In the case of Leutscher v. the Netherlands (1),

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 B (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr L.-E. Pettiti,
Mr R. Macdonald,
Mr S.K. Martens,
Mr M.A. Lopes Rocha,
Mr P. Jambrek,
Mr K. Jungwiert,
Mr P. Kuris,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 24 November 1995 and 22 February 1996,

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

Notes by the Registrar

1. The case is numbered 52/1994/499/581. 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).

PROCEDURE

1. The case was referred to the Court on 8 December 1994 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 17314/90) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) on 29 June 1990 by a Netherlands national, Mr Jakob Koos Leutscher.

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 the respondent State of its obligations under Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant designated the lawyer who would represent him (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. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 January 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr L.-E. Pettiti, Mr R. Macdonald, Mr M.A. Lopes Rocha, Mr P. Jambrek, Mr K. Jungwiert and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the applicant's lawyer 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 and the applicant's memorials on 14 September 1995. The Commission produced the documents in the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 November 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr K. de Vey Mestdagh, Ministry of Foreign Affairs, Agent,
Mr J.L. de Wijkerslooth de Weerdesteijn,
landsadvocaat, Counsel;

(b) for the Commission

Mr H.G. Schermers, Delegate;

(c) for the applicant

Mr B.A.M. van Maarschalkerwaart, advocaat en procureur, Counsel.

The Court heard addresses by Mr Schermers, Mr van Maarschalkerwaart and Mr de Wijkerslooth de Weerdesteijn.

AS TO THE FACTS

I. Particular circumstances of the case

6. The applicant is a Netherlands national born in 1927 and residing in Alicante, Spain. Until the end of 1974 he lived in the Netherlands. At least until late 1976 he was involved in the management of a number of companies incorporated under Netherlands law in which he also had an interest, directly or indirectly, as a shareholder.

7. In 1977 the tax authorities initiated an investigation into possible tax offences committed by the applicant.

8. On 22 January 1980 the tax authorities sent to the applicant additional assessments of his income tax (inkomstenbelasting) for the year 1974 and of his property tax (vermogensbelasting) for the year 1975. The sums payable were increased by 100% as the tax authorities considered that the applicant had returned incorrect statements (see paragraph 13 below).

9. On 25 January 1980 the Director of State Taxes (Directeur van 's Rijks Belastingen) forwarded to the public prosecutor

(officier van justitie) a record of findings of 10 January 1980 (proces-verbaal) by the Fiscal Intelligence and Investigation Service (Fiscale Inlichtingen- en Opsporingsdienst), with the request to take the measures necessary to prosecute the applicant. On 25 June 1980 the applicant sent a letter to the public prosecutor to the effect that it had come to his notice that he was under suspicion.

On 3 September 1982 the public prosecutor requested the opening of a preliminary judicial investigation (gerechtelijk vooronderzoek) against the applicant.

10. On 24 May 1984 the Amsterdam Regional Court (arrondissementsrechtbank) tried the applicant in absentia. The charges comprised four counts of ordering the return of false tax statements for the years 1974 to 1976 by various companies in whose management he was involved as well as two counts of making false statements of his income and assets, resulting in the fixing of incorrect assessments of his income tax for 1974 and his property tax for 1975. The Regional Court found him guilty on all counts on 7 June 1984 and sentenced him to one year's imprisonment and a fine of 1,000,000 Netherlands guilders (NLG).

11. The applicant appealed to the Amsterdam Court of Appeal (gerechtshof).

Having held hearings on 10 October 1986 and on 16 January and 13 March 1987, that court, in its judgment of 13 March 1987, quashed the judgment of the Regional Court and declared the prosecution time-barred. It held that since the applicant had been aware as of 25 June 1980 of the possibility of criminal proceedings being brought against him and no action relating thereto had been taken until 3 September 1982 (the opening of the preliminary judicial investigation), the criminal charge against him could not be said to have been determined within a "reasonable time" as required by Article 6 (art. 6) of the Convention and Article 14 para. 3 of the International Covenant on Civil and Political Rights.

12. On 25 June 1987, Mr Leutscher filed with the Court of Appeal a request for reimbursement of costs and expenses incurred in the course of the criminal proceedings against him. He sought, inter alia, NLG 61,410 for the assistance of counsel and NLG 40,000 for loss of time, relying on Article 591a para. 2 of the Code of Criminal Procedure (Wetboek van Strafvordering; CCP) (see paragraph 17 below).

13. On 6 January 1988, the Tax Chamber (belastingkamer) of the Amsterdam Court of Appeal quashed the additional assessment of the applicant's income tax for 1974. On 13 April 1988 it also quashed the additional assessment of his property tax over 1975 (see paragraph 8 above).

14. On 16 March 1990, following a hearing in camera on 20 July 1988, which was attended by the applicant and his counsel, the presiding judge of the review chamber (raadkamer) of the Court of Appeal gave a decision on the applicant's request for reimbursement of costs and expenses.

He awarded certain sums to cover the costs of the witnesses and the fees of tax consultants, as well as full reimbursement of the applicant's travel expenses. However, he refused to order the payment of any sum to compensate for loss of time, not finding it established that the applicant had suffered any detriment in this regard. He also rejected the claim for reimbursement of counsel's fees. His reasoning on this issue included the following:

"It appears from the case file that [the applicant] was involved in a number of companies and that these companies, under the direction or orders of [the applicant], committed a number of criminal acts of a fiscal nature (fiscale delicten) which have caused the State considerable financial loss. The Regional Court convicted the applicant inter alia of these criminal acts ...

Neither the file of the criminal investigation nor that relating to the present request gives any cause to doubt that this conviction was correct.

In these circumstances the Court of Appeal, considering all the circumstances, does not find that there are any reasons in equity to grant [the applicant] reimbursement of his legal costs."

II. Relevant domestic law

15. The following sets out the relevant provisions of the Code of Criminal Procedure as they read at the time of the events complained of.

16. Article 90 CCP, in so far as relevant, provided:

"1. Compensation shall be awarded in each case if and to the extent that the court, taking all circumstances into account, is of the opinion that there are reasons in equity to do so.

..."

17. Article 591a CCP, in so far as relevant, provided:

"...

2. If the case ends without imposition of a punishment or measure ... the former suspect or his heirs may be granted compensation at the expense of the State for the damage which he has actually suffered through loss of time as a result of the preliminary investigation and the examination of his case at the trial, as well as the costs of counsel. This will include compensation for the costs of counsel during police custody and detention on remand. Compensation for such costs may furthermore be granted when a case ends with the imposition of a punishment or measure on the basis of a fact for which detention on remand is not allowed.

...

4. [Article] 90 ... shall apply by analogy."

18. Appeal proceedings against a conviction or sentence at first instance involve a complete rehearing of the case. The defence enjoys the same rights as it does at first instance (Article 415 CCP).

PROCEEDINGS BEFORE THE COMMISSION

19. Mr Leutscher applied to the Commission on 29 June 1990.

He complained under Article 6 paras. 1 and 3 (b) and (d) (art. 6-1, art. 6-3-b, art. 6-3-d) of the Convention that both the additional tax assessments and the criminal proceedings

against him had been based on incorrect facts and that he had been denied the opportunity to prove that both the assessments and the criminal charges were unjust. He submitted that the additional tax assessments and criminal charges had been based on fiscal documents to which he had been denied access, which had seriously hampered him in challenging the assessments and charges. As a result he had not had a fair hearing before the Court of Appeal in respect of his claims for remuneration after the criminal proceedings had been discontinued.

The applicant also complained that the reference to the correctness of his conviction at first instance made by the President of the review chamber of the Court of Appeal in the latter's decision of 16 March 1990 in respect of his compensation claim had violated his rights under Article 6 para. 2 (art. 6-2) of the Convention as it reflected the opinion that he was guilty of the offences with which he had been charged, whereas the criminal proceedings had not ended in a conviction.

The applicant finally complained under Article 6 para. 1 (art. 6-1) of the Convention that proceedings he had brought to obtain access to certain fiscal documents allegedly grounding the additional tax assessments and increases had not been brought to a conclusion within a reasonable time.

20. On 8 January 1993 the Commission declared the application (no. 17314/90) admissible in so far as it related to the applicant's complaints in respect of the proceedings concerning the claim for reimbursement of legal fees and in respect of the applicant's right to be presumed innocent, and inadmissible for the remainder.

In its report of 12 October 1994 (Article 31) (art. 31), it concluded unanimously that there had been no violation of Article 6 para. 1 (art. 6-1) and by eight votes to five that there had been no violation of Article 6 para. 2 (art. 6-2). The full text of the Commission's opinion and of the partly dissenting opinion contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions - 1996-II), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT

21. The Government concluded their memorial by expressing the opinion that there had been no violation of Article 6 para. 2 (art. 6-2), that Article 6 paras. 1 and 3 (art. 6-1, art. 6-3) were not applicable to the case, and that even if the Court should find Article 6 para. 1 (art. 6-1) to be applicable, it had not been violated.

AS TO THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

22. In his memorial before the Court, the applicant repeated all the various complaints which he had submitted to the Commission, including those which the Commission had declared inadmissible (see paragraphs 19 and 20 above).

However, the compass of the case before it being

delimited by the Commission's decision on admissibility, the Court has no jurisdiction to revive issues declared inadmissible (see, as a recent authority, the Masson and Van Zon v. the Netherlands judgment of 28 September 1995, Series A no. 327-A, p. 16, para. 40).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

23. The first complaint of the applicant declared admissible by the Commission was that he had not had a fair hearing before the Amsterdam Court of Appeal in relation to his request for reimbursement of his counsel's fees, contrary to Article 6 para. 1 (art. 6-1) of the Convention, which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Neither the Commission nor the Government agreed with this contention.

24. The applicant's request was based on Article 591a para. 2 CCP (see paragraph 17 above).

In the above-mentioned judgment in the case of Masson and Van Zon, the Court had regard to the wording of that provision (according to which the competent court "may" award the former suspect compensation - ibid.), which made it clear that Article 591a para. 2 CCP did not require the domestic courts to hold the State liable to pay even if the conditions set out therein were met and therefore did not create any "right" for the former accused. The measure of discretion granted by Article 90 para. 1 CCP, which made the award of compensation contingent on the competent court's being of the opinion that "reasons in equity" existed therefor (see paragraph 16 above) provided a further indication that no actual "right" was recognised under the law of the Netherlands. That being so, the Court held that proceedings under Article 591a para. 2 CCP were not covered by Article 6 para. 1 (art. 6-1) of the Convention (loc. cit., pp. 19-20, paras. 51-52).

The Court sees no reason to alter its conclusion in the instant case. In any event, the applicant did not submit any argument on this issue; nor did the Commission's Delegate, speaking at the Court's hearing, invite the Court to reconsider its earlier case-law.

Accordingly, the Court holds that Article 6 para. 1 (art. 6-1) is not applicable to the proceedings in question.

III. ALLEGED VIOLATION OF ARTICLE 6 PARA. 2 (art. 6-2) OF THE CONVENTION

25. Relying on Article 6 para. 2 (art. 6-2) of the Convention, the applicant also objected to the statement in the Court of Appeal's decision of 16 March 1990 that neither the file of the criminal investigation nor that relating to his request for reimbursement of his lawyer's fees gave any cause to doubt that his conviction at first instance was correct (see paragraph 14 above). This, he contended, constituted a violation of the presumption of innocence enshrined in Article 6 para. 2 (art. 6-2), according to which:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Neither the Commission nor the Government concurred with this view.

26. The applicant argued that since the Amsterdam Court of Appeal had declared the prosecution time-barred on 13 March 1987 (see paragraph 11 above), there had been no final judgment finding him guilty and the presumption of innocence enshrined in Article 6 para. 2 (art. 6-2) had not ceased to apply. In his submission, the subsequent refusal of the Court of Appeal to order the reimbursement of his legal costs, based as it was on the ground that his conviction at first instance appeared sound, amounted to a formal finding of guilt without his having been able to exercise the rights of the defence.

27. The Commission, relying on the case-law of the Court, concluded that the refusal to reimburse the applicant his legal costs did not in itself offend the presumption of innocence.

It further observed that the applicant had been convicted at first instance and that no decision had subsequently been given from which it followed that that conviction had been overturned. The Amsterdam Court of Appeal had therefore, in its view, confined itself to noting the continued existence of a reasonable suspicion against the applicant without formally finding him guilty.

28. The Government endorsed the Commission's arguments in substance. They noted in addition that the impugned ground of the Amsterdam Court of Appeal had been a response to an argument put forward by the applicant to the effect that his conviction at first instance had been "altogether unsound".

29. The Court notes that it was common ground that Article 6 para. 2 (art. 6-2) does not confer on a person "charged with a criminal offence" a right to reimbursement of his legal costs where proceedings taken against him are discontinued (see the Lutz v. Germany judgment of 25 August 1987, Series A no. 123, p. 25, para. 59).

The Court, like the Commission, would also recall its established case-law to the effect that in itself the refusal to order the reimbursement to the former accused of his necessary costs and expenses following the discontinuation of criminal proceedings against him does not amount to a penalty or a measure that can be equated with a penalty (ibid., p. 26, para. 63).

Nevertheless, such a decision may raise an issue under Article 6 para. 2 (art. 6-2) if supporting reasoning, which cannot be dissociated from the operative provisions, amounts in substance to a determination of the guilt of the former accused without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence (ibid., para. 60).

30. Although the judgment at first instance was given in absentia, the applicant had the benefit of appeal proceedings which were by way of a complete rehearing and in which the accused enjoyed the same rights as he did at first instance (see paragraphs 10, 11 and 18 above). To that extent it cannot be said that the applicant was not in a position to exercise the rights of the defence. In the event, the appeal proceedings resulted in the Court of Appeal's judgment of 13 March 1987 declaring the prosecution time-barred.

31. Under Article 591a para. 2 CCP taken together with Article 90 CCP the Court of Appeal was empowered to order that

the applicant's costs should be paid out of public funds only if it found that there were "reasons in equity" for such reimbursement. In the exercise of the wide measure of discretion conferred upon it under these provisions, the Court of Appeal was - both under the Convention and under Netherlands law - entitled to take into account the suspicion which still weighed against the applicant as a result of the fact that his conviction had been quashed on appeal only because the prosecution was found to have been time-barred when the case was brought to trial. It made clear that it did so by stating that "neither the file of the criminal investigation nor that relating to the present request [gave] any cause to doubt that this conviction [had been] correct" (see paragraph 14 above).

The Court of Appeal, when applying Article 591a para. 2 CCP, was not called upon to reassess the applicant's guilt or express a view as to whether his conviction would have been upheld on appeal. Nor, when seen in the context of that provision, as it must be, can its decision of 16 March 1990 be construed as a finding to that effect.

32. No violation of Article 6 para. 2 (art. 6-2) can therefore be found on the facts of the present case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Article 6 para. 1 (art. 6-1) of the Convention is inapplicable in the present case;

2. Holds that there has been no violation of Article 6 para. 2 (art. 6-2) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 March 1996.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar