AS TO THE ADMISSIBILITY OF

Application No. 25708/94
by R.G.
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 17 January 1996, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. 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 5 September 1994 by R.G. against the Netherlands and registered on 18 November 1994 under file No. 25708/94;

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 national, born in 1954, and is currently detained in Amsterdam. He is represented before the Commission by Ms. T. Prakken, a lawyer practising in Amsterdam.

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

a. Particular circumstances of the case

On 7 March 1988, in the context of a preliminary judicial investigation (gerechtelijk vooronderzoek) against one or more persons unknown, the investigating judge (rechter-commissaris) ordered the tapping of a specific telephone number in Amsterdam. It appears that this tapping operation ended on 26 November 1988. In the investigating judge's procès-verbal of destruction (proces-verbaal van vernietiging) of 21 June 1989, it is stated that the recordings and verbatim records of this tapping operation have been respectively erased and destroyed. The tapped telephone was located in an apartment from where the applicant made phone calls regularly.

In the context of another preliminary judicial investigation, the telephone line of Y. at his home in K. was tapped on, inter alia, 9 and 10 December 1989 by the Regional Criminal Investigation Team (Regionaal Recherche Team, hereinafter referred to as "RRT").

On 9 December 1989 X. was shot and killed in an apartment in Amsterdam. On 13 December 1989 the police officer C. stated in a procès-verbal on the investigation of the killing that the applicant corresponded to a description of the perpetrator given by a witness and another suspect and could be considered as a suspect of the killing.

On 14 December 1989 the Dutch authorities issued an international warrant for the applicant's arrest on the suspicion of having committed the killing of X.

On 21 February 1990 the police entered a private club in an unsuccessful attempt to arrest the applicant. By mistake the police left a computer print out behind from which it appeared that the applicant was suspected of murder or manslaughter. This document was communicated to the applicant by acquaintances.

On 11 October 1990 the applicant was arrested in Spain and subsequently detained pending his extradition to the Netherlands. On 30 August 1991 the applicant was extradited to the Netherlands where he was placed in detention on remand on the suspicion of murder, alternatively manslaughter. The applicant remained in detention throughout the subsequent criminal proceedings against him.

After having been granted partial access to the applicant's case-file on 6 June 1991, the applicant's lawyer obtained full access to the case-file on 17 September 1991.

By summons of 13 November 1991 the applicant was ordered to appear on 28 November 1991 before the Regional Court (Arrondissements-rechtbank) of Amsterdam on charges of murder, alternatively manslaughter of X. On the same date, or shortly after, the preliminary judicial investigation against the applicant was closed.

According to a police procès-verbal dated 15 December 1991 and drafted by police officer C., the police officers W.R. and J.K. of the RRT had, on 14 December 1989, recognised the applicant's voice on the recordings of the tapped conversations on Y.'s telephone.

On 28 November 1991 the Regional Court of Amsterdam adjourned its examination. On 12 December 1991 the Regional Court resumed its examination of the applicant's case. In view of its changed composition, the Regional Court fully recommenced its examination. It heard the applicant, who invoked his right to remain silent, and adjourned the hearing of witnesses until 5 March 1992.

On 5 March 1992 the Regional Court resumed its examination and heard the witnesses C.K. and R.C. - who invoked their right to remain silent in order to avoid making self-incriminating statements -, C.H.K., E.D., A.A. and T.W. With the consent of both the prosecution and the defence the Regional Court decided not to hear the witnesses R.P. and Y.

On 19 March 1992, following adversarial proceedings in which the applicant was represented by a lawyer, the Regional Court convicted the applicant of manslaughter and sentenced him to seven years' imprisonment under deduction of the time spent in pre-trial detention.

The Regional Court rejected the complaint of the defence that it had been unjustly restricted in the exercise of the rights of the defence as regards its access to the applicant's case-file. The Regional Court noted that between 4 and 17 June 1991 most of the documents in the case-file had been communicated to the defence and that, on 17 June 1991, the applicant had obtained full access to his case-file.

The Regional Court also rejected the complaints on the

admissibility of the evidence originating from the tapping of Y.'s telephone, holding that the procedure contained in the relevant Sections of the Code of Criminal Procedure (Wetboek van Strafvordering) had been respected. It noted that, although the actual recordings of the tapped conversations had been lost, the verbatim record of these conversations and the procès-verbal on the recognition of the applicant's voice by two police officers had been added to the case-file and that the defence had not argued that the contents of the conversations as stated in these verbatim records were incorrect.

The Regional Court based its conviction, inter alia, on the statements by the witnesses C.H.K., R.C., R.P., A.A., the police officers W.R. and J.K. of the RRT and the verbatim records of two tapped telephone conversations from Y.'s telephone on 9 December 1989 and one tapped telephone conversation of 10 December 1989 from Y.'s telephone. The applicant filed an appeal against the Regional Court's judgment with the Court of Appeal (Gerechtshof) of Amsterdam.

On 1 October 1992 a hearing was held before the Court of Appeal. The defence submitted a number of requests to the Court of Appeal. They requested, inter alia, to be allowed to verify the way the police officers W.R. and J.K. had obtained their knowledge of the applicant's voice. The defence further stated that they were still considering whether or not to request the hearing of [additional] witnesses ("Overigens beraadt cliënt zich nog over eventueel op te roepen [verdere] getuigen."). After having deliberated, the Court of Appeal decided to request the prosecution to submit further information on the investigation against Y., and ordered the hearing of the police officers W.R. and J.K. on the reasons behind their knowledge of the applicant's voice. It rejected the other requests of the defence holding, inter alia, that several of the documents requested by the defence were already in the applicant's case-file.

On 4 November 1992 the Court of Appeal heard the police officers W.R. and J.K. Each of them stated that he had recognised the applicant's voice from telephone conversations tapped by the police between March and November 1988 in the context of an earlier criminal investigation. This telephone tapping had been authorised by the investigating judge. W.R. and J.K. both stated that they had listened to many tapped conversations of the applicant and that, as regards the tapped conversations on Y.'s telephone at issue, they had recognised the applicant's voice and specific way of speaking.

After the hearing of the witnesses, the President of the Court of Appeal gave an oral summary of the contents of the documents in the applicant's case-file. Finally, the Court of Appeal heard the applicant who denied the charges against him. The defence did not request the hearing of additional witnesses.

On 16 November 1992, following adversarial proceedings in which the applicant was represented by a lawyer, the Court of Appeal quashed the judgment of 19 March 1992, convicted the applicant of manslaughter and sentenced him to eight years' imprisonment under deduction of the time spent in pre-trial detention.

The Court of Appeal rejected the preliminary objections in respect of the admissibility of the prosecution made by the defence concerning, inter alia, the alleged manipulation of documents in the applicant's case-file, the limited access the defence had to the applicant's case-file, the tapping of Y.'s telephone and the lawfulness of the extradition proceedings.

The Court of Appeal based its conviction, inter alia, on the applicant's statement before the Court of Appeal, the Court of Appeal's own observations, statements by the witness C.K. before the police and the investigating judge, the verbatim record of two tapped telephone conversations of 9 December 1989 from Y.'s telephone, the verbatim

record of one tapped telephone conversation of 10 December 1989 from Y.'s telephone, statements of the witness R.C. before the police, statements of the witness R.P. before the police, statements of the witness A.A. before the police and the investigating judge, the statement of the witness Y. before the police, a police procès-verbal containing the findings of police officer C., a police procès-verbal on the findings of police officer H.D. of the RRT and statements by the police officers W.R. and J.K. of the RRT before the investigating judge and the Court of Appeal.

As regards its assessment of the evidence, the Court of Appeal stated that it had used the tapped telephone conversations only in combination with other means of evidence relating to the same matters.

The Court of Appeal rejected the applicant's argument that the Dutch rules on telephone tapping are contrary to Article 8 of the Convention and found that the relevant rules on telephone tapping had been respected as regards both the tapping of the telephone of the applicant in 1988 and the telephone of Y. on 9 and 10 December 1989. It found it established that the applicant was a party to the telephone conversations tapped on Y.'s telephone on 9 and 10 December 1989 and that the contents of these tapped conversations were corroborated by the other evidence before it, inter alia, the statements of the persons with whom the applicant had spoken in these telephone conversations.

Immediately on 16 November 1992 the applicant filed an appeal in cassation with the Supreme Court (Hoge Raad). The Court of Appeal transmitted the applicant's case-file on 26 July 1993 to the Supreme Court. The applicant submitted his complaints in cassation to the Supreme Court on 12 October 1993 when the Supreme Court started its examination of the case. The Procurator General (Procureur Generaal) to the Supreme Court submitted his conclusions on 21 December 1993.

The Supreme Court rejected the applicant's appeal in cassation on 8 March 1994. It rejected the applicant's complaints relating to the defence's access to the applicant's case-file, to the use in evidence of certain statements by witnesses and to an allegedly vague procès-verbal of the Court of Appeal hearing on 4 November 1992 in that the documents summarised orally by the President of the Court of Appeal had not been specified in this procès-verbal.

As regards the applicant's complaint that the tapped conversations of 9 and 10 December 1989 had been admitted and used in evidence whilst the tapes on which these conversations had been recorded had been unavailable to the defence as they had been erased, the Supreme Court held that an impossibility to listen to actual recordings of tapped telephone conversations in principle constitutes an objection against the use of such a means of evidence. However, noting that these tapes had been erroneously erased, the Supreme Court held that the Court of Appeal, after a thorough investigation and on the basis of other connected evidence, could reasonably find it established that the applicant was a party to these conversations and that the verbatim records contained a correct statement as regards the contents of these conversations. Also taking into account that the applicant's conviction was based for an important part on other evidence, the Supreme Court accepted the Court of Appeal's decision to admit and use in evidence the verbatim records of the conversations tapped on Y.'s telephone.

The Supreme Court further rejected the applicant's complaint that the Court of Appeal had unjustly rejected the request of the defence to add to the applicant's case-file all relevant documents in connection with the tapping of his telephone in 1988, in order to verify that the police officers W.R. and J.K. had lawfully obtained their knowledge of the applicant's voice. The Supreme Court noted that the Court of Appeal had held on this point that several documents concerning this telephone tap operation were already included in the

applicant's case-file, such as the prolongation decisions of the investigating judge, a procès-verbal of destruction (proces-verbaal van vernietiging) from which it appeared that the applicant's telephone had been tapped between 7 March 1988 and 26 November 1988. It further noted that the Court of Appeal had not granted the request to add more documents in this connection to the applicant's case-file, as the necessity for this had not been established and that this refusal, in view of the Court of Appeal's finding as regards the voice recognition by W.R. and J.K., would not have harmed the applicant in his defence. The Court of Appeal had found that W.R. and J.K. had obtained knowledge of the applicant's voice in a lawful manner and that their statements in this regard could be admitted and used in evidence. The Supreme Court found that the Court of Appeal had rejected these points on correct grounds.

The applicant did not complain of the length of the proceedings against him in the proceedings before the trial courts or in the cassation proceedings before the Supreme Court.

b. Relevant domestic law and practice

Telephone tapping is regulated by Sections 125 f-h of the Code of Criminal Procedure (Wetboek van Strafvordering). It may only be utilised for the investigation of offences for which detention on remand may be imposed, i.e. offences of a certain gravity.

Telephone tapping is only possible following a previous authorisation by the investigating judge and can only take place in the course of a preliminary judicial investigation. The Code of Criminal Procedure does not limit the tapping of telephones to a certain period. However, according to the Guidelines regarding Interception of Telephone Conversations of 2 July 1984, which have been published, the duration of a telephone tapping shall not exceed four weeks. The investigating judge can prolong the duration of the tapping operation but no longer than for a period of four weeks each time. A verbatim record of the tapped conversations must be prepared within 48 hours. Records without relevance must be destroyed as soon as possible.

Pursuant to Sections 433 and 439 of the Code of Criminal Procedure appellants in cassation may submit their grounds of appeal in cassation (middelen van cassatie) at the latest on the day of the hearing before the Supreme Court. If the Supreme Court considers a complaint about the length of criminal proceedings to be founded, it may quash the appealed judgment and refer the case for retrial. It can also provide for another appropriate form of reparation of its own motion (cf. Eur. Court H.R., Abdoella judgment of 25 November 1992, Series A no. 248-A, pp. 12-14, paras. 13 and 14).

COMPLAINTS

1. The applicant complains under Article 6 paras. 1 and 3 (b) of the Convention that in the criminal proceedings against him he did not receive a fair trial in that his conviction was based on unlawfully obtained and incorrectly admitted and assessed evidence. i.e. tapped telephone conversations which the applicant has not been able to listen to, statements by police officers that they had recognised the applicant's voice in the tapped telephone conversations, written statements by certain witnesses which have not been signed by them and which are in contradiction with subsequent statements these witnesses have signed as well as incomplete procès-verbaux of the hearings before the trial courts.

2. The applicant complains under Article 6 para. 1 of the Convention that the criminal proceedings against him have not been determined within a reasonable time. He complains in particular that the Court of Appeal transmitted his case-file only on 26 July 1993 to the Supreme Court, despite several requests by his lawyer to the Court of Appeal

to do so expeditiously.

3. The applicant finally complains that the tapping of his telephone conversations in the course of a preliminary judicial investigation against a person or persons unknown and against Y. is contrary to Article 8 of the Convention in that it was not in accordance with the law as required by the second paragraph of this provision.

THE LAW

1. The applicant complains under Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention that in the criminal proceedings against him he did not receive a fair trial in that his conviction was based on unlawfully obtained and incorrectly admitted and assessed evidence.

Article 6 (Art. 6) of the Convention, insofar as relevant, provides:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by a ... tribunal ..."
> ...
> 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;
> ..."

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 represent constituent elements of the general concept of a fair hearing set forth in paragraph 1 of this provision (cf. Eur. Court H.R., Lala judgment of 22 September 1994, Series A no. 297-A, p. 12, para. 26).

With regard to the judicial decisions in the case, the Commission recalls its constant case-law that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by the domestic courts, 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 p. 81, at p. 88).

The Commission further recalls that the taking of evidence is primarily governed by the rules of domestic law, and that it is in principle for the domestic courts to apply these rules and to assess the evidence before them. The task of the Convention organs in this respect is to ascertain whether the proceedings in their entirety, including the way in which the evidence was taken, were fair (cf. Eur. Court H.R., Saïdi judgment of 20 September 1993, Series A no. 261-C, p. 56, para. 43).

The Commission notes that the applicant was convicted following adversarial proceedings in the course of which he was represented by a lawyer and that he was provided with ample opportunity to challenge the admissibility and probative value of the evidence against him, to question the witnesses heard, to state his case and to submit whatever he found relevant. The Commission further notes that, apart from the police officers W.R. and J.K., the applicant did not request the Court of Appeal to hear any witnesses. In these circumstances the Commission finds no indication that the requirements of Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention were not respected in the proceedings at issue.

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

2. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the criminal proceedings against him were not determined within a reasonable time. He complains, in particular, of the fact that the Court of Appeal transmitted his case-file only on 26 July 1993 to the Supreme Court, despite several requests by his lawyer to the Court of Appeal to do so expeditiously.

The Commission notes that the applicant did not raise any complaint relating to the length of the criminal proceedings against him before the domestic courts dealing with his case.

The Commission recalls that, in order to exhaust domestic remedies within the meaning of Article 26 (Art. 26) of the Convention, an applicant must have raised before the national courts, either in form or in substance, the complaints submitted to the Commission (cf. No. 11425/85, Dec. 5.10.87, D.R. 53 p. 76, and No. 21132/93, Dec. 6.4.94, D.R. 77 p. 75).

The Commission notes that the applicant could have raised this complaint at the latest on 12 October 1993, the day the Supreme Court started its examination of the applicant's appeal in cassation. This date is after the end of the period during which, in the applicant's opinion, the main delay occurred, i.e. the period between 16 November 1992, when the Court of Appeal rendered its judgment, and 26 July 1993, when the Court of Appeal transmitted the case-file to the Supreme Court.

The Commission further notes that the Supreme Court can offer redress for a violation of the reasonable time requirement contained in Article 6 para. 1 (Art. 6-1) of the Convention (cf. Eur. Court H.R., Abdoella judgment of 25 November 1992, Series A no. 248-A, pp. 12-14, paras. 13 and 14).

It follows that, as regards this complaint, the applicant has not satisfied the condition of exhaustion of domestic remedies and that this part of the application must be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

3. The applicant finally complains that the tapping of his telephone for a period of eight months in 1988 in the course of a preliminary judicial investigation against a person or persons unknown is contrary to under Article 8 (Art. 8) of the Convention in that it was not in accordance with the law as required by the second paragraph of this provision.

Article 8 (Art. 8) of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission recalls that telephone communications are covered by the notion of "private life" and "correspondence" within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention (cf. Eur. Court H.R., Huvig judgment of 24 April 1990, Series A no. 176-B, p. 52, para. 25).

The Commission therefore finds that the tapping of the applicant's telephone conversations constituted an interference by a public authority with his right to respect for his private life and correspondence.

The question thus arises whether this interference was justified under paragraph 2 of Article 8 (Art. 8-2) of the Convention.

The Commission must first examine whether the tapping of the applicant's telephone conversations was "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission recalls in this respect that, where the Convention refers to domestic law, it is primarily the task of the national authorities to apply and interpret domestic law, and that the Convention organs have a limited jurisdiction in controlling the manner in which this is done (cf. No. 10689/83, Dec, 14.5.84, D.R. 37 p. 225). However, the phrase "in accordance with the law" does not merely refer back to domestic law, but also relates to the quality of the law, requiring it to be compatible with the rule of law (cf. Eur. Court H.R., Olsson judgment of 24 March 1988, Series A no. 130, p. 30, para. 61).

The Commission has previously examined the Dutch regulations on telephone tapping as contained in, inter alia, Sections 125 f-h of the Dutch Code of Criminal Procedure, and has found that these regulations are sufficiently precise to be considered as "law" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention (cf. No. 21207/94, Dec. 30.11.94, D.R. 79 p. 31 with further references). The Commission finds no reason to take a different view in the present case.

The Commission notes that, in the present case, the Court of Appeal found that the relevant rules on telephone tapping under Dutch law had been respected as regards both the tapping of the telephone conversations of the applicant in 1988 and the telephone of Y. on 9 and 10 December 1989, and that this finding was accepted by the Supreme Court.

The Commission cannot find this ruling unreasonable or arbitrary and finds no indication of non-observance of the relevant provisions of the Dutch Code of Criminal Procedure. Consequently, the Commission considers that the interference at issue was "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission further finds that the interference complained of can reasonably be regarded as necessary in democratic society for the legitimate aim of the prevention of crime within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

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