty votes to eight). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment³.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

45. The Government concluded their memorial by expressing the opinion that the applicants had had a "fair trial" within the meaning of Article 6 paras. 1 and 3 (d) of the Convention (art. 6-1, art. 6-3-d).

³ Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-III), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 3 (d) OF THE CONVENTION (art. 6-1, art. 6-3-d)

46. The applicants complained that their conviction had been based essentially on the evidence of police officers whose identity was not disclosed to them and who were not heard either in public or in their presence. They alleged a violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d), according to which:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

..."

Neither the Government nor the Commission shared this view.

A. Arguments before the Court

47. The applicants questioned the need to maintain the anonymity of the police officers at all. There had in their contention not been any danger for them or their families. This was borne out by the fact that Mr Engelen, the one named witness who in the earlier stages of the proceedings had made statements incriminating one of the applicants, had not been granted anonymity and it had not been suggested that he had at any time been threatened.

Moreover, the interrogation of the witnesses should in their contention not have taken place before the investigating judge. It would in their view have been feasible to have the police officers questioned in open court, wearing disguise if need be.

In addition, the applicants considered that they had not had sufficient opportunity to challenge and question the police officers. They drew attention to the conditions under which the interrogation of the anonymous witnesses had taken place.

The anonymous police officers had been confined in a room with the investigating judge, separated from the applicants and their lawyers; it had not been possible for the applicants or their lawyers to discover whether there had been any other person in that room or what was going on there.

Not all the questions asked by the defence had been answered. Questions not answered had included, for instance, where the police officer being interrogated had been at the time he made his observation, whether he wore spectacles, and whether the observation of the caravan sites had involved the use of optical aids or a directional microphone.

Finally, the applicants claimed that their conviction had been based "to a decisive extent" on the evidence given by anonymous witnesses. The only evidence relied on by the Court of Appeal positively identifying the applicants had been that given by anonymous police officers.

48. The Government and the Commission both considered that there had been no violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d).

They both considered that the safety of the police officers themselves and their families, and the need not to impair their usefulness in other similar operations, provided sufficient justification for maintaining their anonymity.

The procedure followed had been that established by the Netherlands Supreme Court in its judgment of 2 July 1990 (see paragraph 40 above) in the wake of the European Court's judgment in the Kostovski case (judgment of 20 November 1989, Series A no. 166). This procedure, so they argued, had been accepted by the Court in its Doorson judgment (Doorson v. the Netherlands, 26 March 1996, Reports of Judgments and Decisions 1996-II).

In accordance with this procedure, the statements of the anonymous police officers had been taken down (a) by a judge, who (b) had himself ascertained the identity of the police officers concerned, (c) had given a written opinion of their reliability and credibility in his official report, (d) had given a reasoned opinion of their reasons to remain anonymous and found them sufficient, and (e) had given the defence sufficient opportunity to question them or have questions put to them. The official report of the investigating judge, which was very detailed, bore this out.

There had in addition been evidence from non-anonymous sources, namely a recorded telephone conversation, statements of named police officers and certain technical evidence, which tended to corroborate the statements of the anonymous police officers. The conviction of the applicants did therefore not rest solely on the latter statements.

B. The Court's assessment

1. Applicable principles

49. As the requirements of Article 6 para. 3 (art. 6-3) are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 para. 1 (art. 6-1), the Court will examine the complaints under Article 6 paras. 1 and 3 (d) taken together (art. 6-1+6-3-d) (see, among many other authorities, the above-mentioned Doorson judgment, pp. 469-70, para. 66).

50. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, the above-mentioned Doorson judgment, p. 470, para. 67).

51. In addition, all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see the *Lüdi v. Switzerland* judgment of 15 June 1992, Series A no. 238, p. 21, para. 49).

52. As the Court had occasion to state in its Doorson judgment (*ibid.*, p. 470, para. 69), the use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention.

53. In that same judgment the Court noted the following:

"It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention (art. 8). Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify." (see the above-mentioned Doorson judgment, p. 470, para. 70)

54. However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court has recognised that in such cases Article 6 para. 1 taken together with Article 6 para. 3 (d) of the

Convention (art. 6-1+6-3-d) requires that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities (*ibid.*, p. 471, para. 72).

55. Finally, it should be recalled that a conviction should not be based either solely or to a decisive extent on anonymous statements (*ibid.*, p. 472, para. 76).

2. Application of the above principles

56. In the Court's opinion, the balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the police force of the State. Although their interests - and indeed those of their families - also deserve protection under the Convention, it must be recognised that their position is to some extent different from that of a disinterested witness or a victim. They owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances. In addition, it is in the nature of things that their duties, particularly in the case of arresting officers, may involve giving evidence in open court.

57. On the other hand, the Court has recognised in principle that, provided that the rights of the defence are respected, it may be legitimate for the police authorities to wish to preserve the anonymity of an agent deployed in undercover activities, for his own or his family's protection and so as not to impair his usefulness for future operations (see the above-mentioned *Lüdi* judgment, p. 21, para. 49).

58. Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.

59. In the present case, the police officers in question were in a separate room with the investigating judge, from which the accused and even their counsel were excluded. All communication was via a sound link. The defence was thus not only unaware of the identity of the police witnesses but were also prevented from observing their demeanour under direct questioning, and thus from testing their reliability (see the above-mentioned *Kostovski* judgment, p. 20, para. 42 in fine).

60. It has not been explained to the Court's satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered.

In the absence of any further information, the Court cannot find that the operational needs of the police provide sufficient justification. It should be noted that the explanatory memorandum of the bill which became the Act of

11 November 1993 (see paragraph 42 above) refers in this connection to the possibilities of using make-up or disguise and the prevention of eye contact.

61. Nor is the Court persuaded that the Court of Appeal made sufficient effort to assess the threat of reprisals against the police officers or their families. It does not appear from that court's judgment that it sought to address the question whether the applicants would have been in a position to carry out any such threats or to incite others to do so on their behalf. Its decision was based exclusively on the seriousness of the crimes committed (see paragraph 26 above).

In this connection, it is to be noted that Mr Engelen, a civilian witness who in the early stages of the proceedings had made statements identifying one of the applicants as one of the perpetrators, did not enjoy the protection of anonymity and it has not been claimed that he was at any time threatened.

62. It is true - as noted by the Government and the Commission (see paragraph 48 above) - that the anonymous police officers were interrogated before an investigating judge, who had himself ascertained their identity and had, in a very detailed official report of his findings, stated his opinion on their reliability and credibility as well as their reasons for remaining anonymous.

However these measures cannot be considered a proper substitute for the possibility of the defence to question the witnesses in their presence and make their own judgment as to their demeanour and reliability. It thus cannot be said that the handicaps under which the defence laboured were counterbalanced by the above procedures.

63. Moreover, the only evidence relied on by the Court of Appeal which provided positive identification of the applicants as the perpetrators of the crimes were the statements of the anonymous police officers. That being so the conviction of the applicants was based "to a decisive extent" on these anonymous statements.

64. In the Court's view, the present case falls to be distinguished from that of Doorson: in the latter case it was decided on the basis of information contained in the case file itself that the witnesses Y.15 and Y.16 - who were both civilians, and who knew the accused personally - had sufficient reason to believe that he might resort to violence, and they were heard in the presence of counsel (see the above-mentioned Doorson judgment, pp. 454-55, para. 25, pp. 455-56, para. 28, and pp. 470-71, paras. 71 and 73).

In addition, in the latter case other evidence providing positive identification of the accused as the perpetrator of the crimes charged was available from sources unrelated to the anonymous witnesses (*ibid.*, pp. 458-59, para. 34, and p. 472, para. 76).

65. Against this background the Court cannot find that the proceedings taken as a whole were fair.

C. Conclusion

66. There has been a violation of Article 6 para. 1 taken together with Article 6 para. 3 (d) (art. 6-1+6-3-d).

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

67. Article 50 of the Convention (art. 50) provides as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

68. The applicants argued that if the 's-Hertogenbosch Court of Appeal had not relied on the statements of the anonymous police officers, there would have been no case against them and they would have been acquitted. They each claimed non-pecuniary damage to an amount of 250 Netherlands guilders (NLG) for each day of detention.

The Government considered the applicants' claims for damage "disproportionately high".

The Delegate of the Commission did not comment.

69. The Court considers that in the circumstances this aspect of the case is not yet ready for decision. It is accordingly necessary to reserve it, due regard being had to the possibility of agreements being reached between the respondent State and the applicants.

B. Costs and expenses

70. The applicants made no claims in respect of costs and expenses incurred in the domestic criminal proceedings.

As regards the costs and expenses incurred in the proceedings before the European Commission and Court of Human Rights, the applicants' claims were as follows:

Mr van Mechelen and Mr Willem Venerius (represented by Ms Spronken): NLG 16,598.07 including value-added tax;

Mr Johan Venerius (represented by Mr Sjöcrona): NLG 30,446.43 including value-added tax;

Mr Pruijmboom (represented by Mr Knoops): NLG 11,905 including value-added tax.

The Government and the Delegate of the Commission did not comment on these claims.

71. The Court notes that Mr van Mechelen, Mr Johan Venerius and Mr Willem Venerius were granted legal aid by the Convention institutions.

72. The Court is satisfied that the costs and expenses claimed were actually and necessarily incurred by the applicants in their attempts to obtain redress for the violation found. It also finds the sums claimed by the applicants Van Mechelen, Willem Venerius and Pruijmboom reasonable as to quantum.

On the other hand, the claim of Mr Johan Venerius is disproportionate when compared with the claims of the other applicants. No explanation has been given for this discrepancy.

73. The Court awards Mr Pruijmboom the sum claimed.

To Mr van Mechelen and Mr Willem Venerius jointly it awards the sums claimed, less the amount paid to them by the Council of Europe by way of legal aid, namely 11,412 French francs (FRF).

Deciding on an equitable basis, the Court awards Mr Johan Venerius NLG 20,000 including value-added tax, less the amount paid to him by the Council of Europe by way of legal aid, namely FRF 11,436.

C. Default interest

74. According to the information available to the Court, the statutory rate of interest applicable in the Netherlands at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT

1. Holds by six votes to three that there has been a violation of Article 6 para. 1 of the Convention taken together with Article 6 para. 3 (d) (art. 6-1+6-3-d);
2. Holds unanimously that the respondent State is to pay, within three months, in respect of costs and expenses,
 - (a) to the applicants Van Mechelen and Willem Venerius jointly, 16,598 (sixteen thousand five hundred and ninety-eight) Netherlands guilders and 7 (seven) cents, less 11,412 (eleven thousand four hundred and twelve) French francs to be converted into Netherlands guilders at the rate of exchange applicable on the date of delivery of the present judgment;
 - (b) to the applicant Johan Venerius, 20,000 (twenty thousand) Netherlands guilders, less 11,436 (eleven thousand four hundred and

thirty-six) French francs to be converted into Netherlands guilders at the rate of exchange applicable on the date of delivery of the present judgment;

(c) to the applicant Pruijmboom, 11,905 (eleven thousand nine hundred and five) Netherlands guilders;

(d) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;

3. Rejects unanimously the remainder of the claim of the applicant Johan Venerius for reimbursement of costs and expenses;
4. Holds unanimously that the question of the application of Article 50 of the Convention (art. 50) in respect of the applicants' claims for damages is not ready for decision; and consequently,
 - (a) reserves the said question;
 - (b) invites the Government and the applicants to submit, within the forthcoming three months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;
 - (c) reserves the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 April 1997.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Matscher and Mr Valticos;

(b) dissenting opinion of Mr van Dijk.

R. B.
H. P.

DISSENTING OPINION OF JUDGES MATSCHER AND
VALTICOS*(Translation)*

This is a borderline case. On the one hand, the conditions in which the trial took place and the witnesses were examined were certainly not entirely satisfactory and no doubt they could have been improved, although it has to be acknowledged that efforts had been made in Netherlands law to adapt the procedure for hearing anonymous witnesses to the requirements of Article 6 of the Convention (art. 6) as set out in the judgment of *Kostovski v. the Netherlands* (20 November 1989, Series A no. 166). On the other hand, this was a case of armed robbery and it is understandable that the witnesses - even though they were police officers - should be in fear of reprisals from trigger-happy criminals. Were a similar situation to arise in the future, it would certainly be desirable for even more attention to be paid to the requirements of Article 6 of the Convention (art. 6) when measures were taken.

In the instant case, however, having regard to all the circumstances, we are unable to find a violation of Article 6 of the Convention (art. 6) and concur on the whole with the opinion of Judge van Dijk.

DISSENTING OPINION OF JUDGE VAN DIJK

1. To my regret I am unable to agree with the conclusion of the majority that there has been a violation of Article 6 para. 1 in conjunction with Article 6 para. 3 (d) of the Convention (art. 6-1+6-3-d). Nor can I follow the majority as regards the essence of the reasoning supporting that conclusion.

2. Although the Court's case-law has not yet been fully developed as to the conditions subject to which a conviction in criminal proceedings may be based partly on statements of anonymous witnesses, the Court has drawn certain lines. I am of the opinion that the present judgment is neither within these lines nor a logical continuation thereof, while on the other hand the facts of the case are not specific to such a degree as to justify distinguishing the present case from, especially, the Doorson case (Doorson v. the Netherlands judgment of 26 March 1996, Reports of Judgments and Decisions 1996-II, in which the Netherlands were found not to have acted in violation of Article 6 para. 1 taken together with Article 6 para. 3 (d) of the Convention (art. 6-1+6-3-d)). Even though the Court is not bound by precedent, legal certainty and legal equality require that the Court's case-law be both consistent and transparent as well as reasonably predictable in so far as the facts of the case are comparable to those of earlier cases.

3. Since "the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them" (see the previously cited Doorson judgment, p. 470, para. 67), the applicable national legislation and case-law and the practice followed by the domestic courts are to some extent relevant also for the Court.

The Netherlands Supreme Court revised its case-law concerning the conditions under which a conviction may be based on statements of anonymous witnesses in view of the judgment of the Court in the Kostovski case (see paragraph 40 of the present judgment). Moreover, taking that revised case-law as a starting-point and basing itself, *inter alia*, on an analysis of the Court's case-law on the admissibility of statements of anonymous witnesses in criminal proceedings and the implications of the Court's case-law for the relevant domestic law and legal practice in the Netherlands, the Netherlands Government proposed, and the legislature adopted, several amendments to the Code of Criminal Procedure (see paragraph 42 of the judgment, and the explanatory memorandum to the Act of 1993 cited there).

The Act of 1993 was not yet in force when the judgments of the domestic courts in the present case were given. However, had it been in force, the procedure followed by the Court of Appeal would have been in conformity with the rules thereby introduced. It is true that the reasons listed in the Act for keeping the identity of a witness secret do not include the desirability, for tactical reasons, of not disclosing the identity of a police officer in order

not to impair his future effectiveness. The explanatory memorandum of the Act states in so many words that in the opinion of the Government the public interest in investigating serious crimes cannot alone justify guaranteeing complete anonymity (see paragraphs 41 and 42 of the present judgment). However, the Court of Appeal did not base its acceptance of the wish of the witnesses to remain anonymous on this reason, but on the fear of the witnesses for their lives and safety and those of their families (see paragraph 26 of the present judgment), which is a ground provided for in Article 226a of the Code of Criminal Procedure.

The foregoing does not, of course, guarantee per se that the revised case-law of the Supreme Court and/or the relevant provisions of the amended Code of Criminal Procedure will in all circumstances be found to be in conformity with the Convention. However, as noted above, in this matter the domestic case-law and legislation have a relevance of their own. Moreover, in the present case, in view of the legal background of the relevant Netherlands case-law and the drafting history of the new legislation, in both of which Strasbourg case-law was expressly taken into account, there would seem to be good cause for a presumption of conformity, at least in so far as the issues dealt with have also been considered in the Strasbourg case-law.

4. Consideration of the various issues involved ultimately led me to the conclusion that Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) have not been violated in the present case. It might have been preferable for the Court of Appeal or the investigating judge to have interrogated the witnesses in the presence of counsel and the Procurator General, the accused being able to follow the proceedings in a separate room. I cannot discover from the case file that was before the Court whether this possibility was considered at all. Be that as it may, taking all the facts and circumstances into account, I am of the opinion that the right of the defence to examine the witnesses was not limited to such an extent that the defence was not given an adequate and proper opportunity to challenge and question the witnesses, as required by Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) (see the *Lüdi v. Switzerland* judgment of 15 June 1992, Series A no. 238, p. 21, para. 47). I therefore consider the trials to have been fair, taking into account also the compensating elements of the procedure decided on by the Court of Appeal and followed by the investigating judge. In reaching this conclusion I would stress the following aspects:

(a) The anonymous witnesses were not interrogated only by a prosecuting authority, but also by an independent and impartial judge who, judging from his official report of his findings to the Court of Appeal, took great care to compensate the defence for the handicap resulting from the lack of a face-to-face confrontation. The applicants and their counsel were able to hear the interrogation by the investigating judge and to ask questions of their own. In these respects, as was also observed by the Commission, the

present case differs from the cases of *Kostovski* (*Kostovski v. the Netherlands* judgment of 20 November 1989, Series A no. 166, p. 20, para. 42), *Windisch* (*Windisch v. Austria* judgment of 27 September 1990, Series A no. 186, p. 10, para. 27), *Lüdi* (*loc. cit.*, p. 21, para. 49), and *Saïdi* (*Saïdi v. France* judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, para. 44). The practice in cases such as the present of having witnesses heard by an investigating judge instead of by the trial court itself was accepted by the Court in its *Doorson* judgment as being in conformity with the Convention (*loc. cit.*, p. 471, para. 73).

(b) The Court of Appeal has given reasons for delegating the hearing of the witnesses to the investigating judge. The weight which the minority of the Commission laid on the fact that the Court of Appeal, being the trial court, did not avail itself of the possibility to assess for itself the reliability of the witnesses, is in my opinion not conclusive; there is no good reason why the court could not rely for this on the assessment of the equally independent and impartial investigating judge. In that respect, it is also of relevance that the interrogations before the investigating judge did not take place in a pre-trial phase but during a suspension of the trial before the Court of Appeal and pursuant to an order of the Court of Appeal; they formed part of the trial. In the *Kostovski* case, where the Court emphasised the importance of the possibility for the trial judge to observe the witness, only one of the witnesses was heard by a judge, who was, however, unaware of the identity of the person concerned (*loc. cit.*, p. 21, para. 43).

(c) The statements made before the investigating judge were statements by witnesses who had been identified by the investigating judge as having been, at the relevant moment, sworn police officers who were authorised to perform prosecuting duties invested with investigative competence and were under oath in relation to any statement made in that context (see the *Lüdi* judgment previously cited p. 21, para. 49).

(d) The investigating judge, who had observed the witnesses during the interrogations, gave a reasoned opinion as to their reliability; this was also intended to compensate the defence for being deprived of the visual information which would have permitted them to test the witnesses' reliability (see the *Windisch* judgment previously cited, pp. 10-11, paras. 28-29).

(e) The investigating judge gave his reasoned opinion as to whether the wish of the police officers to remain anonymous was justified; these reasons were also found to be justified by the Court of Appeal on the grounds set out in its judgment. Their shared opinion that the accusations and events were such that fear of violent repercussions was not unsubstantiated cannot be considered unreasonable. Article 6 (art. 6) does not guarantee an unlimited right to question witnesses. It is necessary not only to recognise the discretion of the competent domestic court in maintaining conformity with the exigencies of the proper administration of justice, but also to

balance the interests of the defence under Article 6 (art. 6) against the interests of witnesses protected by other substantive provisions of the Convention (see the Doorson judgment previously cited, p. 470, para. 70). Although in the Lüdi judgment (*loc. cit.*, p. 21, para. 49) the Court considered the interest of the police authorities in preserving the anonymity of their agents "legitimate", greater weight should be given in this case, as was done by the Court of Appeal, to the agents' interest in the protection of their lives and safety and those of their families (Articles 2, 3, 5 and 8 of the Convention) (art. 2, art. 3, art. 5, art. 8).

(f) The defence were given ample opportunity to hear and question the witnesses, and to comment on the recording of their answers, and in fact made extensive use of that opportunity; the technical deficiencies complained of were inconvenient and might perhaps have been avoided, but, given especially the extensive time reserved for the hearings and the detailed way in which the statements were recorded, these deficiencies were not such as to hamper the defence to a significant extent.

(g) The Court of Appeal did not exclude beforehand the possibility that additional questions might be put to witnesses at the trial, but was of the opinion that the defence had insufficiently substantiated their wish to do so. Moreover, the defence were offered the possibility to challenge the statements and their use as evidence in open court before the Court of Appeal.

(h) The convictions were not based solely upon the statements of anonymous witnesses. Although these were undoubtedly the core of the evidence, there were also statements by identified witnesses, there was some technical evidence and there was the recording of the telephone conversation. In this respect, too, the Court should recognise that "as a general rule it is for the national courts to assess the evidence before them".

In the Doorson judgment, in which the criterion of "decisive extent" was developed and applied (*loc. cit.*, p. 472, para. 76), the Court found that this criterion had been met in a situation where the conviction was based, in addition to statements of anonymous witnesses, on a statement made by an identified witness to the police but retracted during the trial and a statement by an identified witness who disappeared before the defence had had the opportunity to question him (*loc. cit.*, p. 472, para. 76, in conjunction with pp. 458-59, para. 34).

In view of all these aspects of the case I come to the conclusion that the trial which led to the applicants' conviction was "fair" in the sense of Article 6 of the Convention (art. 6) as construed in the Court's previous case-law.

Having stated my conclusion I wish, with due respect, to make the following observations with regard to the reasoning on which the majority bases its conclusion.

5. Like the majority, and in accordance with the case-law of the Court, I take as my starting-point that evidence must normally be produced at a public hearing. Therefore, I find in the abstract that interrogation of the police officers at the trial before the Court of Appeal, in disguise if necessary to protect their anonymity, would have been preferable. However, I also take note of the opinion of the Court of Appeal that this would have been too risky because disclosure of the identity of the witnesses could not have been excluded. I would have preferred it if the Court of Appeal had given concrete arguments for that opinion. On the other hand, I lack the expertise - as, I assume, do my colleagues in the Court - to judge whether its fear was justified or not. Then again, one may well wonder whether the defence would have been in a better position to observe the witnesses' demeanour and test their reliability had they appeared in disguise, given the fact that an effective disguise may also substantially disguise the sound and intonation of the voice and the body language of the person concerned. A national court may in general be considered to be in a better position to judge such a complex and factual issue than is our Court, which should substitute its judgment for that of the national court only if the latter's judgment is unreasonable. From the wording of the Doorson judgment it is clear that in that case the Court recognised this primary responsibility of the national court.

6. The fact that police officers were fired at in pursuit does not necessarily mean that at a later stage, during or after the trial, their lives and safety and/or those of their families were in danger. However, on both points the national authorities - in this case the national courts - should be left some latitude to balance the interests of the defence against those of the witnesses (see the Doorson judgment previously cited, p. 470, para. 71, where a reasonableness test was applied). In my opinion the Court of Appeal has not overstepped the mark in finding that the risk of disclosure of the identity of the witnesses was present and that their fear for their lives and safety or those of their families was justified in view of the seriousness of the crimes committed and the violence used.

I disagree with the majority that the Court of Appeal failed to make any real effort to assess the threat of reprisals. The Court of Appeal had at its disposal the report of findings of the investigating judge, in which the latter referred not only to the statements made on this subject by the police officers concerned - which were in some cases supported by previous experience (paragraphs 17 and 21 of the judgment) - but also gave his own evaluation, based upon the seriousness of the crimes and the violence used by the perpetrators. Given these reasoned opinions of both the investigating judge and the Court of Appeal, the latter of which was reviewed by the Supreme Court, the Government were not called upon to give an explanation of their own, as held by the majority (see paragraph 60 of the

judgment); nor in my opinion would the Government have been in a position to do so.

In the Doorson judgment (*loc. cit.*, pp. 470-71, para. 71) the Court found that an actual threat against the witnesses was not required for the decision to maintain their anonymity to be reasonable, and that previous experience might be relevant. In the present case it should also be taken into consideration that some of the witnesses had been wounded while pursuing the robbers. Even if one were to take the position that a certain risk is implicit in the profession of police officer, that should not mean that the latter has to take unnecessary risks and it certainly does not mean that the lives and safety of his family deserve any less protection than that of other persons. The "general duty of obedience to the State's executive authorities" (see paragraph 56 of the judgment) owed by policemen cannot imply that their lives and safety and those of their families are any less worthy of protection. Therefore I cannot agree with the majority that, for the sole reason that in the present case members of the police force were involved, the case has to be distinguished from that of Doorson as far as the balancing of the interests of the defence against those of witnesses is concerned.

The fact that Mr Engelen, who had originally made a highly incriminating statement, was not granted anonymity by the police and nevertheless did not suffer any harm at the hands of the applicants cannot be decisive in this context. The police may have made a mistake in his case by revealing his identity, but in any case later events do not automatically and retrospectively invalidate a reasonable assessment of a risk. One can hardly blame a witness who expresses serious fears for not waiting until something serious happens to him or any other witness; the only criterion for the national court to consider is the reasonableness of the fear.

7. I fail to see why policemen should be under a special duty to give evidence in open court (see paragraph 56 of the judgment) since this is a general civic duty prescribed by law. And even if one may agree that the use of policemen as anonymous witnesses "should be resorted to only in exceptional circumstances" (*ibid.*), one may argue on the other hand that their anonymity should meet with fewer objections from the point of view of the defence, because their statements are statements by sworn professionals, whose identity and investigative competence can easily be checked by the investigating judge.

8. The majority also deal with the question whether "operational needs" provided sufficient justification for preserving the anonymity of the police officers. Reference is made in that context to the explanatory memorandum of the Act of 11 November 1993 in which the Netherlands Government indicate that in their opinion that interest can be sufficiently protected by less far-reaching restrictions on the rights of the defence. However, in my opinion that issue is of only minor importance in the present case, since the Court of Appeal stated in its judgment that, of the arguments advanced by

the witnesses for claiming anonymity, it considered the argument concerning the personal safety of these witnesses and their families to be "decisive" (see paragraph 26 of the judgment).

9. It cannot be denied - and indeed it has not been denied - that the possibilities for the defence to interrogate the witnesses were not without limitations. Nor are they always without limitations in normal situations, where the identity of the witnesses is known to the defence. The fact that certain questions were not answered by witnesses and that this was accepted by the investigating judge may be open to criticism but this would in all probability also have occurred had the witnesses been interrogated in open court in some form of disguise. It may therefore be questioned whether it was necessary and proportionate to refuse to answer certain questions put by the defence in order to protect the anonymity of the witnesses and the secrecy of the police tactics. However, this question has to be answered primarily by the competent domestic court, and indeed it was answered in the affirmative by the investigating judge, and after his decision was challenged by the defence before the Court of Appeal, by the latter as well. On the whole, in my opinion, neither the limitations necessitated by the situation nor those accepted by the investigating judge were such as to warrant the finding that there was no "adequate and proper opportunity to question the witnesses" as required by the Court in its *Kostovski* judgment (*loc. cit.*, p. 20, para. 41). The handicaps under which the defence laboured were, therefore, sufficiently counterbalanced by the procedures followed by the judicial authorities (see the *Kostovski* judgment previously cited, p. 21, para. 43, and the *Doorson* judgment previously cited, p. 472, para. 76).

10. Finally, although the statements of the anonymous witnesses were an essential part of the evidence, it cannot be said that the convictions were based solely on these statements. Whether they were based on these statements "to a decisive extent", as the majority holds (paragraph 63 of the judgment), is hard to say. I share the opinion expressed by the Delegate of the Commission at the Court's hearing that this criterion, laid down in the *Doorson* judgment (*loc. cit.*, p. 472, para. 76), is difficult to apply, because if the testimony of anonymous witnesses is used by the court as part of the evidence, that will always be because the court considers it a "decisive" part of that evidence, making the proof complete or at least sufficient. Here again, the Court's finding that "as a general rule it is for the national courts to assess the evidence before them" (paragraph 50 of the present judgment) should prevail. Moreover, as already mentioned (see paragraph 3 (h) above), in this respect the facts of the case would not seem to differ substantially from those of the *Doorson* case.