AS TO THE ADMISSIBILITY OF

Application No. 22942/93
by R.L.
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 18 May 1995, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

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 14 September 1993 by R.L. against the Netherlands and registered on 18 November 1993 under file No. 22942/93;

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 1967, and presently detained in Veenhuizen, the Netherlands. Before the Commission he is represented by Mr. A.B. Baumgarten, a lawyer practising in Voorburg, the Netherlands.

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

a. Particular circumstances of the case

On 12 September 1990, the public prosecutor (Officier van Justitie) in The Hague requested the investigating judge (Rechter-Commissaris) in The Hague to open a preliminary judicial investigation (gerechtelijk vooronderzoek) against the applicant, who was suspected of importing heroin into the Netherlands.

On the same day, the investigating judge opened a preliminary judicial investigation against the applicant, and authorised the tapping of the applicant's telephone. The telephone was tapped between 12 September 1990 and 18 March 1991.

On 6 May 1991, the applicant was arrested and subsequently detained on remand. On this occasion he was informed of the suspicions against him. On 8 May 1991, the applicant was brought before the

investigating judge, who prolonged the applicant's detention on remand. On that occasion, the investigating judge informed the applicant that already on 12 September 1990 a preliminary judicial investigation had been opened against him, and provided him with a copy of the public prosecutor's request of 12 September 1990.

By summons of 24 July 1991, the applicant was ordered to appear before the Regional Court (Arrondissementsrechtbank) of The Hague on 8 August 1991 on four charges of importing heroin into the Netherlands.

On 22 August 1991, the Regional Court convicted the applicant of four counts of importing heroin, and sentenced him to eight years' imprisonment. The Regional Court did not use tapped telephone conversations as evidence in the case. The applicant lodged an appeal against the judgment.

By summons of 7 January 1992, the applicant was ordered to appear before the Court of Appeal (Gerechtshof) of The Hague on 7 February 1992. Sessions of the Court of Appeal took place on 7 and 21 February, 3 March and 3 April 1992.

On 16 April 1992, the Court of Appeal quashed the Regional Court's judgment on technical grounds, convicted the applicant of four counts of importing heroin and sentenced him to eight years' imprisonment. The Court of Appeal did not use tapped telephone conversations as evidence in the case.

In the proceedings before the Court of Appeal, the applicant requested that the prosecution be declared inadmissible because Article 6 para. 3 (a) of the Convention had been violated. He argued that, as he was 'charged with a criminal offence' on 12 September 1990 when the public prosecutor requested the investigating judge to open a preliminary judicial investigation, he should have been promptly informed of the nature and cause of the accusation against him. However, he did not receive notice of the public prosecutor's request until 8 May 1991, which in his opinion was not "promptly". The applicant further submitted that the Dutch Code of Criminal Procedure (Wetboek van Strafvordering) gives a number of rights to the suspect against whom a preliminary judicial investigation is conducted, such as the right to access to the case-file and the right to request the examination of witnesses.

The Court of Appeal rejected the applicant's request, holding that the opening of a preliminary judicial investigation did not constitute a "charge" within the meaning of Article 6 para. 3 (a) of the Convention.

In his subsequent appeal in cassation, the applicant argued, reiterating the arguments he had put forward before the Court of Appeal, that the Court of Appeal's reasoning was incorrect. On 11 May 1993, the Supreme Court (Hoge Raad) rejected the applicant's appeal in cassation. It held:

<Dutch>

> "Van "charged with a criminal offence" in de zin van art. 6, derde lid, EVRM kan geen sprake zijn indien vanwege de Staat nog niet een handeling is verricht tegenover de betrokkene waaraan deze in redelijkheid de gevolgtrekking heeft kunnen verbinden dat hij wordt beschuldigd van een strafbaar feit."

<translation>

> "There can be no question of 'charged with a criminal offence' within the meaning of Article 6 para. 3 of the Convention if, on behalf of the State, no action has been undertaken against the person involved, to which, in all reasonableness, he could have attached the conclusion that

he was charged with a criminal offence."

The Supreme Court added that when a request to open a preliminary judicial investigation has not been made known to the suspect or his lawyer, no action has been carried out to which one can attach the conclusion that one has been charged with a criminal offence.

b. Relevant domestic law and practice

According to Section 27 para. 2 of the Code of Criminal Procedure a suspect is the person against whom the prosecution ("vervolging") is directed. The Code of Criminal Procedure does not contain a definition of the term "prosecution". However, the request of a public prosecutor to an investigating judge to open a preliminary judicial investigation is generally considered to be an act of prosecution.

Telephone tapping is regulated by Sections 125 f-h of the Code of Criminal Procedure. It may only be utilised for investigation of offences for which detention on remand may be imposed, i.e. offences of a certain gravity. Only telephone conversations in which the suspect is likely to participate may be monitored, and the tapping may only be ordered when the investigation urgently requires it. A written record of the telephone conversations that are tapped must be prepared within 48 hours. Records without relevance must be destroyed as soon as possible.

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.

A preliminary judicial investigation is normally opened at the request of the public prosecutor. Pursuant to Section 181 para. 2 of the Code of Criminal Procedure, the request must be in writing and must define the alleged offence as precisely as possible, given the state of the investigation.

After the closure of the preliminary judicial investigation, the public prosecutor either decides not to pursue the charges against the person against whom the investigation was directed, serves him with a summons to appear before a court, or notifies him of his intention to continue the prosecution.

Pursuant to Section 237 of the Code of Criminal Procedure the investigating judge must inform the suspect of the closure of the preliminary judicial investigation.

Section 30 para. 1 of the Code of Criminal Procedure states that, at the request of the suspect, the investigating judge shall give the suspect access to the case-file during the preliminary judicial investigation. However, under the second paragraph of this provision, access may be limited in the interest of the investigation.

COMPLAINT

The applicant complains under Article 6 para. 3 (a) of the Convention that he was not promptly informed of the opening of a preliminary judicial examination against him, which in his opinion constitutes a "charge" within the meaning of Article 6 of the Convention. He submits that under the Dutch Code of Criminal Procedure the suspect against whom a preliminary judicial investigation is opened, has certain rights, in particular the right to have access to the case-file. Because he was not promptly notified of the nature and cause of the accusations against him, he was not able to exercise these rights and he was thus harmed in his defence. The extent of the detriment to the defence cannot be determined, but, in any case, the applicant could not exercise his rights in the period from 12 September 1990 to 6 or 8 May 1991 and he could not take steps in the

interest of his defence.

THE LAW

The applicant complains under Article 6 para. 3 (a) (Art. 6-3-a) of the Convention that he was not promptly informed of the nature and cause of the accusations against him.

The Commission recalls that the guarantees specified in Article 6 para. 3 (Art. 6-3) of the Convention must be interpreted in the light of the general notion of a fair trial contained in Article 6 para. 1 (Art. 6-1). It will therefore examine the complaint under these two provisions taken together (cf. Eur. Court H.R., Asch judgment, 26 April 1991, Series A no. 203, p. 10, para. 25).

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

> "1. In the determination of (...) any criminal charge against him, everyone is entitled to a fair (...) hearing (...).
> (...)
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b. to have adequate time and facilities for the preparation of his defence;
> (...)."

The Commission and the Court have stressed that Article 6 para. 3 (a) (Art. 6-3-a) of the Convention is of fundamental importance in preparing the defence and that its scope must be understood in relation to Article 6 para. 3 (b) (Art. 6-3-b), which guarantees everyone the right to have adequate time and facilities for the preparation of his defence and in the light of the more general right to a fair trial secured by Article 6 para. 1 (Art. 6-1) of the Convention (cf. Gea Catalan v. Spain, Comm. Report 30.11.93, para. 28, Eur. Court H.R., Series A no. 309).

The expressions "criminal charge" ("accusation en matière pénale") in Article 6 para. 1 (Art. 6-1) of the Convention and "charged with a criminal offence" ("accusé") in Article 6 para. 3 (Art. 6-3) of the Convention must be interpreted as having have an autonomous meaning in the context of the Convention and not on the basis of their meaning in domestic law. Although certainly relevant, the legislation of the State concerned provides no more than a starting point in ascertaining whether there was a "criminal charge" against the applicant or whether he was "charged with a criminal offence". The prominent place held in a democratic society by the right to a fair trial favours a "substantive", rather than a "formal", conception of the "charge" referred to by Article 6 (Art. 6). In the determination whether or not there was a "charge" within the meaning of Article 6 (Art. 6), the realities beyond the appearances of the procedure must be examined. In particular, the applicant's situation under the domestic legal rules in force has to be examined in the light of the object and purpose of Article 6 (Art. 6), namely the protection of the rights of the defence (cf. Eur. Court H.R., Adolf judgment of 26 March 1982, Series A no. 49, p. 15, para. 30).

A "charge", for the purposes of Article 6 para. 1 (Art. 6-1), may in general be defined as "the official notification given to the individual by the competent authority of an allegation that he has committed a criminal offence". It may in some instances take the form of other measures which carry the implication of such an allegation and

which likewise substantially affect the situation of the suspect (cf. Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no. 51, p. 33, para. 73; Foti and others judgment of 10 December 1982, Series A no. 56, p. 18, para. 52, and No. 15921/89, Dec. 1.7.91, D.R. 71 p. 236).

Finally, the manner in which Article 6 paras. 1 and 3 (Art. 6-1, 6-3) are to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case; in order to determine whether the aim of Article 6 (Art. 6) - a fair trial - has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (cf. Eur. Court H.R., Imbrioscia judgment of 24 November 1993, Series A no. 275, p. 13, para. 38).

In the present case the applicant was under suspicion of involvement in narcotics offences. The Commission notes that on 12 September 1990 a preliminary judicial investigation was opened against him and that subsequently his telephone was tapped. It further notes that, under Dutch law, it is not possible for the investigating authorities to tap a telephone without prior judicial authorisation and that consequently telephone tapping can only take place in the course of a preliminary judicial investigation which is carried out by an investigating judge.

In these circumstances, the Commission finds that during the period between 12 September 1990, when the preliminary judicial investigation was opened, and 6 May 1991, when the applicant was arrested, he cannot be regarded as having been "charged with a criminal offence" within the meaning of Article 6 para. 3 (a) (Art. 6-3-a) of the Convention. During that period there was merely a suspicion against him not necessarily leading to a formal accusation. This suspicion did give rise to certain investigative measures, including the tapping of his telephone which is subject to certain formalities in view of the judicial safeguards attached to this specific investigative tool.

In reaching this conclusion the Commission took into consideration that an adequate and effective judicial control of interferences by the State with the right to respect for a person's private life, such as the tapping of someone's telephone, is an essential feature of the guarantees embodied in Article 8 (Art. 8) of the Convention, which is intended to minimise the risk of arbitrariness and abuse. Judicial control is required by the rule of law, one of the fundamental principles of a democratic society, which is expressly referred to in the Preamble to the Convention (cf. Eur. Court H.R., Klass and Others judgment of 6 September 1978, p. 23, paras. 49-50, and Leander judgment of 26 March 1987, Series A no. 116, p. 23, para. 51).

Given that on 6 May 1991, following his arrest, the applicant was informed of the reasons for his arrest and the charges against him, the Commission finds that the applicant was promptly informed of the charges against him for the purposes of Article 6 para. 3 (a) (Art. 6-3-a) of the Convention.

As regards the criminal proceedings against the applicant, taken as a whole, it has not been argued nor been shown that the applicant could not effectively exercise his defence rights within the meaning of Article 6 (Art. 6) of the Convention as from the moment of his arrest until the rejection of his appeal in cassation.

The Commission, therefore, concludes that there is no indication which might warrant the conclusion that the proceedings at issue were not in conformity with the requirements of Article 6 (Art. 6) of the Convention.

It follows that the complaint is manifestly ill-founded and must be rejected in accordance with Article 27 para. 2 (Art. 27-2) of the

Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)