AS TO THE ADMISSIBILITY OF

Application No. 25207/94
by Roelof-Jan KREMERS
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 19 October 1995, the following members being present:

MM. H. DANELIUS, President
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

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

Having regard to the application introduced on 17 December 1993 by Roelof-Jan KREMERS against the Netherlands and registered on 20 September 1994 under file No. 25207/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch citizen, born in 1957, and residing in Velp, the Netherlands. Before the Commission he is represented by Mr. L.J.L. Heukels, a lawyer practising in Haarlem, the Netherlands.

The facts of the case, as submitted by the applicant, may be summarised as follows.

a. Particular circumstances of the case

In or around August 1990, the police started investigating accusations of rape and sexual abuse, lodged by three sisters: A. (born in 1968), B. (born in 1972), and C. (born in 1974). The sisters alleged that they had been raped and sexually abused over a long period of time by several relatives, amongst whom the applicant who is their uncle.

The police investigation was initially directed against, inter alia, the applicant and two of his brothers. Later, at the end of 1990 or in the beginning of 1991, A., B. and C. also accused two other relatives, Mr. H. and a third brother of the applicant. Subsequently, the public prosecutor (officier van justitie) ordered the re-opening of the police investigation. During the re-opened police investigation additional evidence against the applicant appeared. The results of the re-opened police investigation were added to the applicant's case-file in November 1991.

It appears that, as a result of the complaints by the three sisters, criminal proceedings were brought against at least seven

persons, amongst whom the applicant, three of his brothers, his brother-in-law H., his sister Mrs. B.K. who is the mother of A., B. and C. and Mr. H.W. who is married to a sister of A., B. and C.

The applicant was arrested on 18 September 1990 and subsequently detained on remand. He was detained throughout the criminal proceedings against him. His requests to be released were rejected on 26 February, 6 May, 5, 10 and 19 June 1992, respectively.

During interrogations by the police on 20, 25 and 26 September, and 2 and 3 October 1990, the applicant admitted having raped A. and B.

On 23 November 1990, the applicant was summoned to appear before the Regional Court (Arrondissementsrechtbank) of Arnhem on 11 December 1990. He was charged with the multiple rape of A., the multiple rape of B., the multiple rape, committed either alone or together with one or more persons, of C., and the rape of two other nieces D. and E. The offences were alleged to have taken place between 1979 and 1989.

On 11 December 1990, the Regional Court adjourned its examination of the case. On 22 January 1991, the Regional Court referred the case to the investigating judge (rechter-commissaris) in order to have a number of witnesses examined.

In January and February 1991, the investigating judge heard A., B. and C., two of their sisters and their mother in the absence of both the public prosecutor and the applicant. The applicant and his lawyer were given the opportunity to submit questions in writing to the investigating judge but were not allowed to question the witnesses directly. The applicant and the public prosecutor could follow the examinations on a TV-monitor in a separate room.

On 26 and 27 March 1991, the Regional Court resumed its examination of the case. The applicant denied all accusations against him and stated that his confessions to the police were incorrect. He admitted, however, having had sexual intercourse with A. and her sisters, D., E. and F., but stated that this had happened with their consent.

On 9 April 1991, the Regional Court acquitted the applicant of the charges involving D. and E., convicted him of the remaining charges and sentenced him to seven years' imprisonment. It used in evidence statements of A., B. and C. to the police and the applicant's confessions to the police. Both the applicant and the public prosecutor appealed to the Court of Appeal (Gerechtshof) of Arnhem.

In November 1991, the results of the re-opened police investigation were added to the applicant's case-file by the Procurator General (Procureur-Generaal) to the Court of Appeal.

On 10 December 1991, the Court of Appeal started its examination of the case. In compliance with the applicant's request, the Court of Appeal referred the case to the investigating judge for an examination of the alleged victims A., B., C. and D. It adjourned its further examination until 25 February 1992.

On 13 and 14 January 1992, the investigating judge heard B. and C. It was decided not to hear D. as the defence had no questions for her and the investigating judge did not find it necessary to put additional questions to her. A. was not heard. The investigating judge, the court Registrar, and the witnesses were in a room on the first floor of the police station of Velp. The Procurator General was in an adjacent room. The applicant and his lawyer were in a room on the second floor. The Procurator General and the defence could follow the examinations on TV-monitors. Video recordings were made of the

examinations. The investigating judge interrupted each of the examinations to give the defence the opportunity to put additional questions to the witnesses.

In addition to B. and C., the investigating judge also heard a number of other witnesses, amongst whom E.

On 25 February 1992, the Court of Appeal resumed its examination of the case. At that time, the separate cases of all accused, except Mr. H.W. who had not filed an appeal against his conviction by the Regional Court, were pending before the Court of Appeal. The Court of Appeal dealt with all the cases on 25 and 26 February, 6 May and 2, 3, 5, 10, 17 and 19 June 1992. Although all cases were dealt with simultaneously, they remained formally separated. The applicant denied the accusations of rape. He admitted having had sexual intercourse with A., D., E. and F., but denied having forced them to this. He denied having had intercourse with B. He made no statement as regards C.

On the same day, the Court of Appeal heard police officers K. and M., who had been involved in the examinations of the alleged victims and/or the interrogations of the applicant. The Court of Appeal questioned them, inter alia, on the interrogation tactics used, on how the applicant's confession before them had come about and whether they had exerted pressure on the applicant.

On 26 February 1992, at the applicant's request, the Court of Appeal heard Mr. P., a psychologist having a certain expertise as regards the particular problems surrounding incest. On the same day, the Court of Appeal viewed parts of the video recordings of the examination of B. and C. by the investigating judge on 13 and 14 January 1992. Subsequently, the applicant filed objections to the way in which the investigating judge had carried out the examinations of the witnesses on 13 and 14 January 1992. He objected, inter alia, to the fact that the questions had to be submitted in writing beforehand, that not all the questions he had submitted had been put to the witnesses, and that the defence had not been given the opportunity to question the witnesses directly. He also alleged that the investigating judge had played too active a role when questioning B. and C. The applicant argued that as a consequence of these irregularities the prosecution should be declared inadmissible. If the Court of Appeal should reject the request to declare the prosecution inadmissible, he requested that B. and C. be summoned before the Court of Appeal.

The Procurator General objected to a new hearing of B. and C. in view of the mental stress this would cause them. She stated that B. and C. had been advised by their psychiatrists not to testify again. The Court of Appeal, however, decided to summon B. and C. and adjourned its examination until 6 May 1992.

On 6 May 1992, the Court of Appeal adjourned its further examination of the case until 2 June 1992 as the Procurator General could not attend the hearing and as it had not been possible for a colleague to get acquainted with the extensive case-file in time. It further decided to summon A., in her capacity as a civil party to the proceedings against the applicant, to appear on 2 June 1992.

On 2 June 1992, the Court of Appeal resumed its examination. The defence requested the Court of Appeal to add a statement made by A. on the same day in one of the related proceedings to the applicant's case-file. The Court of Appeal granted the request, but on the explicit understanding that this statement was not to be regarded as having been made in the applicant's case.

The Court of Appeal subsequently informed the parties that it intended to hear B. and C. in camera and in the applicant's absence. The Procurator General stated that she had no objections. The

applicant's lawyer stated that the defence would accept the Court of Appeal's decision on this point. The Court of Appeal then decided to hear B. and C. in camera in the absence of the applicant, holding, inter alia:

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> "... that the hearing of the witness (B. and C. respectively) ... shall take place in camera, for the weighty reason that the interest of the investigation and the finding of the truth so require. After all, the witness must be enabled to respond as freely and frankly as possible to the questions that will be put to her about the charges against the suspect, knowing that her statements will not immediately come to public notice ... that, furthermore, the hearing shall take place in the absence of the suspect, since a direct confrontation between the witness and the suspect is psychologically and emotionally too burdensome for the witness...."

B. and C. were heard individually in a separate room, in the presence of the three judges of the Court of Appeal, the Registrar to the Court of Appeal, the Procurator General, the applicant's lawyer as well as the witnesses' lawyer and a social worker. The applicant remained in the court room, where he could follow the examination on a TV-monitor. In addition to the applicant, the lawyers of the accused in the related cases, Mr. P. and a number of court officers (parketpolitie) were present in the court room. They too could follow the examinations on the TV-monitor.

The Court of Appeal put a number of questions to B. and C., which had been submitted beforehand in writing by the defence. The Court of Appeal gave the applicant's lawyer and the Procurator General the opportunity to put additional questions to the witnesses directly. The examinations were interrupted in order to allow the applicant's lawyer to consult his client to see if he wished to put additional questions to the witnesses. The applicant availed himself of this opportunity in respect of C. After the interruption of the examination of B., the applicant's lawyer informed the Court of Appeal that he had no further questions. He further stated that he had been able to follow B.'s examination on the TV-monitor and that he had consulted with his lawyer.

The three judges, the Registrar, the Procurator General and the applicant's lawyer subsequently returned to the court room, where the President of the Court of Appeal gave a summary of the statements of the witnesses. After this summary, the applicant stated that he had been able to follow C.'s examination on the TV-monitor and that he had no additional questions. He further stated that he had been able to follow B.'s examination on the TV-monitor and that he had consulted with his lawyer.

On 3 June 1992, the Court of Appeal examined the witnesses Ms. N.T. and Ms. D.L., both of whom had occasionally gone swimming with A., B. and C. between 1986 and 1988 or 1989.

After the hearings of the latter before the Court of Appeal, the applicant requested that the statements made in the related criminal proceedings by A., B. and C. and the statements made on 3 June 1992 by the other witnesses be added to the applicant's case-file. Having deliberated, the Court of Appeal decided to add the statements by A., B. and C. as well as the statements by the other witnesses A.K., W.K., S.H., S.-H., N.T., D.L., as made in the other cases, to the applicant's case-file, but on the explicit understanding that these statements were not to be considered as having been made in the applicant's case.

The applicant subsequently requested a new hearing of B. and C.

before the Court of Appeal in order to confront them with statements made by the witnesses on 3 June 1992. He wished to ask B. and C. when exactly they went swimming and what kind of bathing attire they then wore.

The Procurator General objected to a further hearing of B. and C., arguing that the interest of the victims in not being confronted any longer with traumatic events spoke against such a new hearing and that such a hearing would be psychologically irresponsible. The request by the defence to be allowed to react to the objection of the Procurator General was rejected by the Court of Appeal. Its President stated that the Court or Appeal was aware of the opinion and arguments of the defence. After having deliberated, the Court of Appeal rejected the request for a new hearing of B. and C., considering, inter alia:

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> "... that the defence has been given ample opportunity to question the witnesses. The court itself has observed that the recollection of the events produced very burdensome negative emotions on the part of the witnesses. The interest the defence in an additional examination does not, in the court's opinion, outweigh the detriment to be experienced by the witnesses as a result of this [an additional hearing]. The court finds a further hearing of B. and C. ... neither desirable nor necessary."

The Court of Appeal subsequently heard Mr. P. He stated that he had seen the examinations of A., B. and C. on 2 June 1992 via a TV-monitor and that his first impression was that the examinations were very burdensome, painful and emotional for them, that they had been repeatedly unable to answer a question because of their emotions, and that the emotions appeared to be genuine.

In the course of Mr. P.'s examination, the applicant's lawyer, Mr. D.J.L. Wijnveldt, mentioned that in April 1988, B. and C. had reported to the police that Mr. W., at that time a friend of their mother, had raped them. Referring to this event, Mr. Wijnveldt asked Mr. P. some questions on the behaviour of incest victims in general and the present victims in particular.

On 5 June 1992, the applicant's lawyer stated to the Court of Appeal that he had recently been informed by one of the lawyers representing one of the other accused in the related cases of the existence of the case-file on the criminal proceedings against Mr. W. That case-file contained two medical certificates from the gynaecologist Dr. H.-K., who had examined B. and C. on 27 April 1988. In the certificates, Dr. H.-K. stated that B.'s hymen was ruptured and C.'s hymen appeared not to be ruptured. The case-file also contained a procès-verbal in which B. stated that she did not know much about sex and that she supposed that her hymen had been ruptured by Mr. W. when she had intercourse with him for the first time in 1987 or 1988, because she had lost blood on that occasion. The police officer M. had been involved in the proceedings against Mr. W.

The Court of Appeal decided to add the case-file of Mr. W. to the applicant's case-file and to summon Dr. H.-K. as an expert witness. The Court of Appeal heard Dr. H.-K. later that day.

Dr. H.-K. stated that it is practically impossible to state with 100% certainty whether intercourse has taken place on the basis of an inspection of the hymen. Dr. H.-K. had had the impression, given the state of B.'s hymen and the state of B.'s vaginal secretion, that B. had had frequent sexual intercourse. She further stated that B.'s behaviour had given her the impression that she had "a complete life behind her". As regards C. she had had the impression that C. had not had frequent sexual intercourse.

On 10 June 1992, the applicant's lawyer informed the Court of Appeal that, in accordance with an agreement concluded between the lawyers representing the other accused in the related cases simultaneously pending before the Court of Appeal, the defence wished to submit a general defence plea. This general plea was subsequently submitted by one of the lawyers, Mr. L.J.L. Heukels. The defence, inter alia, drew attention to the apparent discrepancies between the accusations of B. and C. against the applicant on the one hand and the contents of Mr. W.'s case-file on the other. The defence requested the court to appoint one or more experts, such as a psychiatrist, a clinical psychologist, an incest expert and/or a traumatologist, to investigate the mental health of the alleged victims.

The Court of Appeal decided to hear the testimony of another gynaecologist. It rejected the applicant's request to appoint other experts since it did not consider this necessary. The Court of Appeal decided to summon Professor H., who had been proposed by both the Procurator General and the defence.

On 17 June 1992, the Court of Appeal heard Professor H. and Dr. H.-K. Professor H. stated that, having regard to the inspection method used by Dr. H.-K. in this medical examination, the latter's finding that C.'s hymen appeared to have been intact was not necessarily correct. The applicant was given the opportunity to put questions to both witnesses.

On 19 June 1992, at the applicant's request, the Court of Appeal heard another gynaecologist, Professor E., who stated that Dr. H.-K.'s method of inspection was reliable and that he had no reason to doubt her conclusions.

Also on 19 June 1992, the Court of Appeal heard the Procurator General's closing speech, in which she demanded a sentence of fourteen years' imprisonment, and the applicant's final pleas. The applicant's final pleas consisted of a general plea concerning all the accused in the related cases presented by Mr. L.J.L. Heukels, an additional general plea in all cases presented by Mr. P.R. Wery and a final plea concerning the applicant's case in particular presented by the applicant's lawyer Mr. D.J.L. Wijnveldt.

The defence argued, inter alia, that the prosecution should be declared inadmissible for a number of reasons. It argued, inter alia, that the charges against the applicant were too vague, that the police, for whose actions and failures the prosecuting authorities are responsible, had intentionally withheld Mr. W.'s case-file, including the medical certificates on B. and C., and that the public prosecutor had ordered the re-opening of the police investigation during the trial before the Regional Court without informing the defence or the Regional Court, and that the results of the re-opened police investigation were added to his case-file by the Procurator General in November 1991, after the applicant had lodged his appeal. The defence further complained that, during a recess of one of the hearings before the Court of Appeal, the Procurator General had entered the judges' chambers, where the fully-robed judges were present.

The defence also complained that the rights of the defence, as regards the examination of the victims, had been restricted to such an extent that it could not be held that the applicant had received a fair trial. In particular, the Court of Appeal had refused to summon other experts as witnesses and had allowed B. and C. not to answer certain questions. The defence also argued that B.'s and C.'s examination was not completed, as the defence had not waived its right to examine them. The defence requested the Court of Appeal, inter alia, to hear B. and C. again in connection with the information which had appeared from Mr. W.'s case-file.

In its judgment of 3 July 1992 the Court of Appeal quashed the Regional Court's judgment of 9 April 1991, convicted the applicant of the charges in respect of A. and B. and acquitted him of the remaining charges. It sentenced the applicant to five years' imprisonment. The Court of Appeal used in evidence statements made by A. and B. to the police, and the applicant's confessions to the police. It held that charges against the applicant were in conformity with the requirements of Section 261 of the Code of Criminal Procedure (Wetboek van Strafvordering), that the methods used in the police investigations had not been incorrect and that it had not been made plausible in any way that the police had acted improperly and without due care.

As regards the alleged withholding of documents, the Court of Appeal considered, inter alia:

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> "The argument that the police intentionally failed to add to the case-file [the reports made by B. and C. against Mr. W. and the medical certificates on them of 27 April 1988] lacks foundation, because both in the ... procès-verbal in the present criminal proceedings nr. M 9932/AB/1991 of March 1991 ... and in the procès-verbal of the examination of C. dated 29 January 1991, nr. M 9931/G/1991 ... the police officers explicitly referred to the case-file of the criminal case against Mr. W., mentioning both the date of the criminal complaint and the registration number of the case-file."

As regards the presence of the Procurator General in the judges' chambers, the Court of Appeal considered, inter alia:

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> "The court considers on this point that the Procurator General entered the judges' chambers during a recess of the trial only in order to hand a number of letters from the lawyers in the present and other cases to the members of the court. This happened while no deliberations were taking place in the judges' chambers, which, as is correctly stated in the [defence's] written plea, has been stated by the President [of the Court of Appeal].
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> In the opinion of the court there were, under these circumstances, no reasonable grounds to fear that the Procurator General was involved in any way in deliberations in chambers."

As regards the re-opening of the police investigation, the Court of Appeal considered:

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> "The court rejects this argument. The re-opened [police] investigation, which resulted in the second procès-verbal with annexes, took place because [A., B. and C.] made new statements, causing suspicions to arise against persons who, up to that moment, had not been suspected of ... involvement in the facts at issue. This second [police] investigation was, therefore, not a further investigation in respect of the suspects who, at that moment, had already been summoned, but was directed against new suspects. This does not alter the fact that during the re-opened police investigation information came forward concerning the suspects who had already been summoned at that moment.
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> It was open to the Procurator General, pursuant to Section

414 of the Code of Criminal Procedure, which gives the suspect and his lawyer the same competence, to add new documents to the case-file pending the appeal proceedings."

As regards the applicant's complaint that he had not been given adequate and proper opportunity to question B. and C., the Court of Appeal considered:

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"The court itself has observed that the examination in general, and some of the questions put by the defence in particular, entailed a strong emotional burden for B. and C. The examination had to be interrupted several times because the witnesses, as a result of intense emotions, were not capable to reply to the questions put to them. At certain moments the witness B. lapsed into fits of crying and at the end of the examination the witness C. was unable to utter a single word and had to be led out of the room with the help of her lawyer and a social worker. This was apparently the result of the confrontation with, and the recollection of, the suffering experienced in her youth.

The court finds that with this the limit had been reached of what could be required of these obviously traumatised young women - who, in the course of the present criminal proceedings had already been heard repeatedly about the experiences in their youth - as regards the interest of the defence. For that reason it was in the opinion of the court unacceptable to require these witnesses to stay in the room after the examination, or after a recess of the hearing to be present again the next day(s), so that possibly they could be subjected again to an examination. For the same reason it was undesirable to comply with the request of the defence, which was made at a subsequent stage of the trial, to summon these witness once again.

Insofar as the defence was not allowed to put a question, or insofar as the witnesses were allowed not to answer a question, this was done because, in the opinion of the court, the question at issue implied a confrontation with, and the recollection of suffering experienced in youth, which could not be done in view of the emotional state of the witnesses."

As regards the applicant's argument that he had not been given adequate time and facilities to prepare his defence, the Court of Appeal considered, inter alia:

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"In the course of the various court hearings, the defence has been able to submit whatever it considered relevant. As a result of the addition of documents to the case-file at the court hearing of 5 June 1992, an expert witness was heard on the same day and two additional experts were heard during the court hearings of 17 June and 19 June 1992, respectively. Those additional hearing dates were determined in consultation with, and with the approval of the defence and the Procurator General. The court finds that the suspect - in view of this procedure - cannot have been harmed in his defence and that there has been no violation of the principle of a fair trial."

The Court of Appeal rejected the applicant's request to appoint experts to investigate the mental health of B. and C. and their faculty of memory, or to hear further witnesses. The Court found itself

sufficiently informed and considered that the necessity or desirability of hearing further witnesses had not been made plausible.

The applicant subsequently lodged an appeal in cassation with the Supreme Court (Hoge Raad). He reiterated his complaints about the re-opening of the police investigation and the presence of the Procurator General in the judges' chambers. He further complained of the Court of Appeal's refusal to hear B. and C. again, and also complained that the Court of Appeal, contrary to Section 319 in conjunction with Section 415 of the Code of Criminal Procedure, failed to instruct B. and C. after their examination on 2 June 1992 to be present again at the next court hearing, as the defence had not yet formally excused them as witnesses.

The Advocate General (Advocaat-Generaal) to the Supreme Court submitted his written conclusions on 27 April 1993, which were transmitted to the applicant on 3 May 1993.

On 22 June 1993, the Supreme Court rejected the applicant's appeal in cassation. It accepted the grounds on which the Court of Appeal had rejected the applicant's complaints about the re-opening of the police investigation and the presence of the Procurator General in the judges' chambers.

As regards the applicant's complaints in respect of the examination of B. and C., the Supreme Court noted that the applicant had been acquitted of the charges in respect of C. It held consequently that this complaint as regards C. could not lead to cassation. As regards the complaint in respect of B., the Supreme Court considered, inter alia, that on 2 June 1992 the applicant had not objected when B. did not appear in the court room after she had been heard before the Court of Appeal in a separate room. Moreover, the applicant had not objected when the President of the Court of Appeal gave the names of the people who had to be present again on 3 June 1992 without mentioning B.'s name. The Supreme Court accepted the reasons the Court of Appeal gave for its decision to refuse to summon B. for a further examination.

b. Relevant domestic law

Pursuant to Section 24 of the Judicial Organisation Act (Wet op de Rechterlijke Organisatie) it is prohibited for members of the judiciary to have private contacts about pending or future proceedings with the parties to those proceedings. Non-compliance with this prohibition may result in a disciplinary reprimand (Section 14 of the Judicial Organisation Act) or, if it concerns a second time, even dismissal (Section 11 d.3 of the Judicial Organisation Act). Pursuant to Section 28 of the Judicial Organisation Act members of the judiciary are obliged to keep deliberations secret.

COMPLAINTS

1. The applicant complains that, during the proceedings before the Regional Court, the public prosecutor ordered the police to re-open the police investigation, without informing the Regional Court or the defence whilst the results of the re-opened investigation were added to his case-file after he had lodged his appeal with the Court of Appeal.

2. The applicant complains that the police withheld crucial information, in particular the medical reports of 27 April 1988 and B.'s and C.'s statements made to the police in the case against Mr. W.

3. The applicant complains that his defence rights were unduly restricted in the examination of B. and C. on 2 June 1992, as they were not required to answer emotionally burdensome questions.

4. The applicant complains that the Court of Appeal examined B. and C. in camera and in his absence.

5. The applicant complains that, contrary to the Code of Criminal Procedure, after being heard B. and C. did not remain in the court room until they were given formal permission to leave with the consent of the defence and the Procurator General and that they were not notified that they should be present when the Court of Appeal resumed its examination the next day.

6. The applicant complains that, on 3 June 1992, his lawyer was not allowed to reply to remarks of the Procurator General in respect of the request of the defence to hear B. again.

7. The applicant complains that the Court of Appeal failed to summon B. and C. a second time, although new relevant facts had come to light, thereby depriving the defence of the possibility to question these witnesses about the new facts.

8. The applicant complains that the Court of Appeal added statements made by the other alleged victims in the related criminal proceedings to his case-file on the understanding that these statements were not to be considered as having been made in the applicant's case.

9. The applicant complains that the Court of Appeal used the statements by B. and C. in evidence although the defence had had insufficient opportunity to challenge or verify these statements in the light of the exculpating facts which appeared after their examination.

10. The applicant complains that the Procurator General was present in the judges' chambers of the Court of Appeal while the judges of that court were there to deliberate. The Court of Appeal thus gave the impression of allowing itself to be influenced by the Procurator General and therefore of not being impartial.

11. The applicant complains that the criminal charges against him were not determined within a reasonable time.

The applicant invokes Article 6 paras. 1, 2 and 3 of the Convention.

THE LAW

1. The applicant has lodged a number of complaints under Article 6 (Art. 6) of the Convention. This provision reads, insofar as relevant, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ... the press and public may be excluded from all or part of the trial in the interest of morals, ..., where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...
>
> b. to have adequate time and facilities for the preparation of his defence;
> ...

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;
..."

2. Insofar as the applicant alleges that the proceedings against him were not in conformity with Article 6 para. 2 (Art. 6-2) of the Convention and insofar as this complaint has been raised in the domestic proceedings, the Commission considers that it has remained fully unsubstantiated.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The Commission will examine the applicant's complaints under Article 6 paras. 1 and 3 (Art. 6-1, 6-3) taken together, since the guarantees in paragraph 3 of Article 6 (Art. 6-3) represent constituent elements of the general concept of a fair hearing set forth in paragraph 1 (Art. 6-1) of this provision (cf. Eur. Court H.R., Lala judgment of 22 September 1994, Series A no. 297-A, p. 12, para. 26).

4. The applicant complains that, during the proceedings before the Regional Court, the public prosecutor ordered the police to re-open the police investigation, without informing the Regional Court or the defence whilst the results of the re-opened investigation were added to his case-file after he had lodged his appeal with the Court of Appeal.

The Commission observes that the Regional Court rendered its judgment in the applicant's case on 9 April 1991. In accordance with Section 414 of the Code of Criminal Procedure, which allows both the Procurator General and the defence to add new documents to the case-file during proceedings on appeal, the results of the re-opened police investigation were added to the applicant's case-file in November 1991.

The Commission further notes that the Court of Appeal started its examination of the applicant's case on 10 December 1991. It then adjourned its examination until 25 February 1992. Between 25 February and 19 June 1992, the Court of Appeal examined the case in the course of nine hearings and pronounced its judgment on 3 July 1992.

The Commission finds, as regards the addition of the results of the re-opened police investigation to the applicant's case-file, that the defence has been provided with ample time and opportunity to study and to challenge these additional means of evidence and does not find, on this point, that the defence was placed at a substantial disadvantage vis-à-vis the prosecuting authorities.

It follows that this complaint must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant further complains that the police withheld crucial information, in particular Dr. H.-K.'s medical reports of 27 April 1988 and the statements B. and C. made to the police in the case against Mr. W.

The Commission recalls that the domestic courts rejected this complaint for lack of foundation. The Commission notes that, after the defence had realised the possible relevance of the facts of the case of Mr. W., it requested the Court of Appeal to add Mr. W.'s case-file to the applicant's file, a request which was granted. The Commission further notes that, in the course of the last four hearings before the Court of Appeal, the contents and relevance of the material contained in Mr. W.'s case-file formed the subject of an elaborate examination

which included the hearing of three gynaecologists. The Commission finally notes, on this point, that in its judgment the Court of Appeal acquitted the applicant of the charges involving C.

The Commission, therefore, finds that on this point there is no indication that the proceedings were not in conformity with the requirements of Article 6 (Art. 6) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

6. The applicant complains that, on 2 June 1992, B. and C. were allowed not to answer emotionally burdensome questions, and that they were examined in camera and in his absence.

Insofar as the present complaint concerns C., the Commission observes that the applicant was acquitted of the charges involving her. As regards this part of the complaint, the applicant cannot, therefore, claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention.

Insofar as the present complaint concerns B., the Commission recalls that, according to the second sentence of Article 6 para. 1 (Art. 6-1) of the Convention, the public may be excluded from part of the trial on one or more of the grounds mentioned in that sentence. In view of the nature of the charges against the applicant, the Commission considers that the decision of the Court of Appeal to hear B. in camera was in conformity with the exceptions mentioned in Article 6 para. 1 (Art. 6-1) of the Convention.

Insofar as the applicant complains that B. was heard in his absence and that she was allowed not to answer emotionally burdensome questions, the Commission recalls that the rights secured by Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention are those of the accused and the defence in general. In order to determine whether these rights were respected, it is not sufficient to consider the situation in which the accused himself is placed. Consideration must rather be given to the situation in which the defence as a whole is placed. In exceptional circumstances there may be reasons for hearing a witness in the absence of the accused on condition that his lawyer is present (cf. No. 11219/84, Dec. 10.7.85, D.R. 42, p. 287), or to allow a witness not to answer certain questions.

The Commission has also regard to the special features of criminal proceedings concerning rape and other sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the victim's private life. Therefore, the Commission accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence (Baegen v. the Netherlands, Comm. Report 20.10.94, para. 77).

In the present case, the Court of Appeal heard B. in the absence of the applicant, but in the presence of the applicant's lawyer, who could and in fact did question her directly. The applicant could follow B.'s examination via a TV-monitor. Moreover, the Court of Appeal interrupted B.'s examination in order to allow the applicant's lawyer to consult the applicant to see if the latter wished to put additional questions to the witness. After this interruption, the applicant's lawyer informed the Court of Appeal that he had no further questions to B.

In these circumstances the Commission finds that the defence was provided with sufficient opportunity to hear B. on 2 June 1992. It further finds that the interests of the defence could be safeguarded just as well by the applicant's lawyer as by the applicant himself. The Commission therefore finds that B.'s examination in camera and in the applicant's absence was not contrary to Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention.

It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

7. The applicant further complains that, although the defence had not formally waived its right to question B. and C., they did not return to the court room after they had been heard before the Court of Appeal, and that the Court of Appeal, contrary to the Code of Criminal Procedure, failed to notify them that they should be present when the Court of Appeal would resume its examination. The applicant also raises a number of complaints in respect of his unsuccessful request to the Court of Appeal to hear B. and C. again and to hear other witnesses in connection with new and allegedly exculpating facts which had appeared after their respective examinations on 2 June 1992. He complains in particular that his lawyer was not allowed to reply to the Procurator General's objections against a new hearing of B. and C., that the Court of Appeal used B.'s statements in evidence whereas it had rejected the request by the defence to hear her again and to hear other witnesses, thereby depriving the defence of the opportunity to challenge these statements in the light of the facts which had appeared after B.'s examination before the Court of Appeal.

Insofar as the present complaint concerns C., the Commission finds that the applicant cannot claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention (see para. 6).

Insofar as the applicant complains that the Court of Appeal violated the Code of Criminal Procedure by failing to inform B., following her examination on 2 June 1992, that she had to be present at the next court hearing as the defence had not formally waived its right to question her, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its task is to ensure the observation of the obligations undertaken by the parties to the Convention. It is not competent to deal with a complaint alleging that errors of law or fact have been committed by domestic authorities, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (cf. No. 21283/93, Dec. 5.4.94, D.R. 77, pp. 81 and 88).

It remains to be examined whether the applicant's rights under Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention have been respected as regards the administration of evidence before the Court of Appeal.

The Commission notes that, immediately after B. had been heard, the applicant's lawyer informed the Court of Appeal that he had no further questions for B. Moreover, it was open for the applicant to request the Court of Appeal to hear B. a second time, which the applicant did, although unsuccessfully.

In these circumstances the Commission does not find that the fact that B., after she had been heard, did not return to the court room and was not told to be present at the next hearing of the Court of Appeal harmed the applicant in his defence.

As regards the complaint that, before the Court of Appeal, the defence was not allowed to react to the Procurator General's objections to the request of the defence to hear B. again, the Commission finds no indication that this violated the principle of equality of arms or

harmed the applicant in his defence.

As regards the Court of Appeal's rejection of the applicant's request to hear B. again and to hear other witnesses, the Commission recalls that Article 6 (Art. 6) does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness (cf. No. 8231/78, Dec. 6.3.82, D.R. 28, p. 5; No. 10563/83, Dec. 5.7.85, D.R. 44, p. 113; and Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89).

The Commission, recalling its finding that B. was heard before the Court of Appeal in accordance with the requirements of Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention (see para. 6), notes that Mr. P., a psychiatrist, stated before the Court of Appeal that he had the impression that the examination before the Court of Appeal had been extremely burdensome, painful and emotional for B. and her sisters. Also the Court of Appeal itself had observed that B.'s examination before it had been emotionally very burdensome for her and had found that the limit had been reached of what could be required of her in respect of the interest of the defence.

In these circumstances, and taking into consideration the special features of criminal proceedings concerning rape and other sexual offences and, in particular, the situation of victims of such offences, the Commission cannot consider the Court of Appeal's decision not to hear B. again as arbitrary or unreasonable.

The Commission further notes that, after the case-file of Mr. W. had been admitted as evidence, three gynaecologists were extensively heard before the Court of Appeal in connection with the information contained in that case-file, and that the Court of Appeal did not find it necessary to appoint further experts to investigate the mental health of B. and her faculty of memory, or to hear further witnesses.

The Commission also notes that B.'s statements were not the only evidence on which the Court of Appeal based the applicant's conviction as regards the charges involving her. It had in particular regard to the confessions the applicant had made to the police. It is true that the applicant withdrew his earlier confessions before the trial courts, but, where a court is confronted with a contradiction between an earlier statement and subsequent evidence at the trial, it is the task of this court to consider the credibility of the various declarations concerned (cf. No. 8414/78, Dec. 4.7.79, D.R. 17, p. 231).

The Commission, therefore, cannot find that the Court of Appeal's refusal to hear B. again or to summon further witnesses deprived the applicant of a fair hearing within the meaning of Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention.

Furthermore, noting that the applicant was convicted on the basis of evidence which was debated in the course of adversarial proceedings in which the applicant was represented by a lawyer, who, in the course of nine hearings before the Court of Appeal, was provided with ample opportunity to state the applicant's case and to challenge the evidence against the applicant, the Commission finds that the proceedings against the applicant, considered as a whole, were in conformity with the requirements of Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

8. The applicant complains that the Court of Appeal added statements made by the other alleged victims in the related criminal proceedings to his case-file on the understanding that these were not to be

considered as having been made in the applicant's case.

The Commission has already examined the administration of evidence in the criminal proceedings against the applicant and the fairness of those proceedings as a whole (see paras. 6 and 7 above). The Commission does not find that the present complaint requires a separate examination.

It follows that this complaint is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

9. The applicant further complains of the Procurator General's presence in the judges' chambers of the Court of Appeal during an interruption of the court hearing. He submits that this cast a doubt on the impartiality of the Court of Appeal.

The Commission recalls that the existence of impartiality for the purposes of Article 6 para. 1 (Art. 6-1) of the Convention must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (Eur. Court H.R., Hauschildt judgment of 24 May 1989, Series A no. 154, p. 21, para. 46, and Padovani judgment of 26 February 1993, Series A no. 257-B, p. 20, para. 25).

The Commission notes that the applicant has not expressed doubts as to the personal impartiality of the members of the Court of Appeal.

As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. It follows that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the opinion of the accused is important but not decisive. What is decisive is whether his fear can be regarded as objectively justified (Padovani judgment, loc. cit., p. 20, para. 27).

In its judgment of 3 July 1992, the Court of Appeal stated on this point that during an interruption of the trial, the Procurator General entered the judges' chambers only in order to hand a number of letters to the members of the Court of Appeal and that no deliberations took place at that time. The Commission has no reason to doubt the accuracy of this statement. Having regard also to Section 24 in conjunction with Sections 14 and 11 of the Judicial Organisation Act, the Commission finds no elements that warrant misgivings about the objective impartiality of the Court of Appeal.

It follows that this complaint must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

10. As regards the applicant's complaint of the length of the criminal proceedings against him, the Commission notes that this complaint has not been raised in the domestic proceedings.

The Commission recalls that the mere fact that all remedies have been tried does not of itself constitute compliance with the exhaustion of domestic remedies. It is also required that the applicant, either in form or in substance, has submitted to the competent domestic authorities the complaint brought before the Commission (cf. No. 11921/86, Dec. 12.10.88, D.R. 57, p. 81, No. 16810/90, Dec. 9.9.92, D.R. 73, p. 136).

It follows that in this respect the applicant has not complied with the requirements of Article 26 (Art. 26) of the Convention and that this complaint must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)